**OREGON STATE BAR**

**Board of Governors Agenda**

**Meeting Date:** September 5, 2014

**From:** Helen M. Hierschbiel, General Counsel

**Re:** Legal Ethics Committee Recommendation To Amend Oregon Rule of Professional Conduct 1.2

**Issue**

Consider the Legal Ethics Committee’s recommendation to amend Oregon RPC 1.2 to address lawyers’ duties in the face of conflicts between state and federal law.

**Background**

In November 1998, Oregon voters approved the Oregon Medical Marijuana Act (OMMA). The state implemented a registration program the following year and, early this year, a medical marijuana dispensary program. In November 2014, Oregon voters will decide whether to legalize and regulate the recreational use of marijuana.

Currently, lawyers are being asked to assist clients with various legal matters relating to the medical marijuana industry, such as: real estate transactions where use of the property will involve the cultivation, dispensation, sale or use of marijuana; entity formation for the purpose of operating a marijuana business authorized by OMMA; and, regulatory compliance with OMMA. If recreational use of marijuana is legalized in Oregon, the need for legal counsel will likely expand further. Lawyers have expressed concern that providing clients with legal advice or assistance relating to Oregon’s medical marijuana laws may violate their professional responsibilities under RPC 1.2(c), which prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows is illegal or fraudulent. While users, growers and dispensaries who comply with OMMA requirements are protected from state criminal prosecution for production, possession or delivery of marijuana, OMMA does not protect individuals from federal prosecution under the Federal Controlled Substances Act or related federal statutes. In other words, while the client’s conduct may be legal under state law, it remains illegal under federal law. Thus, lawyers who assist their clients with such conduct, arguably violate Oregon RPC 1.2(c) as written.

Other states that have legalized the medical or recreational use of marijuana have encountered similar questions about the limitations imposed by Rule 1.2. The bars and courts in these other jurisdictions have responded in different ways. The State Bar of Arizona adopted a formal ethics opinion that allows lawyers to counsel or assist clients in legal matters permitted under the Arizona Medical Marijuana Act as long as: (1) the Act has not been held to be preempted, void or invalid; (2) the lawyer reasonably believes the client’s conduct is allowed BOG Agenda Memo —Helen M. Hierschbiel October 3, 2014 Page 2 under the Act; and (3) the lawyer advises the client about the federal law implications. See State Bar of Arizona Ethics Op No 11-01.

Not all states have agreed with Arizona’s interpretation of Rule 1.2. For example, the Colorado Bar Association concluded in its formal ethics opinion, that “a lawyer cannot advise a client regarding the full panoply of conduct permitted by” Colorado’s marijuana laws. Specifically, the Colorado Bar Association determined that the plain language of Rule 1.2 would prohibit lawyers from assisting clients in structuring or implementing transactions in furtherance of a marijuana business, because the client’s conduct would violate federal law. See Colorado Bar Association Formal Op No 125. Subsequently, the Colorado Supreme Court adopted commentary to its Rule 1.2 which clarifies that lawyers may counsel and assist clients regarding their state’s medical marijuana laws. To the extent that such laws conflict with federal law, the commentary also requires that lawyers advise the client regarding related federal law and policy. The Nevada Supreme Court followed suit, adopting commentary to its Rule 1.2, and the Washington Supreme Court is also considering adopting commentary to its Rule 1.2.

The Oregon Supreme Court has expressed any interest in adopting commentary to the Oregon Rules of Professional Conduct. According, that is not an option in Oregon. To resolve the uncertainty surrounding this issue, the OSB Board of Governors asked the OSB Legal Ethics Committee to either draft a formal ethics opinion or an amendment to the rules which would clarify that lawyers may provide legal counsel and assistance to clients with medical marijuana businesses without running afoul of their professional responsibilities.

A majority of the Legal Ethics Committee determined that any opinion they would draft would likely reach a conclusion similar to that reached by the Colorado Bar Association (i.e., that advising about conduct contrary to federal law would violate Rule 1.2). Moreover, the LEC felt that an amendment to RPC 1.2 would provide greater clarification and assurance to lawyers about the propriety of advising and assisting clients with their marijuana-related businesses. Therefore, the LEC drafted and recommends adoption of the following proposed amendment.

In order to avoid the unintended consequences of a very broadly worded exception to RPC 1.2(c), the LEC proposal limits the exception to marijuana-related laws. On the other hand, the proposal does not refer specifically to OMMA so that it would cover any issues that might similarly arise from the legalization of recreational marijuana. Given the continued existence of conflicting federal law, the LEC felt it important to require lawyers to advise clients about federal law and policy related to marijuana. This requirement is similar to language included both in the commentary adopted by the Colorado and Nevada Supreme Court, and in the Arizona Formal Ethics Opinion.

**LEC Proposed Amendment to RPC 1.2**

**Rule 1.2 Scope of Representation and allocation of authority between client and lawyer**

(a) Subject to paragraphs (b) and (c), 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 with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

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

(c) 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.

**(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.**