

PLF Coverage for Marijuana-Related Claims

As a result of recent legislation, Oregon law now allows businesses to engage in some forms of growing and selling marijuana. In response to the legalization of recreational marijuana and the resulting growing demand for legal services, Oregon has amended its Rules of Professional Conduct, following other states that have done the same. ORPC 1.2(c) is the ethical rule prohibiting a lawyer from assisting a client in conduct that the lawyer knows is illegal or fraudulent. In 2015, ORPC 1.2(d) was added: “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 or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”

Some practitioners have asked whether the PLF will cover lawyers who advise clients regarding business transactions involving the legal sale of marijuana and related activities in Oregon, or whether there is any jeopardy to PLF coverage when a lawyer does legal work related to the sale or distribution of marijuana.

The PLF does not provide coverage for any provision of legal services that assist the client to engage in illegal activity, regardless of the nature of the activity. PLF Claims Made Plan Section V.2. (Wrongful Conduct Exclusion). Notwithstanding this exclusion, generally speaking, if a covered party is accused of negligence in providing legal services for a client, the PLF will typically defend such a claim. The mere fact that the negligence claim

arose out of the providing of legal services involving legal marijuana-related transactions or activities would not, by itself, be a basis to exclude coverage.

Although legal in Oregon, marijuana is still a Schedule I controlled substance under the federal Controlled Substances Act (CSA). In 2013, the Department of Justice issued a memorandum known as the “Cole Memo,” which outlines eight priorities that drive federal marijuana enforcement policy: (1) No distribution to minors; (2) No revenue to criminals; (3) No diversion of marijuana to “anti-” states; (4) No state-authorized marijuana activity as a pretext to traffic or other illegal drugs; (5) No violence and use of firearms; (6) No drugged-driving or other adverse public health consequences; (7) No growing on federal lands; and (8) No possession or use on federal property. Currently, the DOJ will not enforce the CSA with regard to states that comply with these priorities. However, practitioners should be aware that the federal enforcement policy could change at any time.

Given the emerging nature of retail marijuana businesses, we recommend that lawyers write a letter to clients making them aware of the limitations on operating a marijuana business. The letter should advise the client of federal and tribal law and policy, as well as advise them that their retail marijuana activities must comport with Oregon law. It would also be good practice to have the client sign the letter acknowledging receipt and understanding.

DISCLAIMER

This material is provided for informational purposes only and does not establish, report, or create the standard of care for attorneys in Oregon, nor does it represent a complete analysis of the topics presented. Readers should conduct their own appropriate legal research. The information presented does not represent legal advice. This information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund except that permission is granted for Oregon lawyers to use and modify these materials in their own practices. © 2016 OSB Professional Liability Fund.

As with every coverage determination, the facts of each situation are different, so this should not be interpreted as any representation that defense or coverage would be available under the facts of a specific situation. As this area of the law develops, the PLF may reassess its coverage determinations. Given the evolving nature of this area of the law and the federal prosecutorial discretion, covered parties should take all the circumstances into account in deciding whether to advise clients regarding the legal sale of marijuana and related activities in Oregon.

If you have particular questions regarding coverage, please call Jeff Crawford or Emilee Preble at the PLF at 503.639.6911 or 1.800.452.1639.