

STATE OF WEST VIRGINIA

At a regular term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on January 10, 2018, the following order was made and entered:

RE: Request for Public Comment on Proposed Amendments to Rule 1.2 of the Rules of Professional Conduct (Addressing the West Virginia Medical Cannabis Act) 18-Rules-01

On motion by Charles M. Johnson, Esq., Frost Brown Todd, LLC, the Court is considering an amendment to Rule 1.2 of the Rules of Professional Conduct. The proposed amendment submitted by Charles M. Johnson, Esq. is hereby published for a thirty-day public comment period. Comments must be filed in writing with the Clerk of Court on or before **February 16, 2018**.

The proposed additions to the rule are indicated by underscoring to read as follows:

Rules of Professional Conduct

* * *

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), 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 such action on behalf of the client as is impliedly authorized to carry out the representation. 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, after consultation, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted under Senate Bill 386, the West Virginia Medical Cannabis Act, authorizing the use of marijuana for medical purposes and any state rules, regulations, orders, policies and

procedures implementing the aforesaid act, as amended. In these circumstances, the lawyer shall advise the client regarding related federal law.

A copy of the proposal as submitted by Charles M. Johnson, Esq. is attached to this order

A True Copy

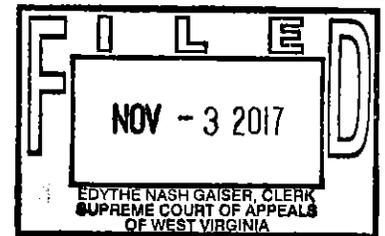
Attest: //s// Edyth Nash Gaiser
Clerk of Court



Charles M Johnson
Member
304.348.2420 (t)
304.345.0115 (f)
cmjohnson@fbtlaw.com

November 2, 2017

Edythe Nash Gaiser, Clerk of Court
West Virginia Supreme Court of Appeals
State Capitol Room E-317
1900 Kanawha Boulevard East
Charleston, West Virginia 25305



Re: Proposed Amendment to Rule 1.2 of the Rules of Professional Conduct

Dear Ms. Gaiser:

I hereby propose that the West Virginia Supreme Court of Appeals consider and adopt a rule change to Rule 1.2 of the Rules of Professional Conduct to address the dilemma faced by West Virginia attorneys who are requested to counsel clients seeking to obtain licenses or to otherwise participate in the programs authorized by the West Virginia Medical Cannabis Act (“MCA”).

The MCA was passed by the Legislature on April 6, 2017, approved by Governor James C. Justice on April 19, 2017 and was effective 90 days from passage on July 5, 2017 (Exhibit “A”). The MCA authorizes the implementation of a medical cannabis program in West Virginia under the guidance of the West Virginia Office of Medical Cannabis (“OMC”), organized under the auspices of the West Virginia Bureau of Public Health. To receive medical cannabis, a patient must demonstrate that he or she has a severe and debilitating medical condition (there are 18 serious medical conditions that qualify) and be certified by a participating physician that the patient is so diagnosed, that the patient is under the care of the physician, that no other treatments have worked and that the patient will receive medical benefit from medical cannabis. The MCA establishes permits, licenses or certificates for growers, processors, dispensaries, registered physicians, caregivers and eligible clients to authorize their participation under State law in the medical cannabis program under new rules to be developed by the OMC. Importantly, the newly adopted West Virginia Code §16-8A-13 establishes that qualifying patients, growers, certifying physicians, caregivers and health care providers treating qualifying patients are not subject to arrest, prosecution or any civil or administrative penalty including a civil or disciplinary action by a professional licensing board or be denied any right or privilege for the medical use of cannabis, provided that these specific persons are acting within accordance with the MCA. On the other hand, marijuana remains a controlled substance and under federal law, and it remains

illegal under the CSA to manufacture, distribute or dispense marijuana pursuant to 21 U.S.C. §8011 *et seq.* See also W.Va. Code4 §60A-4-401.

Recently, the West Virginia Office of Disciplinary Counsel (“ODC”) issued a stern warning to West Virginia licensed attorneys that: 1) the use of medical marijuana by licensed West Virginia attorneys remains illegal under federal law and is thusly a violation of the Rules of Professional Conduct; and 2) the representation of growers, processors, dispensaries, certifying physicians and others intending to participate in the medical marijuana program authorized by the MCA by West Virginia licensed attorneys will subject them to discipline, and perhaps prosecution. This proposed change addresses only the second issue. The dilemma that West Virginia licensed attorneys face is that they either must refrain from representing these clients (placing those that wish to participate in the medical cannabis programs at risk for violating the MCA) or running afoul of the Rules of Professional Conduct is choosing to represent these clients.

The Legislature has announced that the public policy of the State of West Virginia is advanced by implementing a medical cannabis program pursuant to the strict guidelines provided by MCA. The MCA establishes a complex regulatory scheme, and it would be difficult for prospective participants in the medical cannabis program to implement effective programs complying with the MCA and the new regulations without the assistance of a lawyer well versed in the MCA and the rules to be adopted by the OMC. In addition, counsel for the OMC, and lobbyists and lawyers in the legislature that are engaged in prospective changes to the MCA or rules to be adopted thereunder may also be placed in ethical quandaries. Many other states that have adopted medical marijuana laws have also made changes to their rules of professional conduct to authorize lawyers in these states to represent these types of clients, recognizing the important role that attorneys play in counseling clients to comply with these laws.

Based upon remarks by Senator Woefel, West Virginia laws governing medical cannabis were closely tailored based upon similar statutes in Minnesota. In Minnesota, the Minnesota Lawyers Professional Responsibility Board issued Opinion No. 23 stating that, “a lawyer may advise a client about the Minnesota Medical Marijuana Law and may represent, advise and assist clients in all activities relating to and in compliance with the Law including the manufacture, sale, distribution and use of medical marijuana, without violating the Minnesota Rules of Professional Conduct, so long as the lawyer also advises his or her client that such activities may violate federal law, including the Controlled Substances Act (Exhibit “B”). Similarly, other states such as Alaska, Arizona, Colorado, Connecticut, Hawaii, Illinois, New York, Oregon, Pennsylvania and Washington have made changes to their rules or issued opinions to advise their attorneys regarding advising clients that chose to participate in these states marijuana related laws. Maine is the only state that has taken a more conservative approach in prohibiting lawyers from assisting clients in engaging in marijuana related business.

In June of 2016 the Ohio Legislature adopted a statute authorizing medical marijuana use in Ohio. On August 5, 2016, the Board of Professional Conduct of the Supreme Court of Ohio issued Opinion 2016-6 which contained a good analysis of all the relevant aspects of attorneys

counseling or assisting clients regarding compliance with Ohio's medical marijuana law (Exhibit "C"). Promptly thereafter, the Ohio Supreme Court took action to nullify the findings of Opinion 2016-6 by formally amending the Ohio Rules of Professional Conduct to allow Ohio lawyers to provide legal services on behalf of clients engaged in Ohio's medical marijuana programs (Exhibit "D").

I believe the Ohio change to its Rule 1.2(d) is clear and concise. Accordingly, I propose a similar change to the Rules of Professional Conduct in West Virginia as follows:

**Rule 1.2 Scope of Representation and Allocation of Authority
Between Client and Lawyer**

(a) Subject to paragraphs (c) and (d), 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 such action on behalf of the client as is impliedly authorized to carry out the representation. 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, after consultation, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted under Senate Bill 386, the West Virginia Medical Cannabis Act, authorizing the use of marijuana for medical purposes and any state rules, regulations, orders, policies and procedures implementing the aforesaid act, as amended. In these circumstances, the lawyer shall advise the client regarding related federal law.

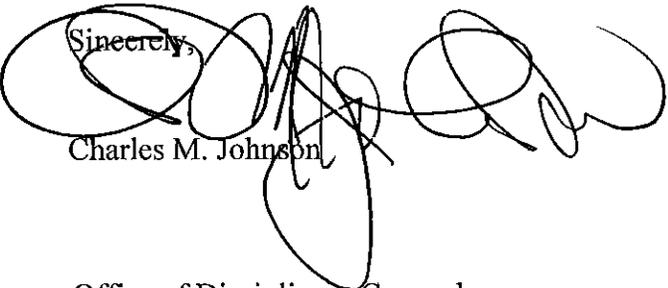
I hope West Virginia Supreme Court of Appeals will consider the proposed Rule change mainly to allow citizens of the state of West Virginia that choose to participate in the MCA to

Edythe Nash Gaiser

November 2, 2017

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obtain counsel from West Virginia licensed attorneys without placing these attorneys in an ethical dilemma regarding compliance with the Rules of Professional Conduct.

Sincerely,

Charles M. Johnson

Enclosures

cc: Rachael L. Fletcher Cipoletti, Chief Lawyer, Office of Disciplinary Counsel
Anita R. Casey, Executive Director, West Virginia State Bar
Dr. Richard D. Lindsay, Chair, Law and Medicine Committee Chair
Brian J. Skinner, Counsel for the West Virginia Bureau for Public Health

EN10853.Public-10853 4841-4501-2819v1

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

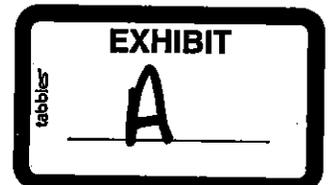
Committee Substitute

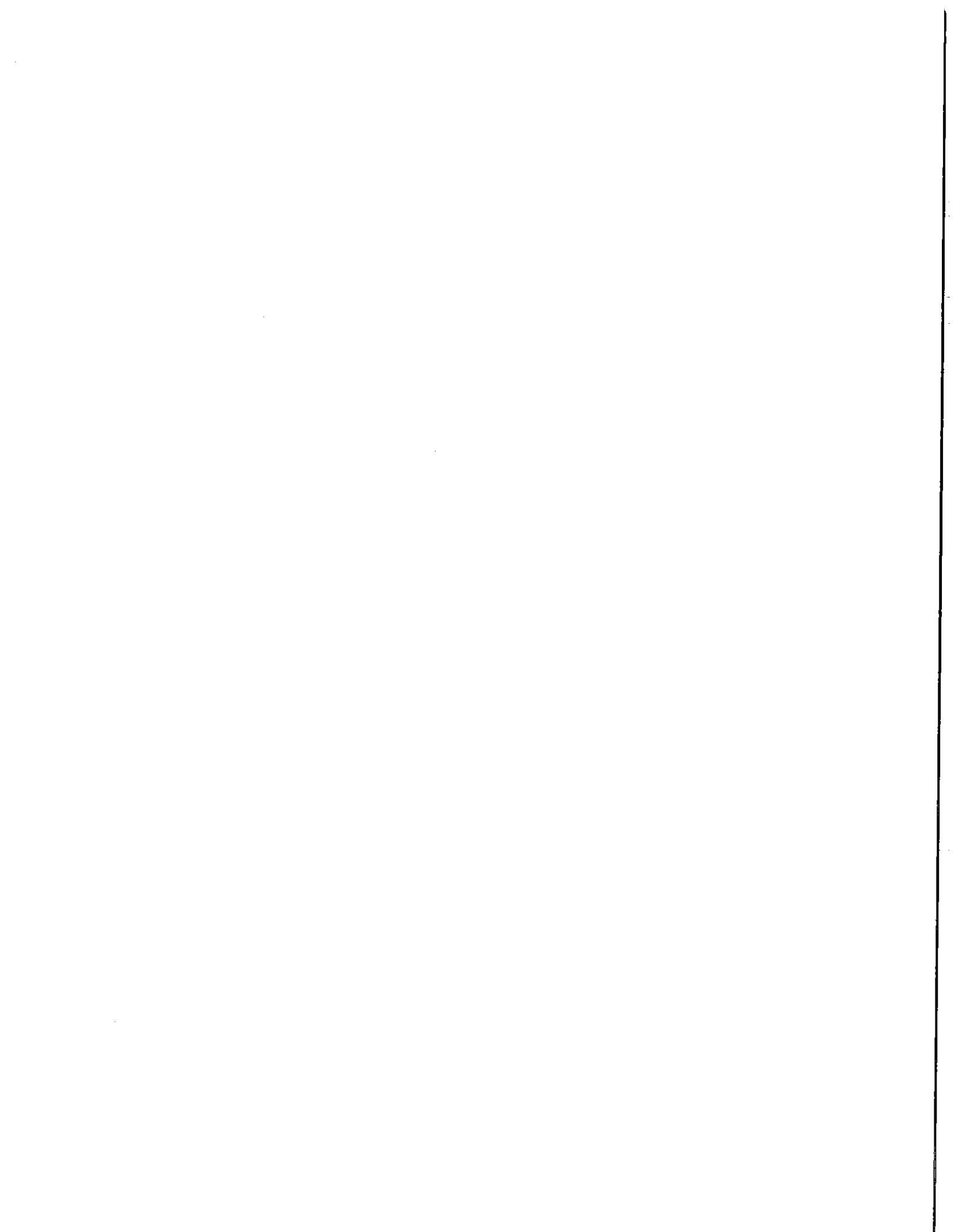
for

Senate Bill 386

BY SENATORS OJEDA, BEACH, FACEMIRE, MILLER,
PALUMBO, PLYMALE, ROMANO, RUCKER, STOLLINGS,
SWOPE, WOELFEL AND BOSO

[Originating in the Committee on Health and Human
Resources; reported on March 25, 2017]





1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §16-8A-1, §16-8A-2, §16-8A-3, §16-8A-4, §16-8A-5, §16-8A-6, §16-8A-7,
3 §16-8A-8, §16-8A-9, §16-8A-10, §16-8A-11, §16-8A-12, §16-8A-13, §16-8A-14, §16-8A-
4 15 and §16-8A-16, all relating to creating the West Virginia Medical Cannabis Act; defining
5 terms; creating the West Virginia Medical Cannabis Commission; setting forth members
6 of the West Virginia Medical Cannabis Commission; setting forth responsibilities for the
7 West Virginia Medical Cannabis Commission; creating a special revenue account known
8 as the West Virginia Medical Cannabis Commission Fund; requiring a portion of any profit
9 to be spend for specific programs; detailing the fund's revenue sources and
10 disbursements; detailing requirements of the commission to implement the provisions of
11 the act; setting requirements for becoming a certifying physician; authorizing the
12 commission to approve physician applications for certain medical conditions; requiring
13 reporting to the Controlled Substances monitoring database; setting out conditions for
14 which cannabis may be used; requiring certain annual reports to the Governor and
15 Legislature; authorizing the commission to license medical cannabis growers and grower
16 agents that meet certain requirements; setting forth certain parameters for licensed
17 growers and grower agents; requiring a certain percentage of licenses be granted to
18 persons in veterans agriculture programs; providing an exception for a qualifying patient
19 to grow a specified amount without a license; authorizing the commission to license
20 dispensaries and register dispensary agents; setting forth certain requirements for
21 dispensaries and dispensary agents; authorizing the commission to license medical
22 cannabis processors and register processor agents; authorizing testing laboratories;
23 stating requirements for the commission's registration of independent laboratories;
24 requiring the State Police and commission to enter a memorandum of understanding for
25 criminal records checks and setting forth basic requirements; providing that certain
26 persons licensed, registered and authorized under the act may not be subject to arrest,

27 prosecution or any civil or administrative penalty, including a civil penalty or disciplinary
28 action by a professional licensing board, or be denied any right or privilege, for the medical
29 use of cannabis; creating a new criminal offense of distributing, possessing, manufacturing
30 or using cannabis that has been diverted from an authorized medicinal use; specifically
31 stating conduct related to cannabis that is not protected by the provisions of the act;
32 authorizing state employees to recover certain counsel fees; empowering the Governor to
33 suspend implementation of the act if the Governor determines certain federal action may
34 occur; and requiring promulgation of emergency rules and the submission of legislative
35 rules for approval by the Legislature.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
2 article, designated §16-8A-1, §16-8A-2, §16-8A-3, §16-8A-4, §16-8A-5, §16-8A-6, §16-8A-7, §16-
3 8A-8, §16-8A-9, §16-8A-10, §16-8A-11, §16-8A-12, §16-8A-13, §16-8A-14, §16-8A-15 and §16-
4 8A-16, all to read as follows:

ARTICLE 8A. WEST VIRGINIA MEDICAL CANNABIS ACT.

§16-8A-1. Definitions.

1 As used in this article, the following words have the meanings indicated.

2 (1) "Caregiver" means:

3 (A) A person who has agreed to assist with a qualifying patient's medical use of cannabis;

4 and

5 (B) For a qualifying patient under the age of eighteen years, a parent or legal guardian.

6 (2) "Certifying physician" means an individual who:

7 (A) Has an active, unrestricted license to practice medicine that was issued by the West
8 Virginia Board of Medicine or the West Virginia Board of Osteopathic Medicine;

9 (B) Is in good standing with the West Virginia Board of Medicine or the West Virginia Board
10 of Osteopathic Medicine, whichever is applicable;

11 (C) Has a valid and unencumbered authority to prescribe controlled substances; and

12 (D) Is registered with the commission to make cannabis available to patients for medical
13 use in accordance with regulations adopted by the commission.

14 (3) "Commission" means the West Virginia Medical Cannabis Commission established
15 under this article.

16 (4) "Dispensary" means an entity licensed under this article that acquires, possesses,
17 processes, transfers, transports, sells, distributes, dispenses, or administers cannabis, products
18 containing cannabis, related supplies, related products containing cannabis including food,
19 tinctures, aerosols, oils, or ointments, or educational materials for use by a qualifying patient or
20 caregiver.

21 (5) "Dispensary agent" means an owner, a member, an employee, a volunteer, an officer,
22 or a director of a dispensary.

23 (6) "Fund" means the West Virginia Medical Cannabis Commission Fund established
24 under this article.

25 (7) "Grower" means an entity licensed under this article that:

26 (A)(i) Cultivates, manufactures, processes, packages, or dispenses medical cannabis; or

27 (ii) Processes medical cannabis products; and

28 (B) Is authorized by the commission to provide cannabis to a qualifying patient, caregiver,
29 processor, dispensary, or independent testing laboratory.

30 (8) "Independent testing laboratory" means a facility, an entity, or a site that offers or
31 performs tests related to the inspection and testing of cannabis and products containing cannabis.

32 (9) "Medical cannabis grower agent" means an owner, an employee, a volunteer, an
33 officer, or a director of a grower.

34 (10) "Processor" means an entity that:

35 (A) Transforms medical cannabis into another product or extract; and

36 (B) Packages and labels medical cannabis.

37 (11) "Processor agent" means an owner, a member, an employee, a volunteer, an officer,
38 or a director of a processor.

39 (12) "Qualifying patient" means an individual who:

40 (A) Has been provided with a written certification by a certifying physician in accordance
41 with a bona fide physician-patient relationship; and

42 (B) If under the age of eighteen years, has a caregiver.

43 (13) "Written certification" means a certification that:

44 (A) Is issued by a certifying physician to a qualifying patient with whom the physician has
45 a bona fide physician-patient relationship; and

46 (B) Includes a written statement certifying that, in the physician's professional opinion,
47 after having completed an assessment of the patient's medical history and current medical
48 condition, the patient has a condition:

49 (i) That meets the inclusion criteria and does not meet the exclusion criteria of the certifying
50 physician's application; and

51 (ii) For which the potential benefits of the medical use of cannabis would likely outweigh
52 the health risks for the patient; and

53 (C) May include a written statement certifying that, in the physician's professional opinion,
54 a thirty-day supply of medical cannabis would be inadequate to meet the medical needs of the
55 qualifying patient.

§16-8A-2. Creation of Cannabis Commission.

1 (a) There is hereby created the West Virginia Medical Cannabis Commission.

2 (b) The commission is an independent commission that functions within the department.

3 (c) The purpose of the commission is to develop policies, procedures, guidelines, and
4 regulations to implement programs to make medical cannabis available to qualifying patients in a
5 safe and effective manner.

6 (d) The commission shall develop identification cards for qualifying patients and
7 caregivers.

8 (e) The department shall adopt rules that establish the requirements for identification cards
9 provided by the commission. The rules shall include:

10 (1) The information to be included on an identification card;

11 (2) The method through which the commission will distribute identification cards; and

12 (3) The method through which the commission will track identification cards.

13 (f) The commission shall develop and maintain a website that:

14 (1) Provides information on how an individual can obtain medical cannabis in the state;

15 and

16 (2) Provides contact information for licensed dispensaries.

§16-8A-3. Makeup of commission and fund.

1 (a) The commission consists of the following sixteen members:

2 (1) The Secretary of the Department of Health and Human Resources, or the secretary's
3 designee;

4 (2) The Commissioner of the Department of Agriculture, or the commissioner's designee;

5 (3) The West Virginia Treasurer, or the Treasurer's designee; and

6 (4) The following thirteen members, appointed by the Governor:

7 (i) Two members of the public who support the use of cannabis for medical purposes and
8 who are or were patients who found relief from the use of medical cannabis;

9 (ii) One member designated by the West Virginia Association of Alcoholism and Drug
10 Counselors;

11 (iii) Three physicians licensed in the state;

12 (iv) One nurse practitioner licensed in the state who has experience in hospice care;

13 (v) One pharmacist licensed in the state;

14 (vi) One scientist who has experience in the science of cannabis;

- 15 (vii) One representative of the West Virginia State Bar;
16 (viii) One representative of law enforcement;
17 (ix) An attorney who is knowledgeable about medical cannabis laws in the United States;
18 and
19 (x) An individual with experience in horticulture, recommended by the Department of
20 Agriculture.
21 (b)(1) The term of a member is four years. However, the Governor shall set the terms of
22 the initial members of the commission by executive order such that three expire after one year,
23 three expire after two years, and three expire after three years in order to stagger the membership
24 terms of the commission.
25 (2) At the end of a commission member's term, the member continues to serve until a
26 successor is appointed and qualified.
27 (3) A member may not serve more than three consecutive full terms.
28 (4) A member who is appointed after a term has begun serves only for the rest of the term
29 and until a successor is appointed and qualifies.
30 (c) The Governor shall designate the chair from among the members of the commission.
31 (d) A majority of the full authorized membership of the commission is a quorum.
32 (e) A member of the commission:
33 (1) May not receive compensation as a member of the commission; but
34 (2) Is entitled to reimbursement for expenses incurred while engaged in the discharge of
35 official duties, not to exceed the amount paid to members of the Legislature.
36 (f) The commission may employ staff, including contractual staff, in accordance with the
37 funds provided in the annual state budget.
38 (g) The commission may set reasonable fees to cover the costs of operating the
39 commission.

40 (h)(1) There is hereby created in the State Treasury a separate special revenue account,
41 which shall be an interest-bearing account, to be known as the West Virginia Medical Cannabis
42 Commission Fund.

43 (2) The commission shall administer the fund.

44 (3) Any balance remaining in the fund at the end of any state fiscal year reverts to the
45 General Revenue Fund: *Provided*, That annually ten percent of profits shall be dedicated to
46 educational programs regarding cannabis use and recovery programs. The commission shall
47 establish a procedure for disbursement of this ten percent in rule.

48 (4) The fund shall be subject to an audit by the West Virginia Legislative Auditor's Office.

49 (5) The Treasurer shall pay out money from the fund as directed by the commission.

50 (6) The fund consists of:

51 (A) Any money appropriated by the Legislature to the fund;

52 (B) Any other money from any other source accepted for the benefit of the fund, in
53 accordance with any conditions adopted by the commission for the acceptance of donations or
54 gifts to the fund; and

55 (C) Any fees collected by the commission under this article.

§16-8A-4. Certifying physician's registration.

1 (a) The commission shall register as a certifying physician an individual who:

2 (1) Meets the requirements of this article; and

3 (2) Submits application materials that meet the requirements of this article.

4 (b) To be registered as a certifying physician, a physician shall submit a proposal to the
5 commission that includes:

6 (1) The reasons for including a patient under the care of the physician for the purposes of
7 this article, including the patient's qualifying medical conditions;

8 (2) An attestation that a standard patient evaluation will be completed, including a history,
9 a physical examination, a review of symptoms, and other pertinent medical information; and

10 (3) The physician’s plan for the ongoing assessment and follow–up care of a patient and
11 for collecting and analyzing data.

12 (c) The commission may not require an individual to meet requirements in addition to the
13 requirements listed in subsections (a) and (b) of this section to be registered as a certifying
14 physician.

15 (d)(1) The commission is encouraged to approve physician applications for the following
16 medical conditions:

17 (A) A chronic or debilitating disease or medical condition that results in a patient being
18 admitted into hospice or receiving palliative care; or

19 (B) A chronic or debilitating disease or medical condition or the treatment of a chronic or
20 debilitating disease or medical condition that produces:

21 (i) Cachexia, anorexia, or wasting syndrome;

22 (ii) Severe or chronic pain that does not find effective relief through standard pain
23 medication;

24 (iii) Severe nausea;

25 (iv) Seizures;

26 (v) Severe or persistent muscle spasms; or

27 (vi) Refractory generalized anxiety disorder.

28 (2) The commission may not limit treatment of a particular medical condition to one class
29 of physicians.

30 (e) The commission may approve applications that include any other condition that is
31 severe and for which other medical treatments have been ineffective if the symptoms reasonably
32 can be expected to be relieved by the medical use of cannabis.

33 (f)(1) A certifying physician or the spouse of a certifying physician may not receive any
34 gifts from or have an ownership interest in a medical cannabis grower, a processor, or a
35 dispensary.

36 (2) A certifying physician may receive compensation from a medical cannabis grower, a
37 processor, or dispensary if the certifying physician:

38 (A) Obtains the approval of the commission before receiving the compensation; and

39 (B) Discloses the amount of compensation received from the medical cannabis grower,
40 processor, or dispensary to the commission.

41 (g)(1) A qualifying patient may be a patient of the certifying physician or may be referred
42 to the certifying physician.

43 (2) A certifying physician shall provide each written certification to the commission.

44 (3) On receipt of a written certification provided under subdivision (2) of this subsection,
45 the commission shall issue an identification card to each qualifying patient or caregiver named in
46 the written certification.

47 (4) A certifying physician may discuss medical cannabis with a patient.

48 (5)(A) Except as provided in paragraph (B) of this subdivision, a qualifying patient or
49 caregiver may obtain medical cannabis only from a medical cannabis grower licensed by the
50 commission or a dispensary licensed by the commission.

51 (B) A qualifying patient under the age of eighteen years may obtain medical cannabis only
52 through the qualifying patient's caregiver.

53 (6)(A) A caregiver may serve no more than five qualifying patients at any time.

54 (B) A qualifying patient may have no more than two caregivers.

55 (h)(1) A certifying physician may register biennially.

56 (2) The commission shall grant or deny a renewal of a registration for approval based on
57 the physician's performance in complying with regulations adopted by the commission.

58 (i) Any certifying physician shall report all qualifying patients as set forth in this article to
59 the Controlled Substances Monitoring Database as set forth in article nine, chapter sixty-A of this
60 code.

§16-8A-5. Reporting requirement.

1 On or before January 31 each year, the commission shall report to the Governor and the
2 Joint Committee on Government and Finance, on physicians certified under this article.

§16-8A-6. Medical cannabis growers and grower agents.

1 (a) (1) The commission shall license medical cannabis growers that meet all requirements
2 established by the commission to operate in the state to provide cannabis to:

3 (A) Processors licensed by the commission under this article;

4 (B) Dispensaries licensed by the commission under this article;

5 (C) Qualifying patients and caregivers; and

6 (D) Independent testing laboratories registered with the commission under this article.

7 (2)(A) Except as provided in paragraph (B) of this subdivision, the commission may
8 license no more than fifteen medical cannabis growers.

9 (B) Beginning June 1, 2019, the commission may issue the number of licenses necessary
10 to meet the demand for medical cannabis by qualifying patients and caregivers issued
11 identification cards under this article in an affordable, accessible, secure, and efficient manner.

12 (C) The commission shall establish an application review process for granting medical
13 cannabis grower licenses in which applications are reviewed, evaluated, and ranked based on
14 criteria established by the commission.

15 (D) If the commission finds sufficient availability, at least ten percent of the licenses
16 granted pursuant to this section shall be to persons participating in a veterans agriculture
17 program.

18 (E) The commission may not issue more than one medical cannabis grower license to
19 each applicant.

20 (F) A grower shall pay an application fee in an amount to be determined by the commission
21 consistent with this article.

22 (3) The commission shall set standards for licensure as a medical cannabis grower to
23 ensure public safety and safe access to medical cannabis, which may include a requirement for
24 the posting of security.

25 (4) Each medical cannabis grower agent shall:

26 (A) Be registered with the commission before the agent may volunteer or work for a
27 licensed grower; and

28 (B) Obtain state and national criminal history records checks in accordance with section
29 twelve of this article.

30 (5)(A) A licensed grower shall apply to the commission for a registration card for each
31 grower agent by submitting the name, address, and date of birth of the agent.

32 (B) Within one business day after a grower agent ceases to be associated with a grower,
33 the grower shall notify the commission and return the grower agent's registration card to the
34 commission. On receipt of the notice, the commission shall immediately revoke the registration
35 card of the grower agent and, if the registration card was not returned to the commission, notify
36 the Superintendent of the West Virginia State Police.

37 (C) The commission may not register a person who has been convicted of a felony drug
38 offense as a grower agent.

39 (6)(A) A medical cannabis grower license is valid for four years on initial licensure.

40 (B) A medical cannabis grower license is valid for two years on renewal.

41 (7) An application to operate as a medical cannabis grower may be submitted in paper or
42 electronic form.

43 (8)(A) The commission shall encourage licensing medical cannabis growers that grow
44 strains of cannabis, including strains with high cannabidiol content, with demonstrated success in
45 alleviating symptoms of specific diseases or conditions.

46 (B) The commission shall encourage licensing medical cannabis growers that prepare
47 medical cannabis in a range of routes of administration.

48 (9)(A) The commission shall:

49 (i) Actively seek to achieve geographic diversity when licensing medical cannabis growers;

50 and

51 (ii) Encourage applicants who qualify as a minority-owned business, as that term is defined
52 in section fifty-nine, article three, chapter five-a of this code.

53 (B) Beginning June 1, 2019, a grower licensed under this article to operate as a medical
54 cannabis grower shall report annually to the commission on the minority owners and employees
55 of the grower.

56 (10) An entity seeking licensure as a medical cannabis grower shall meet local zoning and
57 planning requirements.

58 (b) An entity licensed to grow medical cannabis under this section may provide cannabis
59 only to:

60 (1) Processors licensed by the commission under this article;

61 (2) Dispensaries licensed by the commission under this article;

62 (3) Qualified patients;

63 (4) Caregivers; and

64 (5) Independent testing laboratories registered with the commission under this article.

65 (c)(1) An entity licensed to grow cannabis under this section may dispense cannabis from
66 a facility of a grower licensed as a dispensary.

67 (2) A qualifying patient or caregiver may obtain medical cannabis from a facility of a grower
68 licensed as a dispensary.

69 (3) An entity licensed to grow medical cannabis under this section may grow and process
70 medical cannabis on the same premises.

71 (d) An entity licensed to grow medical cannabis under this section shall ensure that safety
72 precautions established by the commission are followed by any facility operated by the grower.

73 (e) The commission shall establish requirements for security and the manufacturing
74 process that a grower must meet to obtain a license under this section, including a requirement
75 for a product-tracking system.

76 (f) The commission may inspect a grower licensed under this section to ensure compliance
77 with this article.

78 (g) The commission may impose penalties or rescind the license of a grower that does not
79 meet the standards for licensure set by the commission.

80 (h) A qualifying patient is exempt from the provisions of this section and may grow and
81 cultivate up to two mature cannabis plants for their own use in accordance with the certification
82 from a certifying physician. A qualifying patient shall remain subject to the provisions of section
83 four hundred one, article four, chapter sixty-A of this code for delivery or distribution of any
84 cannabis which is grown and legally possessed pursuant to this subsection.

§16-8A-7. Dispensaries.

1 (a) A dispensary shall be licensed by the commission.

2 (b) To be licensed as a dispensary, an applicant shall submit to the commission:

3 (1) An application fee in an amount to be determined by the commission consistent with
4 this article; and

5 (2) An application that includes:

6 (A) The legal name and physical address of the proposed dispensary;

7 (B) The name, address, and date of birth of each principal officer and each director, none
8 of whom may have served as a principal officer or director for a dispensary that has had its license
9 revoked; and

10 (C) Operating procedures that the dispensary will use, consistent with commission
11 regulations for oversight, including storage of cannabis and products containing cannabis only in
12 enclosed and locked facilities.

13 (c) The commission shall:

14 (1) Establish an application review process for granting dispensary licenses in which
15 applications are reviewed, evaluated, and ranked based on criteria established by the
16 commission; and

17 (2) Actively seek to achieve geographic diversity when licensing dispensaries.

18 (d)(1) A dispensary license is valid for four years on initial licensure.

19 (2) A dispensary license is valid for two years on renewal.

20 (e) A dispensary licensed under this section or a dispensary agent registered under
21 section eight of this article may not be penalized or arrested under state law for acquiring,
22 possessing, processing, transferring, transporting, selling, distributing, or dispensing cannabis,
23 products containing cannabis, related supplies, or educational materials for use by a qualifying
24 patient or a caregiver.

25 (f) The commission shall establish requirements for security and product handling
26 procedures that a dispensary must meet to obtain a license under this section, including a
27 requirement for a product-tracking system.

28 (g) The commission may inspect a dispensary licensed under this section to ensure
29 compliance with this article.

30 (h) The commission may impose penalties or rescind the license of a dispensary that does
31 not meet the standards for licensure set by the commission.

32 (i)(1) Each dispensary licensed under this section shall submit to the commission a
33 quarterly report.

34 (2) The quarterly report shall include:

35 (A) The number of patients served;

36 (B) The county of residence of each patient served;

37 (C) The medical condition for which medical cannabis was recommended;

38 (D) The type and amount of medical cannabis dispensed; and

39 (E) If available, a summary of clinical outcomes, including adverse events and any cases
40 of suspected diversion.

41 (3) The quarterly report may not include any personal information that identifies a patient.

§16-8A-8. Dispensary agents.

1 (a) A dispensary agent shall:

2 (1) Be at least twenty-one years old;

3 (2) Be registered with the commission before the agent may volunteer or work for a
4 dispensary; and

5 (3) Obtain state and national criminal history records check in accordance with section
6 twelve of this article.

7 (b) A dispensary shall apply to the commission for a registration card for each dispensary
8 agent by submitting the name, address, and date of birth of the agent.

9 (c)(1) Within one business day after a dispensary agent ceases to be associated with a
10 dispensary, the dispensary shall:

11 (A) Notify the commission; and

12 (B) Return the dispensary agent's registration card to the commission.

13 (2) On receipt of a notice described in subdivision (1) of this subsection, the commission
14 shall:

15 (A) Immediately revoke the registration card of the dispensary agent; and

16 (B) If the registration card was not returned to the commission, notify the Superintendent
17 of the West Virginia State Police.

18 (d) The commission may not register an individual who has been convicted of a felony
19 drug offense as a dispensary agent.

§16-8A-9. Processors.

1 (a) A processor shall be licensed by the commission.

2 (b) To be licensed as a processor, an applicant shall submit to the commission:

3 (1) An application fee in an amount to be determined by the commission in accordance
4 with this article; and

5 (2) An application that includes:

6 (A) The legal name and physical address of the proposed processor;

7 (B) The name, address, and date of birth of each principal officer and director, none of
8 whom may have served as a principal officer or director for a licensee under this article that has
9 had its license revoked; and

10 (C) Operating procedures that the processor will use, consistent with commission
11 regulations for oversight, including storage of cannabis, extracts, and products containing
12 cannabis only in enclosed and locked facilities.

13 (c) The commission shall establish an application review process for granting processor
14 licenses in which applications are reviewed, evaluated, and ranked based on criteria established
15 by the commission.

16 (d)(1) A processor license is valid for four years on initial licensure.

17 (2) A processor license is valid for two years on renewal.

18 (e) A processor licensed under this section or a processor agent registered section ten of
19 this article may not be penalized or arrested under state law for acquiring, possessing, processing,
20 transferring, transporting, selling, distributing, or dispensing cannabis, products containing
21 cannabis, related supplies, or educational materials for use by a licensee under this article or a
22 qualifying patient or a caregiver.

23 (f) The commission shall establish requirements for security and product handling
24 procedures that a processor must meet to obtain a license under this section, including a
25 requirement for a product-tracking system.

26 (g) The commission may inspect a processor licensed under this section to ensure
27 compliance with this article.

28 (h) The commission may impose penalties or rescind the license of a processor that does
29 not meet the standards for licensure set by the commission.

§16-8A-10. Processor Agents.

1 (a) A processor agent shall:

2 (1) Be at least twenty-one years old;

3 (2) Be registered with the commission before the agent may volunteer or work for a
4 processor; and

5 (3) Obtain state and national criminal history records check in accordance with section
6 twelve of this article.

7 (b) A processor agent shall apply to the commission for a registration card for each
8 processor agent by submitting the name, address, and date of birth of the agent.

9 (c)(1) Within one business day after a processor agent ceases to be associated with a
10 processor, the processor shall:

11 (A) Notify the commission; and

12 (B) Return the processor agent's registration card to the commission.

13 (2) On receipt of a notice described in subdivision (1) of this subsection, the commission
14 shall:

15 (A) Immediately revoke the registration card of the processor agent; and

16 (B) If the registration card was not returned to the commission, notify the Superintendent
17 of the West Virginia State Police.

18 (d) The commission may not register an individual who has been convicted of a felony
19 drug offense as a processor agent.

§16-8A-11. Independent Laboratories.

1 (a) The commission shall register a public criminal justice agency as the primary testing
2 laboratory to test cannabis and products containing cannabis that are to be sold in the state.

3 (b) The commission may register additional private independent testing laboratories to test
4 cannabis and products containing cannabis that are to be sold in the state.

5 (c) To be registered as an independent testing laboratory, a laboratory shall:

6 (1) Meet the application requirements established by the commission;

7 (2) Pay any applicable fee required by the commission; and

8 (3) Meet the standards and requirements for accreditation, inspection, and testing
9 established by the commission.

10 (d) The commission shall adopt regulations that establish:

11 (1) The standards and requirements to be met by an independent laboratory to obtain a
12 registration;

13 (2) The standards of care to be followed by all testing laboratories;

14 (3) The initial and renewal terms for an independent laboratory registration and the
15 renewal procedure; and

16 (4) The bases and processes for denial, revocation, and suspension of a registration of an
17 independent testing laboratory.

18 (d) The commission may inspect any independent testing laboratory registered under this
19 section to ensure compliance with this article.

§16-8A-12. Criminal records check.

1 (a) The commission and the State Police shall enter into a memorandum of understanding
2 regarding criminal records checks that include, at a minimum, the following:

3 (1) Any applicant is required to submit to the State Police all information necessary to
4 complete a nationwide background check consisting of inquiries of the National Instant Criminal
5 Background Check System, the West Virginia criminal history record responses and the National
6 Interstate Identification Index;

7 (2) The applicant is required to pay all fees associated with the background checks;

8 (3) The State Police shall complete the background checks promptly upon receipt of all
9 necessary information and fees; and

10 (4) The State Police shall forward to the commission and to the applicant the criminal
11 history record information of the applicant forthwith.

12 (b) Information obtained from the background checks required under this section shall be:

13 (1) Confidential and may not be disseminated other than as authorized in this section; and

14 (2) Used only for the registration purpose authorized by this article.

15 (c) The subject of a criminal history records check under this section may appeal the
16 contents of the printed statement issued, as authorized by relevant criminal history database.

§16-8A-13. Penalties.

1 (a) Any of the following persons acting in accordance with the provisions of this article may
2 not be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty
3 or disciplinary action by a professional licensing board, or be denied any right or privilege, for the
4 medical use of cannabis:

5 (1) A qualifying patient:

6 (A) In possession of an amount of medical cannabis determined by the commission to
7 constitute a thirty-day supply; or

8 (B) In possession of an amount of medical cannabis that is greater than a thirty-day supply
9 if the qualifying patient's certifying physician stated in the written certification that a thirty-day
10 supply would be inadequate to meet the medical needs of the qualifying patient;

11 (2) A grower licensed under section six of this article or a grower agent registered under
12 section six of this article;

13 (3) A certifying physician;

14 (4) A caregiver;

15 (5) A dispensary licensed under section seven of this article or a dispensary agent
16 registered under section eight of this article;

17 (6) A processor licensed under section nine of this article or a processor agent registered
18 under section ten of this article; or

19 (7) A hospital, medical facility, or hospice program where a qualifying patient is receiving
20 treatment.

21 (b)(1) A person may not distribute, possess, manufacture, or use cannabis that has been
22 diverted from a qualifying patient, a caregiver, a licensed grower, or a licensed dispensary.

23 (2) A person who violates this subsection is guilty of a felony and, upon conviction, is
24 subject to confinement not exceeding five years or a fine not exceeding \$10,000, or both fined
25 and confined.

26 (3) The penalty under this section is in addition to any penalties that a person may be
27 subject to for manufacture, possession, or distribution of marijuana under this code.

§16-8A-14. Conduct not protected.

1 (a) This article may not be construed to authorize any individual to engage in, and does
2 not prevent the imposition of any civil, criminal, or other penalties for, the following:

3 (1) Undertaking any task under the influence of marijuana or cannabis, when doing so
4 would constitute negligence or professional malpractice;

5 (2) Operating, navigating, or being in actual physical control of any motor vehicle, aircraft,
6 or boat while under the influence of marijuana or cannabis;

7 (3) Smoking marijuana or cannabis in any public place;

8 (4) Smoking marijuana or cannabis in a motor vehicle; or

9 (5) Except as provided in subsection (b) of this section, smoking marijuana or cannabis
10 on a private property that:

11 (A)(i) Is rented from a landlord; and

12 (ii) Is subject to a policy that prohibits the smoking of marijuana or cannabis on the
13 property; or

14 (B) Is subject to a policy that prohibits the smoking of marijuana or cannabis on the
15 property of an attached dwelling adopted by the council of unit owners, as defined in chapter
16 thirty-six-a of this code, or the executive board of a unit owners association, as defined in chapter
17 thirty-six-b of this code.

18 (b) The provisions of subdivision (5), subsection (a) of this section do not apply to
19 vaporizing cannabis.

20 (c) This article may not be construed to provide immunity to a person who violates the
21 provisions of this article from criminal prosecution for a violation of any law prohibiting or regulating
22 the use, possession, dispensing, distribution, or promotion of controlled dangerous substances,
23 dangerous drugs, detrimental drugs, or harmful drugs, or any conspiracy or attempt to commit
24 any of those offenses.

25 (d) This article may not be construed to require a hospital, medical facility, or hospice
26 program to report to the commission any disciplinary action taken by the hospital, medical facility,
27 or hospice program against a certifying physician, including the revocation of privileges, after the
28 registration of the certifying physician by the commission.

29 (e) This article may not be construed to prohibit a person from being concurrently licensed
30 by the commission as a grower, a dispensary, or a processor.

§16-8A-15. State employee actions and federal law.

1 (a) Notwithstanding any provision of this code to the contrary, a state employee who incurs
2 counsel fees in connection with a federal criminal investigation or prosecution solely related to
3 the employee's good faith discharge of public responsibilities under this article is eligible for
4 reimbursement of counsel fees.

5 (b) The Governor may suspend implementation of this article upon making a formal
6 determination that there is a reasonable chance of federal prosecution of state employees for
7 involvement with implementation of this article.

§16-8A-16. Rulemaking.

1 On or before September 15, 2018, the commission shall promulgate emergency rules
2 pursuant to the provisions of section fifteen, article three, chapter twenty-nine of this code to
3 implement the provisions of this article and shall subsequently propose rules for legislative
4 approval in accordance with the provisions of article three, chapter twenty-nine-a of this code.

NOTE: The purpose of this bill is to authorize medicinal cannabis in West Virginia.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.

ETHICS: OPINION NO. 23 AND MEDICINAL MARIJUANA

by

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In 2014, Minnesota joined the ranks of numerous states that have legalized the medicinal use of marijuana. As evidenced by state movement on the topic, public opinion has shifted on the issue, with recent polls citing slight majorities of the general population in favor of the legalization of marijuana use and associated decriminalization and significant major cities across the country in favor of the legalization of its use for medicinal purposes when properly prescribed by a medical professional.

On the heels of that public sentiment and Minnesota's new law, a Minnesota law firm directly petitioned the Minnesota Supreme Court on July 29, 2014, to amend the Minnesota Rules of Professional Conduct (MRPC). The law firm requested the addition by the court of a comment to Rule 1.2, MRPC, which would specifically permit a lawyer to counsel and assist a client with respect to conduct the lawyer reasonably believes is compliant with Minnesota statutes regarding medicinal marijuana. By order dated Sept. 19, 2014, the court opened the matter for public comment. On Oct. 21, 2014, the Lawyers Professional Responsibility Board (LPRB) submitted comments. The LPRB suggested that perhaps a more appropriate vehicle for the petition's proposed objective would be the issuance of an LPRB opinion.

After a public hearing on Jan. 28, 2015, the court issued an order on Feb. 24, 2015, denying the law firm's petition noting, in part, that "the comments are not an appropriate place to make any changes to the [MRPC] that may be needed to address Minnesota's medical cannabis law."

Following the court's denial of the petition the LPRB Opinion Committee undertook the task of drafting an LPRB opinion addressing the interplay between the MRPC and the medicinal marijuana issue. On April 3, 2015, the LPRB voted to approve the adoption of Opinion No. 23.

Opinion No. 23, in its entirety, reads as follows:

A lawyer may advise a client about the Minnesota Medical Marijuana Law and may represent, advise and assist clients in all activities relating to and in



compliance with the Law, including the manufacture, sale, distribution and use of medical marijuana, without violating the Minnesota Rules of Professional Conduct, so long as the lawyer also advises his or her client that such activities may violate federal law, including the federal Controlled Substance Act, 21 U.S.C. §841(a)(1).

Notable in Opinion No. 23 is the requirement that an attorney advise his or her client as to the implications of the client's conduct under federal law. The sale, manufacture, distribution, or possession of marijuana for any purpose (medicinal or otherwise) remains illegal under federal law. The Department of Justice (DOJ) has, however, taken the approach that it would effectively exercise prosecutorial discretion and focus its attention on pursuing only those marijuana-related offenses which implicate certain enumerated enforcement priorities. This approach, however, is tempered by the ever-present reality that the federal government has specifically reserved for itself the right to investigate and prosecute even those offenses which do not implicate the stated enforcement priorities. In spite of this reservation of prosecutorial authority, the DOJ has, more or less, stated that it will permit states to act relatively autonomously when legislating marijuana-related conduct within its borders provided the subject states have in place and utilize a robust and effective regulatory system addressing marijuana use, sale, cultivation and distribution.

So, while offering absolutely no safe harbor from federal (or state) prosecution, Opinion No. 23 provides protection from disciplinary prosecution to Minnesota attorneys who assist clients acting in accordance with Minnesota state law.

An issue unaddressed by Opinion No. 23 relates to a Minnesota attorney's personal use of medicinal marijuana which, in the director's view, is somewhat akin to an attorney's use of prescription pain medication which can affect memory, judgment and cognitive functions. Even when the medicinal marijuana was prescribed, obtained, and used pursuant to Minnesota law, an attorney's obligations to his or her clients remain and an attorney's failure to fulfill those obligations for whatever reason, including the attorney's use of medicinal marijuana, may be subject to disciplinary prosecution in Minnesota. Simply put, a prescription for medicinal marijuana is not a license to engage in conduct which is otherwise in violation of the MRPC.

Lastly, as a warning for those Minnesota attorneys who are also licensed to practice law in North Dakota, it should be noted that the North Dakota State Bar Association Ethics Committee, in Opinion No. 14-02, specifically advises that an attorney "would not be able to live and use medical marijuana prescribed by a physician in Minnesota while being licensed to practice law in North Dakota." Opinion No. 14-02 takes the position

that such conduct would be in violation of Rule 8.4(b) of the North Dakota Rules of Professional Conduct which — like Minnesota’s Rule 8.4(b), MRPC — states that “[i]t is professional misconduct for a lawyer to ... commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” Minnesota attorneys licensed in North Dakota who anticipate engaging in marijuana-related conduct are encouraged to review Opinion No. 14-02 in its entirety and contact the appropriate North Dakota body for guidance.

The Supreme Court of Ohio

BOARD OF PROFESSIONAL CONDUCT

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OPINION 2016-6

Issued August 5, 2016

Ethical Implications for Lawyers under Ohio's Medical Marijuana Law

SYLLABUS: A lawyer may not advise a client to engage in conduct that violates federal law, or assist in such conduct, even if the conduct is authorized by state law. 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. A lawyer may provide advice as to the legality and consequences of a client's proposed conduct under state and federal law and explain the validity, scope, meaning, and application of the law.

A lawyer's personal use of medical marijuana pursuant to a state regulated prescription, ownership in, or employment by a medical marijuana enterprise, subjects the lawyer to possible federal prosecution, and may adversely reflect on a lawyer's honesty, trustworthiness, and overall fitness to practice law.

QUESTIONS: Several lawyers seek guidance concerning Ohio Sub. H.B. 523, effective September 8, 2016, that permits the cultivation, processing, sale, and use of medical marijuana under a state licensing and regulatory framework. This opinion addresses three questions:

- 1) Whether an Ohio lawyer may ethically counsel, advise, provide legal services to, and represent state regulated medical marijuana cultivators, processors, and dispensaries, as well as business clients seeking to transact with regulated entities;



- 2) Whether an Ohio lawyer may operate, hold employment or an ownership interest in, a licensed medical marijuana enterprise; and
- 3) Whether an Ohio lawyer may ethically use medical marijuana with a prescription.

APPLICABLE RULES: Prof.Cond.R. 1.2(d), 8.4(b), 8.4(h).

OPINION: Ohio Sub. H.B. 523 permits a patient, upon the recommendation of a physician, to use medical marijuana to treat a qualifying medical condition. Three state regulatory agencies are permitted to issue licenses to persons and entities for the purposes of cultivating, processing, testing, dispensing, and prescribing medical marijuana. The law provides that a registered patient or caregiver is not subject to arrest or criminal prosecution for using, obtaining, possessing, or administering marijuana and establishes an affirmative defense to a criminal charge to the possession of marijuana. The law immunizes professional license holders, including lawyers, from any professional disciplinary action for engaging in professional or occupational activities related to medical marijuana. Notwithstanding this provision, this advisory opinion analyzes the questions presented in light of rules promulgated by the Supreme Court pursuant to Oh. Const. Art. IV, Section 2(B)(1)(g).¹

On and after September 8, 2016, a direct conflict will exist between Ohio law and federal law. The federal Controlled Substances Act ("CSA") currently designates marijuana as a Schedule I controlled substance which makes its use for any purpose, including medical applications, a crime. 21 USC §§ 812(b)(1), 841(a)(1). Additionally, under the CSA, it is illegal to manufacture, distribute, or dispense a controlled substance, including marijuana (21 USC § 841(a)(1)), or conspire to do so (21 USC § 846). Consequently, any Ohio citizen engaged in cultivating, processing, prescribing, or use of medical marijuana is in violation of federal law.

In 2013, the U.S. Department of Justice ("USDOJ") issued a memorandum stating its general policy not to interfere with the medical use of marijuana pursuant to state laws, provided the state tightly regulates and controls the medical marijuana market. Memorandum from James M. Cole, Deputy Attorney General, to All United States

¹ "The supreme court shall have original jurisdiction in * * * [a]dmission to the practice of law, the discipline of persons so admitted, and all other matters related to the practice of law."

Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013) (“Cole Memorandum”).² The Cole Memorandum does not override federal law enacted by Congress or grant immunity to individuals or businesses from federal prosecution.

The conflict between the Ohio and federal marijuana laws complicates the application of the Rules of Professional Conduct for Ohio lawyers. While Ohio law permits certain conduct by its citizens and grants immunity from prosecution for certain state crimes for the cultivation, processing, sale, and use of medical marijuana, the same conduct constitutes a federal crime, despite instructions to U.S. attorneys from the current administration to not vigorously enforce the law and therefore implicates Prof.Cond.R. 1.2 for lawyers with clients seeking to engage in activities permissible under state law.³

ANALYSIS:

Advice and Legal Services Provided to Clients Engaged in Conduct as a State Regulated Marijuana Enterprise

A lawyer cannot assist a client who engages or seeks to engage in conduct the lawyer knows to be illegal. Prof.Cond.R. 1.2(d). Nor can a lawyer recommend to a client the means by which an illegal act may be committed. Prof.Cond.R. 1.2(d), cmt. [9]. Prof.Cond.R. 1.2(d) embodies a lawyer’s important role in promoting compliance with the law by providing legal advice and assistance in structuring clients’ conduct in accordance with the law. The rule underscores an essential role of lawyers in preventing clients from engaging in conduct that is criminal in nature or when the legality of the proposed conduct is unclear. N.Y. Op. 1024 (2014).

Prof.Cond.R. 1.2(d) does not distinguish between illegal client conduct that will, or will not, be enforced by the federal government. The first inquiry of a lawyer is whether the legal services to be provided can be construed as assisting the client in conduct that is a violation of either state or federal law. If the answer is in the affirmative

² <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³ Federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes. Additionally, the federal government always may enforce its own criminal statutes. “Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized.” *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013).

under either law, Prof.Cond.R. 1.2(d) precludes the lawyer from providing those legal services to the client.⁴

Under Prof.Cond.R. 1.2(d), a lawyer cannot deliver legal services to assist a client in the establishment and operation of a state regulated marijuana enterprise that is illegal under federal law. The types of legal services that cannot be provided under the rule include, but are not limited to, the completion and filing of marijuana license applications, negotiations with regulated individuals and businesses, representation of clients before state regulatory boards responsible for the regulation of medical marijuana, the drafting and negotiating of contracts with vendors for resources or supplies, the drafting of lease agreements for property to be used in the cultivation, processing, or sale of medical marijuana, commercial paper, tax, zoning, corporate entity formation, and statutory agent services. *See also*, Colo. Op. 125 (2013). Similarly, a lawyer cannot represent a property owner, lessor, supplier or business in transactions with a marijuana regulated entity, if the lawyer knows the transferred property, facilities, goods or supplies will be used to engage in conduct that is illegal under federal law. Even though the completion of any of these services or transactions may be permissible under Ohio law, and a lawyer's assistance can facilitate their completion, the lawyer ultimately would be assisting the client in engaging in conduct that the lawyer knows to be illegal under federal law.

However, Prof.Cond.R. 1.2(d) does not foreclose certain advice and counsel to a client seeking to participate in the Ohio medical marijuana industry. Prof.Cond.R. 1.2(d) also provides:

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.

This portion of the rule permits a lawyer to explain to the client the conflict that currently exists between state and federal law, the consequences of engaging in conduct that is permissible under Ohio law but contrary to federal law, and the likelihood of federal enforcement given the policies of the current administration. A lawyer may counsel and advise a client regarding the scope and general requirements of the Ohio medical

⁴ Jurisdictions in accord with this view include Connecticut (Conn. Op. 2013-02); Hawaii (Haw. Op. 49 (2015)); Maine (Me. Op. 199 (2010)); and Colorado (Colo. Op. 125 (2014)).

marijuana law, the meaning of its provisions, and how the law would be applied to a client's proposed conduct. A lawyer also can advise a client concerning good faith arguments regarding the validity of the federal or state law and its application to the client's proposed conduct.

In addition to the permissible range of advice permitted under Prof.Cond.R. 1.2(d), the rule does not preclude a lawyer from representing a client charged with violating the state medical marijuana law, representing a professional license holder before state licensing boards, representing an employee in a wrongful discharge action due to medical marijuana use, or aiding a government client in the implementation and administration of the state's regulated licensing program. With regard to the latter, lawyers assisting a government client at the state or local level in the establishment, operation, or implementation of the state medical marijuana regulatory system are not advising or assisting the client in conduct that directly violates federal law. The state or a local government is not directly involved in the sale, processing, or dispensing of medical marijuana prohibited by federal law, even though it is arguably enabling the conduct through the issuance of licenses and the maintenance of its regulatory system.

For these reasons, the Board concludes that a lawyer violates Prof.Cond.R. 1.2(d) when he or she transitions from advising a client regarding the consequences of conduct under federal and state law to counseling or assisting the client to engage in conduct the lawyer knows is prohibited under federal law. Colo. Op. 125 (2013). Unless and until federal law is amended to authorize the use, production, and distribution of medical marijuana, a lawyer only may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law and explain the scope and application of state and federal law to the client's proposed conduct. However, the lawyer cannot provide the types of legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact with medical marijuana businesses. To document compliance with his or her ethical obligations, a lawyer approached by a prospective client seeking to engage in activities permitted by Ohio Sub. H.B. 523 should enter into a written fee agreement with the client that encompasses a mutual understanding about the exact scope of services the lawyer is ethically and lawfully able to provide under Prof.Cond.R. 1.2(d).

The Board is mindful that the current state of the law creates a unique conflict for Ohio lawyers and deprives certain clients of the ability to obtain a full range of legal services in furtherance of activities deemed lawful by the General Assembly. The

Supreme Court may amend the Rules of Professional Conduct to address this conflict. Several jurisdictions have reached similar conclusions to those contained in this opinion and have amended, or are considering amending Rule 1.2 or the comments to that rule. These states include Illinois, Alaska, Colorado, Nevada, Oregon, Washington, and Hawaii.

A Lawyer's Personal Use of Medical Marijuana and Participation in a Medical Marijuana Enterprise

Under current federal law, an Ohio lawyer's use of medical marijuana, even obtained through a state regulated prescription, constitutes an illegal act and subjects a lawyer to possible prosecution under federal law. Such activity may implicate Prof.Cond.R. 8.4(b) (commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness) and Prof.Cond.R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).

Whether the illegal act "reflects adversely on the lawyer's honesty or trustworthiness" under Prof.Cond.R. 8.4(b) only can be determined on a case-by-case basis. A lawyer is "answerable to the entire criminal law," but is only "professionally answerable" to those offenses that demonstrate a lack of honesty or trustworthiness. Prof.Cond.R. 8.4(b), cmt. [2]. For example, a single violation of the CSA by a lawyer using medical marijuana would not, by itself, demonstrate the requisite lack of honesty or trustworthiness to constitute a violation of Prof.Cond.R. 8.4(b). Other misconduct related to the illegal act, such as lying to federal investigators or obtaining a prescription for medical marijuana for purposes of resale or providing it to a minor, would need to be present to trigger a violation of Prof.Cond.R. 8.4(b). A nexus must be established between the commission of an illegal act and the lawyer's lack of honesty or trustworthiness. Colo. Adv. Op. 124 (2012). Similarly, multiple violations of federal law would likely constitute "a pattern of repeated offenses" indicating an "indifference to legal obligations" and constitute a violation of the rule. Prof.Cond.R. 8.4(b), cmt. [3]. See *Stark County Bar Ass'n v. Zimmer*, 135 Ohio St.3d 462, 2013-Ohio-1962 (respondent's multiple driving infractions constituted a violation of Prof.Cond.R. 8.4(b)).

Personal conduct involving medical marijuana that does not implicate a specific Rule of Professional Conduct may give rise to a standalone violation of Prof.Cond.R. 8.4(h). In these cases, a violation is found when there is clear and convincing evidence that the lawyer has engaged in misconduct that adversely reflects on the lawyer's fitness

to practice law. *Disciplinary Counsel v. Bowling*, 2010-Ohio-5040 (magistrate charged, but not convicted, for marijuana possession under state law violated Prof.Cond.R. 8.4(h)).

Similar to the issue of personal marijuana use, a lawyer's personal ownership or other participation in an Ohio medical marijuana enterprise violates federal law. Consequently, under circumstances similar to those previously discussed in relation to personal marijuana use, a lawyer's ownership of a medical marijuana enterprise may implicate Prof.Cond.R. 8.4(b), Prof.Cond.R. 8.4(h), or both. Likewise, participating in a medical marijuana enterprise as an employee or personally investing or lending money to a medical marijuana enterprise, subjects the lawyer to the same criminal and professional liabilities as having an ownership interest in a medical marijuana enterprise.

CONCLUSION: Federal law currently prohibits the sale, cultivation, processing, or use of marijuana, for any purpose. Prof.Cond.R. 1.2 prohibits a lawyer from counseling or assisting a client to engage in conduct the lawyer knows is illegal under any law. The rule does not contain an exception if the federally prohibited conduct is legal under state law. However, a lawyer may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law, explain the scope and application of the law to the client's conduct, but a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business. A lawyer seeking to use medical marijuana or participate in a regulated business under Ohio law is in technical violation of federal law. A lawyer's personal violation of federal law, under certain circumstances, may adversely reflect on a lawyer's honesty, trustworthiness, and fitness to practice law in violation of Prof.Cond.R. 8.4(b) or 8.4(h).

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.

**AMENDMENTS TO THE
OHIO RULES OF PROFESSIONAL CONDUCT**

The following amendments to the Ohio Rules of Professional Conduct (Prof. Cond. R. 1.2(d)) were adopted by the Supreme Court of Ohio. The history of these amendments is as follows:

August 30, 2016	Initial publication for comment
September 20, 2016	Final adoption by conference
September 20, 2016	Effective date of amendments

OHIO RULES OF PROFESSIONAL CONDUCT

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

[Existing language unaffected by the amendments is omitted to conserve space]

(d)(1) 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.

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal 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.

Comment

[Existing language unaffected by the amendments is omitted to conserve space]

Illegal, Fraudulent and Prohibited Transactions

[9] Division (d)(1) 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. 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)(1) 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)(1) 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)(1) 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).

Comparison to former Ohio Code of Professional Responsibility

Rule 1.2 replaces several provisions within Canon 7 of the Code of Professional Responsibility.

The first sentence of Rule 1.2(a) generally corresponds to EC 7-7 and makes what previously was advisory into a rule. The second sentence of Rule 1.2(a) states explicitly what is implied by EC 7-7. The third sentence of Rule 1.2(a) corresponds generally to DR 7-101(A)(1) and EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

Rule 1.2(c) does not correspond to any Disciplinary Rule or Ethical Consideration.

The first sentence of Rule 1.2(d)(1) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d)(1) is similar to EC 7-4.

Rule 1.2(e) is the same as DR 7-105 except for the addition of the prohibition against threatening "professional misconduct allegations."

Comparison to ABA Model Rules of Professional Conduct

Rule 1.2(a) is modified slightly from the Model Rule 1.2(a) by the inclusion of the third sentence, which does not exist in the Model Rules.

Model Rule 1.2(b) has been moved to Comment [5] of Rule 1.2 because the provision is more appropriately addressed in a comment rather than a black-letter rule.

Rule 1.2(c) differs from Model Rule 1.2(c) in that it requires only that the limitation be communicated to the client, preferably in writing. The Model Rule requires that the client give informed consent to the limitation.

Rule 1.2(d)(1) is similar to Model Rule 1.2(d) but differs in two aspects. The Model Rule language “criminal” was changed to “illegal” in Rule 1.2(d)(1), and Model Rule 1.2(d) was split into two sentences in 1.2(d)(1).

Rule 1.2(d)(2) does not exist in the Model Rules.

Rule 1.2(e) does not exist in the Model Rules.

FORM OF CITATION, EFFECTIVE DATE, APPLICATION

[Existing language unaffected by the amendments is omitted to conserve space]

(m) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.2(d) and Comments [9] and [12] of the Ohio Rules of Professional Conduct effective September 20, 2016.