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Arkansas Issue 6: Navigating the Weeds of State-Legal Medical Marijuana

By Andrew King

This article provides an overview of the Arkansas Medical Marijuana Amendment of 2016, discusses federal policy regarding enforcement of marijuana laws, and outlines risks that attorneys may face in advising marijuana businesses.

In the 2016 general election, Arkansas voters approved the Arkansas Medical Marijuana Amendment of 2016, otherwise known as “Issue 6.”¹ Now that Arkansas joined 29 other states and the District of Columbia in making medical marijuana legal at the local level, lawyers, state agencies, and the General Assembly must grapple with a multitude of issues that arise for a new industry that is still defined as a crime under federal law.² This article outlines some of the issues that Arkansas attorneys should consider when advising clients regarding Arkansas’ legalization of medical marijuana.

Overview of Issue 6

Issue 6 is an amendment to the Arkansas Constitution that permits patients with qualifying medical conditions³ to obtain, possess, and use up to 2.5 ounces of usable marijuana every two weeks.⁴ Qualifying patients and their designated caregivers must



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obtain registry identification cards from the Arkansas Department of Health after submitting an application with a physician's written certification that the patient has a qualifying medical condition.⁵ The amendment protects patients and their physicians from criminal liability and risks to employment, eviction, and professional licensure if they comply with the amendment, at least at the state level.⁶

With a registry card, a qualifying patient may obtain marijuana from a licensed dispensary.⁷ A five-member Medical Marijuana Commission is created to determine the qualifications for dispensary and cultivation facility licenses and award licenses.⁸ Dispensaries may grow or possess up to 50 mature marijuana plants at one time, and otherwise must purchase marijuana for resale from a licensed cultivation facility.⁹ A cultivation facility can grow as much marijuana as "reasonably necessary to meet the demands and needs of qualifying patients" as determined by the commission.¹⁰

News reports suggest that interest in obtaining licenses is strong.¹¹ The commission must begin accepting applications by July 1, 2017.¹² At the time of application, applicants and 60% of their investors must have resided in Arkansas for the previous seven years.¹³ The application must give a proposed address for the dispensary or cultivation facility, and certify that the location complies with zoning regulations for pharmacies and is a specified distance from schools, churches, and day cares.¹⁴ The commission may issue between 20 and 40 dispensary licenses, with a maximum of four per county.¹⁵ It may issue four to eight cultivation facility licenses.¹⁶

By May 8, 2017, the Commission, Department of Health, and Alcoholic Beverage Control Division must adopt regulations carry out the Amendment. The General Assembly may amend any portion of the Amendment by a two-thirds vote of both chambers, except for the criminal liability protections for qualifying patients and limits on numbers of licenses.¹⁷ Legislators have already modified amendment to extend the time for the Commission to adopt regulations and accept applications.¹⁸

Federal Uncertainty Casts Haze

While the Arkansas General Assembly and state agencies scramble to create a regulatory framework for medical marijuana, at the federal level, a marijuana-tolerant executive branch has been replaced by a new

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administration that could drastically modify federal marijuana enforcement policy. To understand the interplay of federal and state marijuana laws, it is important to recognize the two federal policies that have permitted state-legal marijuana to exist without interference from federal agencies:

- The Justice Department's Ogden Memorandum¹⁹ and Cole Memoranda,²⁰ which set a policy of declining to prosecute individuals who are in clear and unambiguous compliance with state laws permitting the use of marijuana; and

- The Rohrabacher Amendment,²¹ which prohibits the use of federal funds to supersede state law in states that have legalized medical marijuana.

The Ogden and Cole Memoranda reflect an executive policy that "it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers."²² The Rohrabacher Amendment is a legislative expression of the same policy judgment, but is set to expire on April 28, 2017, unless reauthorized by Congress.²³ In a 2016 case, *United States v. McIntosh*, the Ninth Circuit relied on the Rohrabacher Amendment to require the dismissal of federal criminal indictments against marijuana growers and sellers who had complied with California law.²⁴

A blunt assessment of these federal policies must recognize that the new Attorney General could eliminate the Ogden and Cole Memoranda with the stroke of a pen to revise the Justice Department's discretionary enforcement priorities in opposition to state-legal marijuana. And the Rohrabacher Amendment—which passed the House of Representatives by a vote of 242 to 186 in June 2015²⁵—does not include Arkansas among the 39 states to which it applies.²⁶ Consequently, the United States attorneys in Arkansas would not be

barred from the sort of prosecution that was dismissed in *McIntosh*.

Banking and Security Challenges for Cultivators and Dispensaries

Even after the smoke clears on the Trump administration's medical marijuana policies, licensed marijuana growers, dispensaries, and their business partners are sure to face significant operational challenges beyond complying with Arkansas laws and regulations. The most prominent challenge is banking. Credit card companies and most debit card networks will not handle marijuana transactions, which means that dispensaries often deal with large amounts of cash. There are few banks or credit unions that will deposit funds from marijuana growers or dispensaries out of concern for violating federal anti-money-laundering laws. The result is a precarious situation in which many marijuana businesses must possess and secure large amounts of cash, surely an attractive target for crimes of opportunity. Nor can they use firearms to protect themselves, because it is still illegal to possess a firearm at the same time as marijuana.²⁷

The Justice Department and Treasury Department's Financial Crimes Enforcement Network (FinCEN) has made efforts to alleviate these public safety concerns by issuing guidance for how financial institutions can provide services to marijuana businesses. FinCEN advises banks to look out for red flags associated with the illicit drug trade, perform due diligence when deciding whether to take on a customer in the state-legal marijuana business, and file marijuana-specific Suspicious Activity Reports (SARs) in a format corresponding to the Justice Department's enforcement priorities.²⁸ Again, this guidance does not change the law and could be erased by the new administration. In Colorado and Washington, there are enough banks and credit unions that have followed this guidance that some marijuana

dispensaries can accept debit cards using an independent debit card network.²⁹

Ethical Concerns

Given the numerous legal developments that are bound to happen at both the state and federal levels, medical marijuana is a new industry in which there are significant risks and opportunities for investors. At the state level, the industry will be highly regulated. It is unlawful under federal law but may be tolerated to some degree. Few situations call out more clearly for the wise counsel of trained lawyers. But can a lawyer ethically advise a client who sets out to violate federal criminal laws?

Arkansas Rule of Professional Conduct 1.2(d) provides a clear, but discouraging answer:

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.

A straightforward reading is that a lawyer would violate this rule by advising a client who wants to open a dispensary or cultivation facility in compliance with Issue 6.³⁰ If so, new entrants into this new industry will be deprived of counsel to help them navigate a murky and fluid legal terrain.

When Colorado passed marijuana legalization through a state constitutional amendment in 2012, the Colorado Supreme Court issued a revised comment to its version of Rule 1.2(d) permitting lawyers to advise their clients regarding the validity, scope, and meaning of the constitutional amendment.³¹ At a recent House of Delegates meeting, the Arkansas Bar Association has encouraged the Arkansas Supreme Court to follow suit. The proposal is sensible and necessary to ensure that medical marijuana businesses can operate in an above-board manner that fully complies with Issue 6 and coming state regulations.

Unfortunately, adjustments to Rule 1.2(d) do not eliminate the risks that an attorney must consider when advising marijuana-possessing individuals and entities. Any involve-

ment in conduct that is a federal crime carries with it a broad array of liability concerns.³² For example, in Colorado, anti-marijuana groups targeted marijuana dispensaries, their landlords, banks, and accountants with federal civil RICO lawsuits.³³ An attorney who seeks to advise medical marijuana businesses should enter the engagement with clear eyes about all the risks involved.

Conclusion

Arkansas voters have enacted an ambitious regime for medical marijuana at a time when federal marijuana policy is at a crossroads. The year 2017 will see major developments in medical marijuana law and policy, both in Arkansas and nationwide. Significant challenges lie ahead for the General Assembly, state agencies, and attorneys who may advise the emerging medical marijuana industry.

Endnotes:

1. The Arkansas Medical Marijuana Amendment of 2016, ARK. CONST. amend. ____ (adopted Nov. 8, 2016), *available at* <http://www.healthy.arkansas.gov/Documents/The%20Arkansas%20Medical%20Marijuana%20Amendment%20of%202016.pdf> (hereinafter “Ark. Med. Marijuana Amend.”).
2. 21 U.S.C. §§ 802, 812, 844.
3. Ark. Med. Marijuana Amend. § 2(13). The list of qualifying conditions includes cancer, glaucoma, HIV, AIDS, hepatitis C, amyotrophic lateral sclerosis (ALS), Tourette’s syndrome, Crohn’s disease, ulcerative colitis, post-traumatic stress disorder, severe arthritis, fibromyalgia, and Alzheimer’s disease. The Arkansas Department of Health may expand the list of qualifying medical conditions through a petition process. Ark. Med. Marijuana Amend. §§ 2(13)(C), 4(c).
4. Ark. Med. Marijuana Amend. §§ 3(a), 10(b)(8).
5. Ark. Med. Marijuana Amend. §§ 2(19), 5(a); Act 5 of 2017 (eliminating requirement that physician certify that benefits of marijuana outweigh risks).
6. Ark. Med. Marijuana Amend. § 3.
7. Ark. Med. Marijuana Amend. § 8(m)(1).
8. Ark. Med. Marijuana Amend. § 19. As of the date of this writing, the five-member commission is appointed and has held several meetings.
9. Ark. Med. Marijuana Amend. § 8(m)(3)-(4).

10. Ark. Med. Marijuana Amend. § 8(m)(4)(i).

11. *See, e.g.,* John Moritz, *Rx-marijuana growers in Arkansas to be merit-selected*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 23, 2016 at 1B; Bart Schaneman, *New Market: Smooth rollout expected for Arkansas MMJ industry*, MARIJUANA BUSINESS DAILY, Dec. 7, 2016, <https://mjbizdaily.com/new-market-arkansas-mmj-attract-state-patients/>.

12. Ark. Med. Marijuana Amend. § 8(g)(1) (revised by Act 4 of 2017).

13. Ark. Med. Marijuana Amend. § 8(c).

14. Ark. Med. Marijuana Amend. §§ 8(g)(2), 14(a).

15. Ark. Med. Marijuana Amend. § 8(h), (i).

16. Ark. Med. Marijuana Amend. § 8(j).

The Commission initially voted to issue five cultivation facility licenses. John Moritz, *Rx-marijuana growers in Arkansas to be merit-selected*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 23, 2016 at 1B.

17. Ark. Med. Marijuana Amend. § 23; ARK. CONST. ART. 5, § 1.

18. Act 4 of 2017 (revising deadlines for regulations and applications); see also Andrew DeMillo, *Arkansas Lawmakers Weigh Launch Delay, Taxes for Medical Marijuana*, Associated Press, Nov. 18, 2016, available at <http://www.stuttgarterdailyleader.com/news/20161118/arkansas-lawmakers-weigh-launch-delay-taxes-for-medical-pot>.

19. David W. Ogden, *Memorandum, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE DEPUTY ATTORNEY GENERAL (Oct. 19, 2009), *available at* <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

20. James M. Cole, *Memorandum, Guidance Regarding Marijuana Related Financial Crimes*, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE DEPUTY ATTORNEY GENERAL (Feb. 14, 2014), *available at* [https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20\(2\).pdf](https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%2014%20(2).pdf); James M. Cole, *Memorandum, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE DEPUTY ATTORNEY GENERAL (Jun. 29, 2011), available at <https://>



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www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf.

21. United States Congress, Text of House Amendment 748 (113th Cong.), available at <https://www.congress.gov/amendment/113th-congress/house-amendment/748/text>.

22. James M. Cole, Memorandum, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE DEPUTY ATTORNEY GENERAL (Jun. 29, 2011).

23. *Key federal marijuana protection extended through April*, MARIJUANA BUSINESS DAILY, Dec. 12, 2016, <https://mjbizdaily.com/>

key-federal-marijuana-protection-extended-through-april/.

24. *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

25. United States House of Representatives, Final Vote Results for Roll Call 283 (Jun. 3, 2015) available at <http://clerk.house.gov/evs/2015/roll283.xml>. All four of Arkansas' representatives voted against the amendment.

26. United States Congress, Text of House Amendment 748 (113th Cong.), available at <https://www.congress.gov/amendment/113th-congress/house-amendment/748/text>.

27. *See Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016) (affirming denial of firearm purchase by medical marijuana user under federal Gun Control Act).

28. United States Department of the Treasury Financial Crimes Enforcement Network (FinCEN), Guidance, *BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014), available at <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

29. CanPayDebit.com, *About Us*, <https://www.canpaydebit.com/about-us/>.

30. *See David L. Hudson Jr., Not So Fast: Lawyers advising clients on marijuana laws may run afoul of ethics rules even in states where the drug is legal*, ABA JOURNAL, Jan. 1, 2017 at 24, available at http://www.abajournal.com/magazine/article/marijuana_legal_ethics_rules/; Eli Wald et al., *Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, 44 COLO. LAW. 61 (Aug. 2015).

31. Lorelei Laird, *Do ethics rules allow lawyers to advise clients on new laws legalizing marijuana?*, ABA JOURNAL, June 2014 available at http://www.abajournal.com/magazine/article/do_ethics_rules_allow_lawyers_to_advise_clients_on_new_marijuana_laws.

32. *See Sam Kamin & Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013).

33. Ricardo Baca, *Anti-pot racketeering suit settles, opens door for future RICO claims*, Denver Post, Dec. 30, 2015, available at <http://www.denverpost.com/2015/12/30/anti-pot-racketeering-suit-settles-opens-door-for-future-rico-claims/>. ■