

## PROPOSED AMENDMENTS TO RULE 1.2(C) OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

### Issue

Should the State Bar of Michigan adopt a resolution calling for an amendment to the Michigan Rules of Professional Conduct (MRPC) permitting lawyers to counsel or assist clients in legal matters permitted under the Michigan Medical Marihuana Act (MMMA) or other laws relating to marijuana that may in the future be adopted (collectively, the Marijuana Laws) as long as: (1) the Marijuana Laws have not been held to be preempted, void, or invalid; (2) the lawyer reasonably believes the client's conduct is allowed under the Marijuana Laws; and (3) the lawyer advises the client about the federal law implications?

RESOLVED, that the State Bar of Michigan supports amendment of Rule 1.2(c) of the Michigan Rules of Professional Conduct (MRPC), which states that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal 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”; and

FURTHER RESOLVED, that the State Bar of Michigan proposes the amendment of MRPC 1.2 (c) by adding the following at the end of MRPC 1.2(c):

**Notwithstanding the previous sentence of this subparagraph (c), a lawyer may counsel and assist a client in legal matters permitted under Michigan's marijuana-related laws. If Michigan law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.**

### Synopsis

The proposed resolution supports an amendment to the Michigan Rules of Professional Conduct (MRPC) to permit lawyers to counsel and assist clients in activity permitted by the Michigan marijuana-related laws. To the extent that such laws conflict with federal law, the Rule also requires that lawyers advise the client regarding related federal law and policy.

### Background

In 2008, Michigan voters approved the Michigan Medical Marihuana Act (MMMA). While patients, caregivers, and physicians who comply with MMMA requirements are protected from state criminal prosecution for production, possession, or delivery of marijuana, the MMMA does not protect individuals from federal prosecution under the Federal Controlled Substances Act (CSA) or related federal statutes. Federal law provides that it is illegal to possess, manufacture, distribute, or dispense marijuana, or conspire to do so. In other words, while the client's conduct may be legal under state law, it remains illegal under federal law. Consequently, lawyers who assist these clients risk being accused of conspiring to violate federal law and MRPC 1.2(c) as written.

Since the implementation of the MMMA, lawyers have been asked to assist clients with various legal matters related to the medical marijuana industry, such as: real estate transactions when use of the property will involve the cultivation, dispensation, sale, or use of marijuana; entity formation for the purpose of operating a marijuana-related business authorized by the MMMA; and regulatory compliance with the MMMA.

A substantial number of states which have authorized some sort of marijuana legalization have also addressed the issue of Rule 1.2(c)<sup>1</sup>. There is general agreement within these states that a lawyer may *advise* a client on the meaning of state marijuana laws, and may *assist* a client engaged in state legal marijuana-related activity, if the lawyer also advises the client of the illegality of such activity under federal law.

The proposed amendment to MRPC 1.2(c) would clarify that lawyers may provide legal counsel and assistance to clients engaged in state legal medical marijuana-related activities without running afoul of their professional responsibilities. The proposed amendment would also allow compliant advice and counsel if Michigan law further develops beyond medical marijuana to increase the scope of lawful marijuana related activity.

### **Opposition**

None known.

### **Prior Action by Representative Assembly**

None known.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None known.

## **STATE BAR OF MICHIGAN POSITION**

### **By vote of the Representative Assembly on September 22, 2016**

Should the Representative Assembly adopt the above resolution:

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<sup>1</sup> Ethics authorities in the states of Florida, Massachusetts, Alaska, Arizona, Colorado, Connecticut, Hawaii, Minnesota, Nevada, New York, Oregon, Pennsylvania, and Washington have all recommended amending their respective Rules or Comments to authorize a lawyer to counsel and assist clients whose conduct is lawful under state law. Two major cities in California (San Francisco and Los Angeles) have followed suit, though a state-wide change appears to not yet have been adopted. See Rachel T. Nguyen, *Clearing the Smoke – An Update on the Marijuana Dilemma for Lawyers*, ALAS Loss Prevention Journal, Winter 2016. The Maine Professional Ethics Commission recently reversed a prior prohibition; Maine’s Rule now conforms to the other states mentioned above.

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FURTHER RESOLVED, that the State Bar of Michigan proposes the amendment of MRPC 1.2 (c) by adding the following at the end of MRPC 1.2(c):

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- (a) Yes
- or
- (b) No