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Recent Developments in Risk Management

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Advising Clients Regarding Potentially Criminal Conduct – Assisting Clients in Connection with the Medical or Recreational Marijuana Industry

Rhode Island Ethics Advisory Panel Op. 2017-01

Risk Management Issue: In a state that has legalized marijuana, notwithstanding the federal Controlled Substances Act, how far are lawyers permitted to go when asked to advise a client in connection with the marijuana industry?

The Opinion: The federal prohibition of marijuana under the Controlled Substances Act creates thorny ethical issues for attorneys representing clients in the cannabis industry in the twenty-nine states that have legalized medical marijuana and the eight states that have legalized recreational marijuana. The Rhode Island Ethics Advisory Panel recently joined a chorus of other states in concluding that attorneys may ethically advise clients on all matters related to a particular state's medical marijuana law, as long as attorneys also advise clients regarding the federal law.

Rule 1.2(d) of the Rhode Island Rules of Professional Conduct prohibits lawyers from counseling or assisting clients in conduct that the lawyer knows is criminal. This rule creates an inherent conflict for attorneys representing clients involved in Rhode Island's medical marijuana industry because marijuana remains classified as a Schedule I narcotic under the Controlled Substances Act. In order to clarify attorneys' duties and responsibilities under Rule 1.2(d), two attorneys sought guidance from the Ethics Advisory Panel concerning the propriety of advising clients that seek to cultivate, dispense or supply medical marijuana.

The Panel concluded that when an attorney assists a client in a lawful medical marijuana program, the lawyer is not assisting in conduct that is criminal, but rather providing assistance in implementing and promoting state law that is sufficiently complex to require legal guidance. The Panel reasoned that when the Supreme Court implemented Rule 1.2(d), it did not intend to bar attorneys from advising clients in activity permissible under state law.

In further support of its decision, the Advisory Panel discussed the growing consensus among courts and ethics committees that attorneys representing clients in the marijuana industry are not in violation of the applicable rules of professional conduct. For example, some states – New Jersey, Ohio, Pennsylvania, Alaska, Connecticut, Hawaii, Illinois and Oregon – have amended Rule 1.2(d) to expressly allow attorneys to assist clients in navigating state marijuana laws as long as the attorneys provide guidance related to federal law and policy. Colorado, Nevada, Vermont, and Washington have added similar language to the comments of their Rule 1.2(d). Comment 14 to Colorado's Rule 1.2 provides that attorneys may counsel clients regarding Colorado's marijuana laws, and may assist clients in conduct that the lawyers reasonably believe is permitted under the law, but shall also advise clients regarding federal law and policy. This comment, however, does not protect lawyers who assist clients in the operation of marijuana-related businesses in ways which might contravene federal laws.

In other states – Arizona, Minnesota, New York, Florida and Massachusetts – ethics committees have issued opinions confirming that attorneys may ethically advise clients in the marijuana industry. Based in part on this growing consensus

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among the states where some form of marijuana use has been legalized, and in consideration of the Supreme Court's intention when implementing 1.2(d), the Panel concluded that Rhode Island attorneys representing clients in the medical marijuana industry are not in violation of Rule 1.2(d), as long as attorneys provide guidance on the federal law as well.

Comment: Attorneys practicing in this area should be aware that actively assisting clients in the marijuana industry may be illegal under federal law, and therefore has the potential to result in criminal liability for violation of the Controlled Substances Act, aiding and abetting criminal conduct (18 U.S.C. § 2), or money laundering (18 U.S.C. §§ 1956, 1957). While the Cole Memorandum provides some protection against federal prosecution for legal marijuana businesses that adhere to their state's regulatory framework, it does not provide legal protection for service providers to the industry, including attorneys. Indeed, the Cole Memorandum expressly states that state law does not provide a legal defense to a violation of federal law, including a civil or criminal violation of the Controlled Substances Act.

A bill called the Compassionate Access, Research Expansion, and Respect State (CARERS) Act was recently introduced in the U.S. Senate, which would amend the Controlled Substances Act and exempt from prosecution those acting in compliance with state medical marijuana laws. If this bill becomes law in its current form, it will also protect from prosecution attorneys advising clients in the medical marijuana industry. Unless and until the CARERS Act becomes law, attorneys should remain cognizant of the fact that representing clients in this industry may make them susceptible to criminal liability.

Risk Management Solution: It is becoming clear that lawyers may give advice on state and local laws relating to marijuana in their states, subject to two important provisos: First, they also need to counsel clients regarding the **Controlled Substances Act**, as well as the **Cole Memorandum** and the **Rohrabacher-Farr Amendment**, among other applicable federal rules and regulations. Second, to the extent attorneys actively assist clients in connection with establishing or doing business under state and local marijuana laws, attorneys put themselves in jeopardy regarding the federal laws and regulations, and make themselves potential targets for accusations that they aided and abetted violation of these federal laws. Accordingly, the prudent course, so long as the federal laws remain in place, is for lawyers to give advice, but not actively assist clients in taking any steps that may contravene federal law.

Duty of Confidentiality – Marketing – Revealing the Identity of Current and Former Clients

Wisconsin Formal Ethics Opinion EF-17-02

Risk Management Issue: Is it permissible to disclose the identity of a client for purposes of marketing the lawyer's or law firm's practices if the disclosure is harmless, or if the identity of the client is already a matter of public record?

The Opinion: The opinion concludes that disclosure of a client's identity, without informed consent, is prohibited unless the disclosure falls under limited exceptions. Wisconsin Supreme Court Rule ("SCR") 20:1.6 governs a lawyer's professional duty to protect the confidentiality of information relating to the representation of clients, and in connection with the subject matter addressed in this Opinion, mirrors Model Rule of Professional Conduct 1.6. Since SCR 20:1.6 prohibits lawyers from revealing information "related to representation of a client," the Opinion addresses whether client identity falls within this category.

Comment [3] to SCR 20:1.6 states "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever the source." This extremely broad definition leads to confusion as to the scope of the rule. The duty to protect information thus defined is often misunderstood because lawyers confuse the duty of confidentiality with attorney-client privilege. ABA Comment [3] to Model Rule 1.6 notes the difference: "[3] . . .The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning the client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. . ." The ABA Ethics Committee previously considered the scope of the duty of confidentiality in Formal Ethics Op. 04-430 (2004), and found that the "protection afforded by Rule 1.6 is not forfeited *even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer."* (Emphasis added)

The duty of confidentiality extends automatically even if the client does not request the information be kept confidential or if the client does not consider it confidential. In order to disclose information relating to the representation of a client, it is the lawyer's obligation to obtain informed consent, or determine if there is an exception that allows disclosure of the information. Even if the lawyer thinks that disclosure of the information is harmless, it does not mean that the disclosure is permitted, absent client consent.

The Opinion recognizes that attorneys also have duties with respect to prospective clients, and that the duty of confidentiality continues beyond the death of a client. See Wisconsin Ethics Op. E-89-11.

Notably, the advertising rule in SCR 20:7.2 is consistent with the confidentiality obligation in that it only allows a lawyer to disclose the names of regularly represented clients in attorney advertising, *with consent*. The Opinion takes note of other, consistent opinions from Illinois, New York, Nevada, and Iowa.

Comment: The ethical duty of confidentiality is extremely broad, applying to any information related to the representation of a client no matter the source. This information is protected regardless of privilege, status as public record, or where disclosure would be harmless. The duty extends to former clients and prospective clients. The disclosure of a client's identity is prohibited unless the client gives informed consent, unless it is necessary to carry out the representation, or is within a specific exception to the rule. Attorneys should be mindful of this duty in all circumstances, and should consult their state version of Rule 1.6.

Risk Management Solution: Lawyers and law firms should always obtain client consent before referring to them in any advertising, marketing or social media communication, even if information regarding the client or matter is publicly available.

Attorney-Client Privilege – Waiver – Inadvertent Disclosure by Third Party – Disqualification for Use of Inadvertently Disclosed Privileged Information

***McDermott Will & Emery LLP v. The Superior Court,* 10 Cal. App. 5th 1083 (2017)**

Risk Management Issue: What are the obligations of an attorney who receives information inadvertently disclosed, which is later held to be attorney-client privileged, when the attorney reasonably believed that the privilege holder waived the privilege?

The Case: Dick Hausman, a director and officer responsible for managing the investments of M. Hausman, Inc. (MHI), hired McDermott Will & Emery LLP (McDermott) to provide a variety of estate planning services for his family. Over the years, McDermott formed several trusts for family members, and also represented MHI on corporate, employment, and other matters.

Dick's personal attorney, Mark Blaskey, sent Dick a lengthy email providing legal advice to Dick about his options for resolving a dispute with other MHI officers. Dick forwarded the Blaskey email to Ninetta, his sister-in-law, who then forwarded the email to her husband, who in turn gave it out to Dick's children, a McDermott lawyer, and others.

Thereafter, Dick filed two malpractice lawsuits against McDermott alleging conflicts of interest involving the firms' representation of various members of the Hausman family. McDermott was represented by Gibson Dunn, who received a copy of the Blaskey email from McDermott.

Over the objections of Dick's counsel, Gibson Dunn used the Blaskey email in the defense of McDermott, taking the position that any claimed privilege had been waived, because Dick sent the email to nonlawyers. Gibson Dunn also argued that the email came directly from the file of McDermott, not via discovery, and was therefore outside the conventional scope of attorney duties relating to the inadvertent disclosure of privileged information.

Dick filed a motion seeking a judicial determination that the Blaskey email was a privileged attorney-client communication that Dick had inadvertently disclosed, and a motion to disqualify Gibson Dunn from representing McDermott based on its use of the Blaskey email and its refusal to return it.

The trial court granted both of Dick's motions, disqualifying Gibson Dunn from continuing to represent McDermott in the malpractice actions.

A divided appellate court upheld the disqualification of Gibson Dunn. The court first held that substantial evidence supported the trial court's conclusion that Dick inadvertently forwarded the Blaskey email to Ninetta with no intention of waiving the

privilege. Ninetta's subsequent disclosure of the email to others could not support a waiver of the privilege because Ninetta was not the holder of the privilege.

The court next considered whether Gibson Dunn's use of the email violated the rule set forth in*, State Compensation Insurance Fund v. WPS, Inc.,* 70 Cal.App.4th 644 (1999), the seminal California decision defining a lawyer's ethical obligations upon receiving another's privileged materials. It established the following standard: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified."

The court here found substantial evidence that supported the conclusion that the Blaskey email was a confidential communication made in the course of an attorney-client relationship, and therefore it was presumptively privileged. Therefore *State Fund* required Gibson Dunn to return the email. The court affirmed the disqualification because Gibson Dunn had improperly used the privileged material and because it determined that disqualification was required to prevent future harm and to protect the integrity of the judicial system.

The California Supreme Court declined McDermott's appeal petition on June 16. McDermott's request for the court to depublish the decision, which would bar any use or reference to the case, was also denied.

Comment: This is an extremely troubling decision, at least as it relates to Gibson Dunn's disqualification. While states' rules regarding waiver of privilege vary widely, few states go as far as California in imposing the draconian consequence of disqualification where a lawyer in good faith makes an objectively reasonable determination that privilege has been waived. The consequence of this outcome for McDermott – loss if its counsel of choice – does not seem in any way proportionate to what happened. It is hard to see how the plaintiff (or the legal system) would be harmed by permitting Gibson Dunn to continue as McDermott's counsel, subject to being precluded from making any further reference to the email.

Attorneys must be mindful that the duties under *State Fund* (or applicable rules in other jurisdictions) may not be limited to the inadvertently disclosed but privileged documents received from opposing counsel, but also may apply to documents the attorney receives from a client or other third parties. Regardless of how the attorney obtains the documents, whenever a reasonably competent attorney would conclude the documents appear to be privileged and are inadvertently disclosed, the *State Fund* rule requires the attorney to review the documents no more than necessary to determine whether they are privileged, notify the privilege holder, and refrain from using the documents until the parties or the court resolve any dispute about their privileged nature. The receiving attorney's reasonable belief that the privilege holder waived the privilege will not vitiate the attorney's duties. The receiving attorney assumes the risk of disqualification when that attorney elects to use the documents before the parties or the court has resolved the dispute over the privileged status. Note that rules governing obligations upon receiving inadvertently disclosed privileged material vary from state to state, and few states' rules are as draconian as California's.

Risk Management Solution: When there is the slightest doubt as to the propriety of using an inadvertently received document, lawyers should consider requesting the direction of the court before making use of it.