Pennsylvania's New Medical Marijuana Law: The Legal Roadmap For A Growing Industry

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ABSTRACT

Following a protracted, bipartisan effort in the legislature, Pennsylvania Governor Tom Wolf signed comprehensive medical marijuana legislation into law. The new law tracked a similar trend in half the states and the District of Columbia, but included Pennsylvania-specific features. As the Department of Health develops the accompanying regulations and prospective growers, processors and dispensaries line up to apply for a limited allotment of licenses, Pennsylvania lawyers will play a key role in advising marijuana related businesses how best to navigate and prosper in this fast growing but highly regulated field. At the same time attorneys will be obliged to conform to recently adopted ethical guidance in view of the ongoing conflict between federal and state law.

This article details Pennsylvania's path toward accepting medical marijuana and frames it against the backdrop of the national trend. It summarizes the legislation's provisions and reviews the key fields where legal guidance will be implicated. The article then highlights the related ethical and business concerns confronting lawyers and their clients.

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INTRODUCTION

As the fanfare subsides and the industry develops, Pennsylvania businesses, lawyers, and courts will confront medical marijuana's side effect: a clash with federal law. Marijuana industry actors will grapple with the implications of an industry best described as "quasi-legal" and how to finesse tight state regulations and patchwork federal policy. This article proceeds in five parts. First, it reviews the background leading to passage of the Medical Marijuana Act (hereinafter referred to as the "MMA"),[2] as well as the national trend the new law reflects. Second, it outlines and describes the MMA's key provisions. Third, it previews the forthcoming regulatory scheme to issue from the Department of Health. Fourth, it explores the ethical implications of medical marijuana for the legal industry—how other states have responded and Pennsylvania's chosen path. Fifth, it surveys the MMA's broader consequences and its spillover effects into other industries.

FROM PIPE DREAM TO REALITY

Pennsylvania's Path

On April 17, 2016, Governor Tom Wolf signed the MMA into law and made Pennsylvania the 24th state authorizing medical use.[3] Wolf's approval put the capstone on a multi-session, multi-year process. State Senator Daylin Leach (D-Montgomery) introduced the first version of medical marijuana legislation in 2010 after State Representative Mark Cohen (D-Philadelphia) introduced a similar bill in the House.[4] Four years later, Leach partnered with Sen. Mike Folmer (R-Lebanon) and appealed to a need to treat children with extreme seizure disorders[5] in achieving a 43-7 vote in the Pennsylvania Senate. Despite that strong margin, former Governor Corbett's veto threat and opposition in the Pennsylvania House of Representatives prevented passage in the lower chamber.[6]

The Act and forthcoming regulations will present a series of substantive and ethical issues for Pennsylvania lawyers to address.

Governor Wolf's inauguration sparked plans for a more expansive bill. In early 2015, Sen. Leach and Sen. Folmer broadened the bill's scope by expanding the list of authorized medical conditions and permitted delivery methods.[7] The more expansive bill's supermajority margins in the Senate (42-7) and House (149-46) testified to its broad support.[8]

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2. The Act of April 17, 2016, P.L. 84, No. 16. The MMA was not enacted as part of the Pennsylvania Consolidated Statutes (Pa.C.S.). As a result it will appear in Purdon's Statutes (P.S.) at 35 P.S. §10231.101 *et seq*.

3. Daniel Craig, *Wolf signs medical marijuana bill into law*, PhillyVoice (Apr. 17, 2016), http:// www.phillyvoice.com/wolf-set-turn-medical-marijuana-bill-law/.

4. Wallace McKelvey, *How medical marijuana came to Pennsylvania, A long, arduous path*, PennLive (Apr. 2016), http://www.pennlive.com/politics/index.ssf/2016/04/how_medical_marijuana_came_to.html#1.

5. Co-sponsorship Memorandum from Pennsylvania Senators Mike Folmer and Daylin Leach, Senate of Pennsylvania (Dec. 3, 2014) (http://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20150&cosponId=15539).

6. Vince Sullivan, *Pa. Sen. Daylin Leach reintroduces medical marijuana bill*, The Times Herald (Jan. 27, 2015), http://www.timesherald.com/article/JR/20150127/NEWS/150129866.

7. Marc Levy, *Gov. Tom Wolf vows to support state Senate's medical marijuana bill*, The Morning Call (Jan. 27, 2015), http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-medical-marijuana-tom-wolf-20150127.story.html.

8. Daniel Craig and Michael Tanenbaum, *Medical Marijuana bill passes Pa. House; Wolf to sign into law*, PhillyVoice (Apr. 13, 2016), http://www.phillyvoice.com/medical-marijuana-passes-pa-house-wolf-expected-sign.law/.

The National Movement

Pennsylvania's law reflects a national trend toward permitting medical marijuana. In 1996, California became the first state to allow medical use. Since then, another 24 states, the District of Columbia, and Guam have adopted such laws of their own. The federal government has not been immune from this change in sentiment. Congress blocked the District of Columbia's medical marijuana initiative in 1998, but permitted the same initiative in 2009.[9] In the same year, a Department of Justice ("DOJ") memorandum directed US Attorneys to de-prioritize prosecution of state-compliant medical marijuana usage.[10] While there was a brief window during which the DOJ seemed to narrow its deference,[11] in mid-2013 the DOJ announced it would defer to states that both authorized marijuana usage and developed strong regulatory and enforcement mechanisms capable of self-policing lower level marijuana offenses in their own jurisdictions. The DOJ reserved the right to prosecute when federal priorities are threatened.[12] Congress bolstered that deference by prohibiting the DOJ from using federal funds to prevent then-marijuana-legal states from "implement[ing] their own State laws that authorize the use, distribution, possession or cultivation of medical marijuana."[13] Congress renewed that provision in 2015 and may include it in this year's appropriation package.[14] A California federal district court has held the DOJ strictly to that prohibition by declining to enjoin marijuana activity not violating state law.[15] However, other courts have proven reluctant to adopt that interpretation.[16] The DOJ may change its policies at any time and prosecute activity that took place during its prior deference.

States have surely and steadily embraced medical marijuana. The federal response has ranged from thinly-disguised tolerance (prosecutorial deference) to tacit approval (allowing DC's ballot initiative to become law). The combination of state-by-state action and federal quasi-action now legalizes medical marijuana usage for nearly 175 million Americans, should they qualify, in twenty-five states, the District of Columbia, and Guam.[17] Further action may be around the corner with mari-

9. *State Medical Marijuana Laws*, National Conference of State Legislatures (July 7, 2016), http://www.ncsl.org/ research/health/state-medical-marijuana-laws.aspx.

10. U.S. Dep't Of Justice, Office of the Attorney General, Memorandum For Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009) https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

11. U.S. Dep't of Justice, Office of the Attorney General, Memorandum for All United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (2011), *available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf.

12. U.S. Dep't of Justice, Office of the Deputy Attorney General, Memorandum For All United States Attorneys: Guidance Regarding Marijuana Enforcement (2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

13. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, 128 Stat. 2130 §538 (2014) ("2015 Appropriations Act").

14. Ben Weyl and Matthew Nussbaum, *Congress mellows on pot crackdowns*, POLITICO (June 26, 2016), http://www.politico.com/story/2016/06/marijuana-congress-pot-industry-224790.

15. *United States of America* v. *Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039 (N.D. Cal. 2015) (permitting an injunction only to the extent Marin violated California's marijuana laws). *But see Olive* v. *Commissioner of Internal Revenue*, 792 F.3d 1146, 1150 (9th Cir. 2015) (holding the federal tax code did not permit deduction of business expenses because Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, did not explicitly change the Controlled Substances Act).

16. *See United States* v. *Chavez*, 2016 U.S. Dist. LEXIS 31899 (E.D. Cal. Mar. 10, 2016) (declining to follow *Marin* because the decision was not binding and there was "some difficulty" reconciling *Marin* with other decisions).

17. Christopher Ingraham, *25 States now call marijuana "medicine." Why doesn't the DEA?*, THE WASHINGTON POST: WONKBLOG (June 9, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/09/25-states-now-call.marijuana-medicine-why-doesnt-the-dea/. RUSS BELLVILLE, *GUAM PASSES MEDCAL MARIJUANA LAW*, NOV. 4, 2014, HTTP://HIGHTIMES.COM/MEDICINAL/GUAM-PASSES-MEDICAL-MARIJUANA-LAW/.

juana-related legislation on November ballots nationwide,[18] but in a long-awaited decision the DEA recently reaffirmed marijuana's Schedule I status along with heroin and LSD.[19] The Democratic Party recently added downgrading medical marijuana to its national party platform.[20]

THE KEY PROVISIONS

The text of the MMA confirms what the easy passage suggested: it is regulation-imposing and research-funding legislation. While broader than its predecessors, the MMA nonetheless contains a restricted list of eligible conditions defined in the MMA as "serious medical conditions," imposes rigorous certification standards, and limits methods for use. The MMA confines medical use to patients suffering from any of seventeen enumerated conditions.[21] Patients with any of these conditions must have them certified by a practitioner registered to recommend medical marijuana. Patients then must submit that doctor certification, in addition to other necessary materials, to the Department of Health (hereinafter referred to as the "Department") for a medical marijuana identification card.[22] To register, practitioners must also apply to the Department with the mandated documentation of credentials, training, and/or experience.[23] If approved, they will have to successfully complete a Department-designed four-hour training course before issuing any medical marijuana certifications.[24] The MMA then permits properly certified patients to purchase cannabis in various forms including pill, oil, or ointments, etc.—but notably does not include dry leaf or smokeable modes.[25] The sold cannabis will include warnings about possible impairment, the form and species of medical marijuana, the percentage of tetrahydrocannabinol (hereinafter referred to as "THC"), the psychoactive chemical, and cannabinol, the desired medical substance, and any

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18. MARIJUANA POLICY PROJECT, 2016 MARIJUANA POLICY REFORM LEGISLATION (2016), https://www.mpp.org/states/key-marijuana-policy-reform/.

19. https://www.dea.gov/divisions/hq/2016/hq081116.shtml; Gina Smith, *On Legalizing Medical Cannabis: The DEA Responds*, ANEWDOMAIN (2016), http://anewdomain.net/2016/06/21/on-cannabis-rescheduling-questions-the-dea.responds-exclusive/.

20. David Weigel, *Democrats call for 'pathway' to marijuana legalization*, THE WASHINGTON POST (July 9, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/09/democrats-call-for-pathway-to-marijuana.legalization/?wpisrc=nl_wemost-draw5&wpmm=1.

21. "Serious medical condition." Any of the following:

(1) Cancer.
(2) Positive status for human immunodeficiency virus or acquired immune deficiency syndrome.
(3) Amyotrophic lateral sclerosis.
(4) Parkinson's disease.
(5) Multiple sclerosis.
(6) Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity.
(7) Epilepsy.
(8) Inflammatory bowel disease.
(9) Neuropathies.
(10) Huntington's disease.
(11) Crohn's disease.
(12) Post-traumatic stress disorder.
(13) Intractable seizures.
(14) Glaucoma.
(15) Sickle cell anemia.
(16) Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective.
(17) Autism.

35 P.S. §10231.103.

22. *Id*. at §10231.501(a) and (b).

23. *Id*. at §10231.401(a).

24. *Id*. at §10231.301(a)(6).

25. *Id*. at §10231.303(b)(2).

warnings the Department deems necessary.[26] Smoking marijuana[27] and any edible forms, unless needed to aid ingestion, remain banned.[28] Notably, the MMA imposes no obligation on insurers to cover medical marijuana expenses.[29]

Suppliers face a rigorous screening standard with state police and Federal Bureau of Investigation background checks required for organization principals, financial backers, operators and employees upon applying for a permit.[30] Growers must also implement a seed-to-sale tracking system monitoring the marijuana from seed to plant until sold to a dispensary.[31] Section 616 initially limits permits to twenty-five growers/processors and fifty dispensaries, with each dispensary permit authorizing three dispensaries.[32] In awarding permits, the Department will consider the following five criteria: the regional population; the number of patients with an eligible condition; the type of conditions in the population; the patients' access to public transportation; and any other factor deemed relevant.[33] For comparison, New Jersey approved only six dispensary permits after five years.[34] The Department aims to ensure adequate statewide access through this selection process. To facilitate this goal, the Department will establish a minimum of three regions to grant permits and enforce the MMA.[35] Already, temporary "Safe Harbor" guidelines have been issued to permit parents and guardians to administer out-of-state medical marijuana to qualified minors under their care.[36]

Finally, the Department holds regulatory authority along with a newly constituted Medical Marijuana Advisory Board. The Advisory Board will consist of fifteen members including health professionals, Pennsylvania State Police Commissioner, a patient advocate, and several appointments by state officials[37] appointed for various lengths.[38] The Advisory Board must review the produced research findings and propose recommendations to the legislature as needed.[39]

The MMA took legal effect on May 17, 2016, but Governor Wolf has estimated that it will take until 2018 for the regulatory systems and the industry to be up and running,[40] in part because the grower-processors will take a year to get their product to

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26. *Id*. at § 10231.303(b)(8).
27. *Id*. at §10231.304(b)(1).
28. *Id*. at §10231.304(c).
29. *Id*. at §10231.2102.
30. *Id*. at §10231.602(a)(4).
31. *Id*. at §10231.701(a)(1).
32. *Id*. at §10231.616(1) and (2).
33. *Id*. at §10231.603(d).
34. Jan Hefler, *Medical marijuana competition in NJ lowers prices, brings new business vibe*, PHILLY.COM (Apr. 11, 2016), http://articles.philly.com/2016-04-11/news/72213053_1_compassionate-sciences-alternative-treatment.center-garden-state-dispensary.
35. 35 P.S. §10231.603(d).
36. 28 Pa. Code §1131 (Sept. 2016).
37. 35 P.S. §10231.1201(a)(8). The appointers are:
    (1) The Governor
    (2) The President pro tempore of the Senate
    (3) The Majority Leader of the Senate
    (4) The Minority Leader of the Senate
    (5) The Speaker of the House of Representatives
    (6) The Majority Leader of the House of Representatives
    (7) The Minority Leader of the House of Representatives.
38. *Id*. at §10231.1201(g).
39. PENNSYLVANIA DEPARTMENT OF HEALTH, FREQUENTLY ASKED QUESTIONS: ACT 16 OF 2016 – THE MEDICAL MARIJUANA PROGRAM 7 (2016). HTTP://WWW.HEALTH.PA.GOV/My%20HEALTH/DISEASES%20AND%20CONDITIONS/M-P/MEDICALMARIJUANA/DOCUMENTS/FINAL%20MEDICAL%20MARIJUANA%20FAQS%20053116.PDF.
40. Daniel Craig, *What's the status of Pennsylvania's medical marijuana law?*, PHILLYVOICE (May 31, 2016) http://www.phillyvoice.com/whats-status-pennsylvanias-medical-marijuana-law/.

market after receiving certification.[41] Analysts expect the MMA to create an industry with annual sales starting at $125 million and increasing at a rate of 180 percent per year for the first few years. Projections have Pennsylvania's medical marijuana market reaching 9.2% of national market share by 2020.[42]

Financial Measures

Revenue-raising measures accompany the regulatory mechanisms. Dispensaries must pay a nonrefundable $5,000 fee to apply for a medical marijuana license.[43] If the license is approved, a $30,000 permit fee is required for the first year and a $5,000 renewal fee every year thereafter.[44] To ensure financial solvency, dispensary applicants must have at least $150,000 in capital deposited with a financial institution.[45] Grower applicants must pay a $10,000 nonrefundable application fee,[46] a $200,000 permit fee,[47] and a $10,000 yearly renewal fee, which would cover all owned locations.[48] Growers must also hold at least $2 million in capital with $500,000 deposited with a financial institution.[49] Finally, a 5% tax on gross receipts is assessed and deposited into a new Medical Marijuana Program Fund ("Fund"), which the MMA then earmarks for several programs.[50] Medical marijuana will be not subject to the Pennsylvania sales tax.[51]

The Fund will set aside 40% of its budget for operating costs. The MMA then earmarks 15% for programs serving three purposes: 1) financially assisting those with demonstrated financial hardship; 2) assisting patients and caregivers with costs associated with obtaining identification cards; and 3) reimbursing caregivers for the cost of providing background checks for caregiver employees.[52] The Act further designates 10% to the Department of Drug and Alcohol Programs for treatment services.[53] Local police departments will receive enforcement funding from the 5% grant to the Pennsylvania Commission on Crime and Delinquency.[54] Research institutions will receive 30% to further investigate how medical marijuana can treat other conditions and subsidize costs for program patients.[55]

WHAT REMAINS TO BE DONE

Upcoming Regulations

The Department of Health began developing both temporary and permanent regulations on June 1, 2016. The Department indicated regulations for growers and

41. Steve Esack and Scott Kraus, *Pa.'s medical marijuana law taking shape*, The Morning Call (June 2, 2016), http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-medical-marijuana-health-regs-20160601-story.html.
42. Scott Kraus, *Medical Marijuana may be Pa.'s next big business*, Pittsburgh Post-Gazette (Apr. 16, 2016), http://www.post-gazette.com/news/state/2016/04/16/Medical-marijuana-may-be-Pa-s-next-big-business/stories/201604150233.
43. 35 P.S. §10231.607(2).
44. *Id*.
45. *Id*.
46. *Id*. at §10231.607(1)(i).
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*. at §10231.901(a).
51. *Id*. at §10231.901(e).
52. *Id*. at §10231.902(c)(1).
53. *Id*. at §10231.902(c)(2).
54. *Id*. at §10231.902(c)(4).
55. *Id*. at §10231.902(c)(3).

processors would arrive first so production can begin.[56] Any temporary regulations will begin being promulgated within six months of the MMA's effective date and will automatically expire within two years.[57] Temporary regulations are due by November 17, 2016 with permit applications coming soon thereafter.[58] During the first six months, the Department will conduct a full population study to determine: 1) the location and number of patients with eligible conditions; and 2) their access to a dispensary using public transportation.[59]

The Department also holds broad regulatory and enforcement power over the growing, processing, sale, and use of medical marijuana within the state.[60] This includes regulating the number and type of marijuana products a grower/processor can produce and a dispensary can dispense.[61] Further, the Department will decide the depth and breadth of the certification process for physicians. If the resulting process is too complicated or the requirements too difficult to meet, physicians may decline to enter the industry, leaving patients with reduced access.[62] Prices are also subject to regulation by the Department of Health in conjunction with the Department of Revenue. Should the departments deem the per-dose price excessive, they may impose a renewable six-month price cap.[63]

The Advisory Board and the Department of Health will jointly convert experiment to regulation. The former will examine the research conducted and comments submitted in issuing a written report to the Legislature and Governor within two years concerning: 1) whether to modify the types of medical professionals permitted to issue patient certifications; 2) whether to change, add or reduce the types of qualifying medical conditions; 3) whether to change the medical marijuana forms permitted; 4) whether to change, add or reduce the number of growers/processors or dispensaries; 5) how to ensure patients have affordable access; and 6) whether to permit dry leaf or plant form marijuana for administration by vaporization.[64] The Department may promulgate regulations to effectuate any recommendations.[65]

The Department of Education has the difficult task of issuing regulations within eighteen months regarding possession and use of medical marijuana in schools by both students and employees.[66] Such regulations will cover possession and use in preschools, primary schools, and secondary schools.[67] The Department of Human

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56. Pennsylvania Department of Health Press Release, Department of Health Announces First Phase of Temporary Regulations for Medical Marijuana Implementation in Pennsylvania (June 1, 2016) http://www.media.pa.gov/Pages/Health-Details.aspx?newsid=309.

57. 35 P.S. §10231.1107 (Purdon's Pennsylvania Legislative Service Pamphlet) (2016, Acts 2016-9 to 2016-24).

58. *Supra* note 39 at 2. On August 18, 2016, the Department posted draft temporary regulations for medical marijuana organizations (grower/processors, dispensaries and clinical registrants) and grower/processors on its website. The draft temporary regulations focused on the application process for all three types of medical marijuana organizations and the specific operational requirements for one, grower/processors. The Department invited comment to the drafts until August 28, 2016, and the drafts were removed from the website on August 29, 2016. As of this writing, we are awaiting publication of the public comments, the Department's responses thereto, which will likely be embodied in temporary regulations that will be posted and be effective for two years, and temporary regulations (in draft form or otherwise) that will set forth the specific operational requirements for dispensaries and clinical registrants.

59. *Id*. at 4.

60. 35 P.S. §10231.301(a)(3).

61. *Id*. at §10231.301(a)(12).

62. Esack and Kraus, *supra* note 41.

63. 35 P.S. §10231.705.

64. *Id*. at §10231.1201(j)(5).

65. *Id*. at §10231.1202.

66. *Id*. at §10231.2104.

67. *Id*.

Services holds the comparable responsibility for regulations regarding possession of medical marijuana by children under their care, the employees providing that care, and those in youth development centers.[68]

Potential Judicial Issues

Medical marijuana's state legalization will present courts with a host of issues. At the outset, Department rulemaking will have to establish the administrative process for challenging the grant, or even the revocation, of a license. Judges (and the Department) must develop or choose a way to measure marijuana-induced intoxication for driving under the influence ("DUI") charges. In the employment context, courts should expect wrongful termination suits from employees fired for using state-legal medical marijuana. Factfinders across all disciplines must grapple with whether medical marijuana was the causative factor in the patients' claimed negligent, careless or reckless actions. In products liability suits, for example, plaintiffs injured after medical marijuana use may charge suppliers provided insufficient and legally defective warning labels, reasoning the suppliers knew of risks beyond what the State required.[69] Defining the "reasonable" person standard of care for anyone acting under medical marijuana's influence may ultimately require judicial clarification.

ETHICAL IMPLICATIONS

States with medical marijuana laws have grappled with the scope of the permissible legal advice lawyers may give to business clients notwithstanding the federal prohibition. The ABA Model Rules of Professional Conduct prohibit lawyers from assisting a client in criminal conduct. In Pennsylvania, the pertinent language appears in Rule of Professional Conduct 1.2(d), which states:

> 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.[70]

Comment [9] to the Rule provides:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime 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 criminal or fraudulent of itself make a lawyer a party to a course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.[71]

This ethical rule is not unique to Pennsylvania. All states except California have adopted the Rules of Professional Conduct with similar language.

Other States' Approaches

Several states have adopted permissive interpretations of the rule to permit counseling marijuana-related businesses, so long as the objective is to honestly advise

68. *Id*. at §10231.2105.
69. *Id*. at §10231.303(b)(8) sets forth those minimum requirements.
70. Pennsylvania Rules of Prof'l Conduct R. 1.2(d).
71. *Id*., cmt. [9]. 15

about application of governing law and not to directly aid or abet a federal law violation. The overwhelming majority of states to have considered the issue permit attorneys to not only counsel clients about legal consequences, but also to actively assist those clients to the extent permitted by state law. That is, the ethics guidance has focused on the "critical distinction" between simply "presenting an analysis of legal aspects" and "recommending the means by which a crime or fraud might be committed with impunity."

Several states now permit attorneys to counsel and actively assist their state marijuana businesses. Arizona's state bar centered its ethical opinion on the need for legal services and the need for "vigorous advocacy" historically in obtaining "the vindication of constitutional or other rights long denied." It added three qualifiers: 1) at the time of assistance, no court has held the state act's relevant provisions "preempted, void or otherwise invalid;" 2) the lawyer "reasonably concludes" the proposed activities "comply fully" with state law requirements; and 3) the attorney warns the client about the proposed action's possible federal law implications or directs the client to another lawyer able to do so.[72]

Similarly, Connecticut's 2015 amendment to Rule 1.2(d) permits lawyers to "counsel or assist a client regarding conduct expressly permitted by Connecticut law" so long as the lawyer advises about the legal consequences under "other applicable law."[73] Colorado's Comment 14 to Rule 1.2 likewise permits attorneys to advise and assist clients regarding marijuana issues but under a more lenient standard—to the extent the lawyer "reasonably believes" the state law permits the proposed conduct. Colorado attorneys likewise must include a federal law warning.[74] The Colorado federal district court refused to adopt Colorado's new permissive comment.[75] This left cautious attorneys engaged in federal practice in a quandary whether to represent marijuana industry clients, and further raised the question whether federal or state professional disciplinary actions would take precedent. Washington State adopted a comparable approach—permitting counseling and assisting clients when the lawyer "reasonably believes" the state statute so permits—but adds the caveat that lawyers can only do so "until there is a change in federal enforcement policy."[76]

Maine has proven the outlier. Beginning with marijuana's continuing illegality under federal law, the Professional Ethics Commission of Maine concluded that the role of the attorney was "limited." As a result, Maine's Commission decided that Maine attorneys can neither counsel nor assist in the conduct itself but may only advise the client in making a "good faith" effort to determine the "validity, scope, meaning or application of the law."[77] The Minnesota legislature did not await approval from the judicial branch, including a caveat that an attorney "may not be subject to disciplinary action" for providing legal assistance regarding activity legal under state law.[78]

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72. Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 11-01 (Feb. 2011). *See also* NJ Rules of Prof'l Conduct R. 1.2(d), effective Sept. 1, 2016.

73. Conn. Rules of Prof'l Conduct R. 1.2(d) (2015).

74. Colorado Rules of Prof'l Conduct R. 1.2(d) (2008), cmt. [14] (2014).

75. D.C.Colo.LAttyR 2(b)(2).

76. Wash. Rules of Prof'l Conduct R. 1.2(d) (2011), cmt. [18] (2014).

77. *Maine Prof'l Ethics Comm'n*, Op. 199 (July 7, 2010). Recently, the Ohio Supreme Court Board of Professional Conduct issued a similarly conservative ethics opinion, concluding that "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." Advisory Opinion 2016-6 (Aug. 5, 2016). In response to the advisory opinion, the Ohio Supreme Court issued an order on September 20, 2016 adopting a new Rule 1.2(d)(2) providing that a lawyer may counsel or assist a client in conduct expressly permitted by the state medical marijuana law and "shall advise the client regarding related federal law."

78. Minn. Stat. §152.32(2)(i) (2015).

Pennsylvania's Approach

After reviewing other states' ethics opinions on the issue and the DOJ's guidance, the Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee and the Philadelphia Bar Association's Professional Guidance Committee articulated Pennsylvania's stance in a joint formal opinion.[79] They interpreted Pennsylvania's Rule 1.2, which is identical to the Model Rule. The result resembled Connecticut's path, consisting of a comprehensive and conservative ethics opinion accompanied by a pragmatic proposed Rule 1.2(d) amendment. The two committees recognized the conflict between state and federal law that Pennsylvania's legalization of medical marijuana created. The resulting joint opinion appreciated that clients will be better served if the legal profession could advise on compliance with the forthcoming laws and regulations without fear of discipline.

The opinion consequently concluded that lawyers may provide only "strictly advisory services" to marijuana industry clients—they may only discuss the consequences of the proposed conduct and may "counsel or assist" a client to make a "good faith effort to determine the validity, scope, meaning, or application of the law." Moreover, lawyers must also counsel clients regarding federal and policy implications. The joint opinion deemed the federal implications "material" information for making informed judgments. Finally the committees opined that lawyers may not "advise" clients to engage or "assist" a client in federally illegal conduct, notwithstanding state law legality.

The two committees preferred to procedurally amend rather than facially disregard the Rule of Professional Conduct's clear language. The joint opinion closes with a proposed Rule 1.2 amendment allowing lawyers to "counsel or assist a client regarding conduct expressly permitted by the law of the state where it takes place or has its predominant effect" so long as the lawyer also advises the client of the proposed course of conduct's legal consequences under other applicable law. The Disciplinary Board of the Supreme Court of Pennsylvania supported the rule change, published it for comment[80] and the proposal now awaits action by the Pennsylvania Supreme Court.

In all states with Rule 1.2 amendments permitting lawyers to advise on marijuana issues, the amendments limited lawyers to counseling on issues permitted under *that state's* laws.[81] If enacted, Pennsylvania's amendment would allow lawyers to advise clients regarding conduct in *any state* where that state's law permits, so long as the conduct took place in that state or had its predominant effect there. In effect, this allows Pennsylvania lawyers to act to the fullest extent permitted by any state's laws within that state even if Pennsylvania itself may not permit the relevant conduct.

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79. *Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility and Philadelphia Bar Ass'n Prof'l Guidance Comm.*, Joint Formal Op. 2015-100 (2015) *available at*: http://www.sackswestondiamond.com/documents/PA-Bar.Assoc.-Recommendation-and-Report.pdf (last visited 8/5/2016).

80. 46 Pa.B. 2274 (May 7, 2016).

81. *See* Conn. Rules of Prof'l Conduct R. 1.2(d)(3) (2015) (permitting lawyers to counsel clients regarding conduct "expressly permitted by *Connecticut law*") (emphasis added); Colo. Rules of Prof'l Conduct R. 1.2 cmt. [14] (2014) (permitting lawyers to counsel clients regarding "*Colorado* constitution article XVII secs. 14 & 16" and "assist a client in conduct a lawyer reasonably believes is permitted by *these constitutional provisions*") (emphasis added). Nev. Rules of Prof'l Conduct R. 1.2, cmt. [1] (2014) (permitting lawyers to counsel clients regarding "*Nevada* Constitution article 4, section 38" and "assist a client in conduct that the lawyer reasonably believes is permitted by *these constitutional provisions*") (emphasis added); Wash. Rules of Prof'l Conduct R. 1.2, cmt. [18] (2014) (permitting lawyers to counsel clients regarding "the validity, scope and meaning of *Washington* Initiative 502" and "assist a client in conduct that the lawyer reasonably believes is permitted by *this statute*") (emphasis added).

BROADER IMPLICATIONS

Rarely is one legal field so entwined with a budding industry. Medical marijuana-related businesses in Pennsylvania will require significant legal assistance in navigating the clash between state and federal law, as well as the burgeoning regulatory arena. This need will only increase with the industry's exponential growth. Legal marijuana sales nationwide totaled $5.4 billion in 2015, up from $4.6 billion the year before. Analysts expect 25% growth to $6.7 billion this year.[82] A marijuana market report forecasts legal cannabis sales will hit $22.8 billion by 2020.[83] The growth is occurring despite substantial inability to access financial institutions—which face significant reporting requirements from federal regulators if they accept marijuana industry deposits.[84] Growth in the marijuana industry will likely mean corresponding growth in legal need due to the hand-in-hand relationship between the two.

Pennsylvania Industries

With limited licenses available, prospective medical marijuana businesses must quickly master the licensing requirements, regulatory regimes, and local regulations. They face the strategic choice of where to locate their businesses given the MMA's focus on ensuring statewide access in distributing permits. Applicants may confront a host of unique zoning and land use issues stemming from marijuana's federal illegality.[85] Marijuana industry participants themselves face a potential lack of access to property and liability insurance from cautious underwriters.[86] Landowners fearing civil asset forfeiture, a federal seizure of property used in, or purchased with proceeds from, illegal activity, may refuse to lease to marijuana-related businesses. As the current regulations are temporary, even companies which manage to secure licenses must keep abreast of statewide developments to ensure solid positioning when the permanent regulations are unveiled.

Moreover, manufacturers may face a host of intellectual property issues if and when they seek protection for developed marijuana strains.

In addition, Pennsylvania's new medical marijuana businesses face tax hurdles. The Internal Revenue Service limits the deductions such companies can claim because the businesses illegally traffic controlled substances.[87] The limited deductions, however, do not excuse companies from paying their full federal tax burden in addition to the state-added marijuana tax.

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82. Althea Chang, *Tech start-ups hope for marijuana sales growth*, CNBC (Feb. 3, 2016), http://www.cnbc.com/2016/02/03/tech-start-ups-hope-for-marijuana-sales-growth.html.

83. Jeff Daniels, *Legal pot business takes deep breath, faces growing pains*, CNBC (Apr. 1, 2016), http://www.cnbc.com/2016/04/01/legal-pot-business-takes-deep-breath-faces-growing-pains.html.

84. Yuka Hayashi, *Marijuana Companies Stuck Doing Business the Old-Fashioned Way, in Cash*, The Wall Street Journal (Mar. 31, 2016), http://www.wsj.com/articles/marijuana-companies-stuck-doing-business-the-old-fashioned-way-in-cash-1459416605.

85. For example, Worcester, Massachusetts, extracted payments of $450,000 over three years and $200,000 per year from a dispensary seeking to operate within the city's borders. Kay Lazar, *Marijuana dispensary licenses to the highest bidder?*, The Boston Globe (July 24, 2016), https://www.bostonglobe.com/metro/2016/07/24/marijuana.dispensary-licenses-highest-bidder/fxXp5MBr9nAl6npiTopS3M/story.html.

86. Ben Steverman, *You Can Lose Out Just Being Associated With Pot*, Bloomberg (July 8, 2016), http://www.bloomberg.com/news/articles/2016-07-08/you-can-lose-out-just-being-associated-with-pot.

87. Jane Wells, *IRS says pot is illegal – but you still have to pay taxes* (Jan. 29, 2016), http://www.cnbc.com/2016/01/29/irs-says-pot-is-illegalbut-you-still-have-to-pay-taxes.html.

Employment Law Implications

The MMA prohibits employers from firing employees "solely" for certified medical marijuana use.[88] However, it simultaneously does not require employers to make any accommodations for usage and explicitly does not prevent employers from disciplining an employee when the employee's work falls below the position's normal standard of care.[89] Therefore, employers should consider amending hiring standards and employee handbooks to reduce penalties solely for marijuana usage and instead emphasize, and increase documentation of, how exactly employees fall below the "normally accepted" standard of care.[90] Special attention should be paid to updating drug-testing policies, the consequences for refusing to submit to such tests, and the penalties for a positive test. Further, the MMA may restrict curious employers from asking employees whether they have valid medical marijuana certifications. As certification requires demonstration of a serious medical condition, an affirmative answer may expose employers to liability under the Americans with Disabilities Act and/or the Pennsylvania Human Relations Act.[91]

Consequences for Family Law

While courts cannot consider medical marijuana use "by itself" in custody determinations,[92] they may instead seek to impose conditions on usage. For example, custody orders may forbid use immediately prior to or during the custodial period similar to how some custody orders currently treat alcohol.[93] Conflict may also arise when shared legal custody parents face the decision whether to treat their child with medical marijuana. In the spousal support and alimony contexts, potential disputes may surface over contributions to a current or former spouse's medical marijuana costs. If a supported spouse is fired for medical marijuana usage, the other spouse may argue the user's willfully working while impaired constitutes a "voluntary reduction of income" and therefore necessitates no change in assessed earning capacity.[94]

Financial Institutions

Financial institutions will also require continuing legal guidance as federal regulators adapt to the medical marijuana trend. Currently, federal guidance has not proven consistent. The Department of the Treasury's Financial Crimes Enforcement Network permits providing financial services to state-regulated marijuana businesses so long as compliance guidelines are followed, including filing a suspicious activity report.[95] However, federal bank regulators have remained "silent," leaving the financial sector "dazed and confused" about their options in responding to the

88. 35 P.S. §10231.2103(b)(1).
89. *Id*. at §10231.2103(b)(2).
90. George A Voegele, Jr., *New Medical Marijuana Act's Impact on Pennsylvania Employers*, The Pennsylvania Lawyer (Sept./Oct. 2016).
91. Americans with Disabilities Act, 42 U.S.C. §12101, et seq.; Pennsylvania Human Relations Act, 43 P.S. §§951-963.
92. 35 P.S. §10231.2103(c).
93. Lindsay Hanifan Childs, *The Impact of Pennsylvania's Medical Marijuana Act on Custody & Support Cases*, 38 Pa. Fam. Lawyer 97, 97-98 (2016) (discussing the MMA's potential effects on child custody hearings and other family law implications).
94. *Id*.
95. Fin. Crimes Enforcement Network, Dep't of the Treasury, Fin-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses 1 (Feb. 14, 2014), https://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf.

burgeoning marijuana industry. Thus, in March of 2016, only 301 financial institutions had accepted cash deposits from cannabis clients.[96] This presents a problem for would-be suppliers because the MMA requires both grower and dispensary permit applicants to have funds deposited at a financial institution.[97]

If few banks take medical marijuana deposits, the industry's growth risks overwhelming the banks' resources. Other risks may depend on Pennsylvania's regulatory ability. As the DOJ only defers to states robustly regulating medical marijuana, states without strong enforcement, such as California,[98] may fall outside of that deferential policy. Conversely, if federal regulations trend toward tolerating medical marijuana, the cost-benefit analysis for financial institutions will progressively shift toward embracing a burgeoning business. Already, the new industry has swiftly displaced traditional treatments with the average doctor in medical-marijuana states prescribing 1,826 fewer doses of painkillers per year, 265 fewer doses of antidepressants, 486 fewer doses of seizure medication, 541 fewer doses of anti-nausea drugs and 562 fewer anti-anxiety doses for Medicare Part D patients.[99]

Other Industries

Even established corporations now seek to enter the industry. Microsoft shocked observers in June 2016 when it announced its inaugural venture in the marijuana sphere—partnering with KIND Financial to provide "seed-to-sale software to state and local governments" to manage cannabis commerce.[100] Established venture capital funds, including Peter Thiel's Founders Fund, have gradually staked footholds in the medical marijuana market.[101] Pennsylvania companies may also wish to capitalize on the first-mover opportunity. Nationwide, opportunities exist if companies prove they can not only provide a reliable product or service but also navigate the industry's highly complex regulatory regimes, thereby reducing risks for their clients. However, they will bear the risk of contracting for illegal services—courts may not enforce contracts with illegal components.[102]

CONCLUSION

Pennsylvania now enjoys the promise of a new industry with substantial medical and financial benefits but also confronts the accompanying federalism conflict. As the conflict between federal illegality and state legality in this growing field develops, it will test whether the legal system can effectively apply to a quasi-legal industry. The conflict is a dynamic one. Medical marijuana's steady drumbeat has reached one state house after another and has slowly moved federal agencies from deliber-

96. Maria St. Louis-Sanchez, *Colorado banks for the most part still unwilling to serve the marijuana industry*, Colorado Springs Gazette (Apr. 22, 2016, 10:34pm), http://gazette.com/colorado-banks-for-the-most-part-still-unwilling-to-serve-the-marijuana-industry/article/1574675.

97. 35 P.S. §10231.607(1) and (2).

98. Kristin Casler, *Marijuana: Insurance Risks and Legal Quirks in a Developing Industry*, LexisNexis (2016), https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2016/03/07/marijuana-insurance-risks-and-legal-quirks-in-a-developing-industry.aspx.

99. Ashley C. Bradford and W. David Bradford, *Medical Marijuana Laws Reduce Prescription Medication Use in Medicare Part D*, Health Affairs (July 2016) http://content.healthaffairs.org/content/35/7/1230.abstract.

100. Jennifer Booton, *Microsoft gets into the weed business*, MarketWatch (June 18, 2016), http://www.marketwatch.com/story/microsoft-gets-into-the-weed-business-2016-06-16.

101. Alison Vekshin, *Silicon Valley Investors Are Finally Getting Marijuana Religion*, Bloomberg Politics (July 7, 2016), http://www.bloomberg.com/politics/articles/2016-07-07/silicon-valley-investors-are-finally-getting-marijuana-religion.

102. Casler, *supra* note 98.

ate inaction to favorable inclinations. Now, four states and the District of Columbia currently permit recreational marijuana usage.[103] Many more states, notably California, may see recreational use, or start down the medical path via ballot initiatives this fall.[104] In Colorado, legalization for recreational use created a billion-dollar-a-year industry with over $135 million so far going into the state treasury via the applicable tax.[105] Lured by the promise of significant profits, Pennsylvania's aspiring market actors will rely heavily on legal assistance in navigating a fledgling but highly regulated industry.

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SEE PAGES 161 AND 162 FOR UPDATE

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103. *Where pot is legal*, CNN, http://money.cnn.com/interactive/news/economy/marijuana-legalization-map/.

104. Ingraham, *supra* note 17.

105. Joshua Miller, *In Colo., a look at life after marijuana legalization*, THE BOSTON GLOBE (Feb. 22, 2016), https://www.bostonglobe.com/metro/2016/02/21/from-colorado-glimpse-life-after-marijuana-legalization/rcccuzhMDWV74UC4IxXIYJ/story.html. Debra J. Saunders, *California Should Legalize Pot*, San Francisco Chronicle (Sept. 16, 2016), http://www.sfchronicle.com/opinion/saunders/article/California-should-legalize-pot-9228359.php.

AUTHOR'S POSTSCRIPT TO PENNSYLVANIA'S NEW MEDICAL MARIJUANA LAW: THE LEGAL ROADMAP FOR A GROWING INDUSTRY

The following two significant developments occurred shortly after this issue went to press:

1. By Order dated October 26, 2016, the Pennsylvania Supreme Court approved an amendment to Pennsylvania Rule of Professional Conduct 1.2 intended to address the provision of legal advice concerning compliance with the new medical marijuana law, as follows:

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

The Order was made effective in 30 days. The amendment as approved by the Court differed in one respect from the version proposed by the Pennsylvania and Philadelphia Bar Associations and published for comment by the Disciplinary Board. As approved, paragraph (e) is limited to advice concerning conduct expressly permitted "by Pennsylvania law," whereas the proposed language would have expressly allowed lawyers to advise clients regarding conduct in any state where that state's law permits, as long as the conduct occurred in that state or had its "predominant effect" there. (*See* Article, p. 156) As a result, the Pennsylvania version of the rule amendment resembles that of Connecticut and several other states. The limitation imposed by the Court raises the question to what extent Pennsylvania practitioners may advise clients concerning compliance with marijuana laws in other states. *See* "New Pa. Rule Clears Path for Medical Cannabis Practices," *The Legal Intelligencer* (Oct. 31, 2016). Notwithstanding the limitation, Rule 8.5(b)(2) (Disciplinary Authority; Choice of Law) ameliorates this concern because it provides that the law of the jurisdiction where the lawyer's conduct has its "predominant effect" shall apply in matters not pending before a tribunal. Therefore, if the lawyer's business advice to a marijuana dispensary in Colorado, for example, focuses on compliance with that state's law, it is likely that Colorado disciplinary rules would apply. The amendment is available at: http://www.pacourts.us/assets/opinions/Supreme/out/147drd-attach.pdf?cb=1.

2. On October 29, 2016, the Pennsylvania Department of Health published in the Pennsylvania Bulletin temporary regulations for growers and processors under Act 16, noting that the Department had received "nearly 1,000 comments from members of the community, the industry and our legislative partners." Pennsylvania Department of Health Press Release, Department of Health Provides Update on Medical Marijuana Program Implementation in Pennsylvania (Oct. 26, 2016). The temporary regulations appear under Chapter 1151. *See* 46 Pa.B. 6829 (Oct. 29, 2016).

This version of the regulations removes previously published sections concerning taxation and conflicts of interest. Among other changes, the regulations divide the state into six geographical regions, up from three, for the purpose of distributing licenses to grow houses and dispensaries. Dispensaries may not be within 1,000 feet of a school or day-care facility. In addition, the word "person" is defined to include corporations and limited liability companies, which should allow licenses and permits to be sold like publicly traded businesses. The Health Department also stated

that it may issue waivers if "necessary to provide patients with adequate access to medical marijuana." The regulations also address such matters as security and surveillance at grower/processor facilities, disposal and recall of marijuana and medical marijuana, sanitation and safety, and insurance requirements.

The public feedback period for the temporary regulations for dispensaries was scheduled to be open until November 4, 2016, with final temporary regulations to be published in the Pennsylvania Bulletin by year end.

November 2, 2016