



Cannabis Law Committee Newsletter

Vol. 2, No. 1 — July 2019

Message From the Editor

by Ruth Rauls

This is our third newsletter covering all things cannabis-related in New Jersey. If you did not have a chance to read our prior newsletters, you can find them by logging in with your member ID to the New Jersey State Bar Association website at njsba.com, and going to the Cannabis Law Committee page.

The Cannabis Law Committee focuses on New Jersey law and future legislation permitting the legal cultivation, manufacturing, distribution and use of cannabis, as well as the intersection between these laws and the existing federal prohibition on cannabis. The state of the cannabis industry in New Jersey touches many substantive areas of the law, which we try to cover in this newsletter.

This volume discusses the first annual Cannabis Symposium, the New Jersey Department of Health's biennial report, family law, the New Jersey Appellate Division's recent decision regarding medical marijuana in the employment context and the recently announce notice of request for applications. As you can see from the content of this newsletter, cannabis affects all areas of the law, and this industry continues to evolve in New Jersey.

In addition to other communications to the bar, the committee will circulate this newsletter to discuss the legal implications of the evolving cannabis industry in New Jersey. Thank you to all of our contributors for this edition!

If you are interested in submitting content for this newsletter, please contact Ruth Rauls at ruth.rauls@saul.com. ■

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Cannabis Law Committee

Co-Chairs

Michael F. Schaff	Seth Tipton
Wilentz Goldman & Spitzer	Florio Perrucci Steinhardt & Cappelli LLC
90 Woodbridge Center Drive	235 Broubalow Way
Woodbridge, NJ 07095	Phillipsburg, NJ 08865
732-855-6047	908-878-0124

Anthony M. Arbore	Pamela M. Copeland	Gordon J. Golum	Lisa D. Love	Chirali V. Patel	Robert E. Schiappacasse
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The opinions of the various authors contained within this issue should not be viewed as those of the Cannabis Law Committee or the New Jersey State Bar Association.

State Bar Sponsors First Annual Cannabis Symposium

by Lisa Gora

On March 13 of this year, the Cannabis Law Committee of the New Jersey State Bar Association (NJSBA) and the Cannabis Interest Group of the New Jersey Society of Certified Public Accountants cosponsored the first annual Cannabis Symposium at the New Jersey Law Center in New Brunswick. The symposium welcomed a distinguished panel of speakers comprised of attorneys, certified public accountants and industry association representatives, as well as a Senator Declan O'Scanlon, who spoke on the importance of the medical marijuana program in New Jersey.

The symposium was moderated by the co-chairs of the Cannabis Law Committee of the NJSBA, Michael Schaff of Wilentz, Goldman & Spitzer, P.A. and Seth Tipton of Florio Perrucci Steinhardt & Cappelli, LLC.

The program speakers included:

- **Anthony Arbore** of Forster Arbore Velez, Attorneys at Law (Ledgewood)
- **Joshua S. Bauchner** of Ansell, Grimm & Aaron PC (Woodland Park)
- **Brittany A. Bonetti** of Cooper Levenson Attorneys at Law (Atlantic City)
- **Melissa Dardani**, a certified public accountant with Eisner Amper LLP (Iselin)
- **Alma L. Saravia** of Flaster Greenberg, PC (Cherry Hill)
- **Lisa Gora** of Wilentz, Goldman & Spitzer, PA (Woodbridge)
- **Jonathan A. Havens** of Saul Ewing Arnstein & Lehr LLP (Baltimore)
- **Hugh O'Beirne**, president of the New Jersey Cannabis Industry Association (Trenton)
- **Robert E. Schiappacasse** of Sills Cummis & Gross, PC (Newark)
- **Stacey D. Udell**, a certified public accountant and director of valuation and litigation services with HBK Valuation (Cherry Hill)

The agenda for the symposium consisted of a myriad of legal and accounting topics that cannabis-related businesses looking to operate establishments in New Jersey should be aware of. The list of topics and their respective speakers includes:

- The legislative landscape in New Jersey surrounding medical marijuana, its proposed expansion, and adult use cannabis legalization (O'Beirne)
- Real estate lease issues in the cannabis space (Schiappacasse)
- The growth of CBD and industrial hemp, and the roles of the FDA and DEA (Havens)
- Compliance with labor and employment laws (Saravia)
- The classes and types of cannabis licenses if adult use cannabis is legalized (Gora)
- The taxing nature of cannabis (Udell and Dardani)
- Physician obligations and patient protections and other healthcare practitioner and health institution concerns (Bonetti)
- The path to licensure if adult use cannabis is legalized (Bauchner)
- Expungements and criminal enforcement regarding cannabis (Arbore)

The symposium drew 235 attendees and required additional rooms at the Law Center to be set up to accommodate the crowd. To accommodate and promote the continued interest of attorneys, accountants and the public of New Jersey, the NJSBA expects to host the second annual Cannabis Symposium in early 2020, so please keep an eye out for details.

The Cannabis Law Committee would like to thank Diane Rotmil of the New Jersey Institute for Continuing Legal Education (NJICLE) and her team for assisting in the coordination, organization and execution of the symposium. ■

Lisa Gora is a corporate and health law attorney at Wilentz, Goldman & Spitzer, P.A. in Woodbridge, and is a member of the firm's cannabis law team. She also serves as secretary of the NJSBA's Cannabis Law Committee and is on the board of the Health Law Section.

Legal Weed and Family Law

by Pamela Copeland

New Jersey has recognized the medical benefits of using marijuana in certain circumstances, and has enacted legislation to permit its use in those circumstances.¹ In addition, as of this writing, 10 states plus Washington, DC and the Northern Mariana Islands have legalized marijuana for adult recreational use.² Illinois will become the 11th as soon as their governor signs the legislation on his desk, which he said he will do. Governor Phil Murphy has pledged New Jersey would join those states, as has New York Governor Andrew Cuomo. Despite massive legislative efforts in New Jersey, the issue will be on the ballot in 2020. It will be interesting to see which state gets there first, if ever.

The implications of these issues on family law practice are potentially profound, particularly in contested custody and/or parenting time proceedings. In determining these issues within the context of separated or divorced parents, New Jersey recognizes that it is public policy to assure minor children frequent and continuing contact with both parents.³ In deciding custody/parenting time issues, New Jersey courts evaluate a variety of statutory factors, including, but not limited to, the fitness of the parents. As noted in the statute, “[a] parent shall not be deemed unfit unless the parents’ conduct has a substantial adverse effect on the child.”⁴

One of the challenges facing law enforcement is that there is no easy test, such as a breathalyzer for alcohol use, to determine if a person who has used marijuana legally is ‘stoned’ to the point of being impaired. The ingredients in marijuana remain in the body for weeks after consumption, even if no further usage occurs. In other words, under the tests currently available, a person will test positive for marijuana use for weeks thereafter, long after the effects of that usage have worn off. Although much research is being done, there presently are no tests to determine if a person is actually impaired by marijuana use.

Obviously, nobody wants their child to be cared for by a parent who is impaired, no matter the substance used. On the other hand, it would be patently unfair to punish a parent by requiring supervised parenting time

or denying parenting time simply because he or she tested positive for legal marijuana use with the current tests available, when they are not impaired during their parenting time. Other states have addressed these issues.

In the state of Washington, marijuana use is permissible under the law for medical purposes, as is the case here in New Jersey. Nevertheless, in 2008 a father who was a medical marijuana patient was ordered to have supervised parenting time with his children. The trial court, the parties and the children’s guardian *ad litem* all noted difficulties in fashioning an objective test to determine if he was impaired during his parenting time, because of the inadequacy of the available tests. The trial court ordered supervised parenting time, and the court of appeals affirmed, stating: “In the family law setting, the best interests of the child are of paramount importance.”⁵

Washington amended its law in 2011 to provide, “Parental rights or residential time—Not to be restricted...solely due to his or her medical use of cannabis...absent written findings...of impairment that interferes with...parenting functions...”⁶ One can only speculate if the *Wieldraayer* case, and perhaps others, had an impact on the enactment of this amendment.

The state of Maine Medical Use of Marijuana Act similarly states, “A person may not be denied parental rights and responsibilities with respect to or contact with a minor child as a result of acting in accordance with this chapter, unless the person’s conduct is contrary to the best interests of the minor child...”⁷ In other words, use of medical marijuana alone is insufficient to deny a parent his or her rights or responsibilities with his or her child. Nevertheless, a trial court denied a father’s request for primary custody of his young daughter, due in part to his use of medical marijuana. The Supreme Judicial Court affirmed, stating that the best interests of the child includes a consideration of whether a parent’s ability to care for his or her child is impaired, including by his or her marijuana use.⁸ The Supreme Judicial Court also relied on the trial court’s finding that the father’s thinking at trial “appeared slow” and “his eyes were pink and bloodshot.”

It took more than just that father's use of medical marijuana to deny his request for primary custody of his minor child; it was the effects of his use, and thus one of the factors in that decision.

As of 2017, Arizona, Delaware, Hawaii, Illinois, Michigan, Minnesota, New Hampshire and New York also had what are called anti-custody discrimination provisions in their medical marijuana statutes.⁹ New Jersey did not incorporate such language in its statute, nor are there any provisions relating to family law issues in recently proposed legislation.

While there has not yet been a reported case involving legal medical marijuana use and custody/parenting time, New Jersey's family court has ruled that smoking cigarettes is a permissible parental habit to consider when determining what is in the best interests of the children, because it may affect their health and safety.¹⁰ The same analysis could be used for marijuana use as well, although the health hazards of smoking cigarettes, including the detrimental effects of second-hand smoke, are well-documented, and if those options are available to them, fewer medical marijuana users are smoking the substance; they are vaping or consuming edibles.

Since there is no reported case law yet in New Jersey regarding these issues, and the statute does not as yet include anti-custody discrimination provisions, this area of the law remains in flux. For example, would there be a difference in how the courts evaluate custody and parenting time in the context of medical marijuana use versus recreational use, if the latter ever comes into play? Time will tell.

In the meantime, current medical marijuana users who are facing custody/parenting time issues will require guidance as to how best to manage their legal usage with the least amount of impact on their cases. The same level of guidance, of course, applies to the other side of the equation: If a child's other parent is using any substance, legal or otherwise, that impairs their ability to care appropriately for their child, they will require assistance to ensure their child will be safe and free from any harmful circumstances.

These issues and more will continue to arise in contested family law proceedings. Practitioners owe it to their clients to understand the issues thoroughly in order to assist them in dealing with those issues with knowledge, sensitivity and clarity. ■

Pamela M. Copeland is a certified matrimonial law attorney, a mediator on the Court referral lists for Somerset, Hunterdon and Union counties, and practices collaborative family law. She is a member of the NJSBA's Cannabis Committee as well as NJSBA's Family Law and Women in the Profession sections.

Endnotes

1. N.J.S.A. 24:61-1.
2. National Conference of State Legislatures, <http://nsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.
3. N.J.S.A. 9:2-4.
4. N.J.S.A. 9:2-4(c).
5. *In Re Marriage of Wieldraayer* (Court of Appeals Washington, Division One, 2008).
6. RCW 69.51A.120.
7. Title 22 § 2430-C.4.
8. *Daggett v. Sternick*, 2015 ME 6 (Jan. 29, 2015).
9. Alice Kwak, *Medical Marijuana and Child Custody: The Need to Protect Patients and their Families from Discrimination*, 28 *Hastings Women's L.R.* 119 (2017).
10. *Unger v. Unger*, 274 N.J. Super. 532 (Ch. Div. 1994).

Massive Expansion of the Medicinal Marijuana Program Underway in New Jersey

by Lisa Gora

On June 3 of this year, the New Jersey Department of Health (NJDOH) released a notice of a request for applications (RFA) for up to 108 additional alternative treatment centers (ATCs) in the state of New Jersey. As of July 1, the permit application forms for ATCs and additional instructions will be available at <http://www.nj.gov/health/medicalmarijuana>. On July 16, the NJDOH will hold a pre-application webinar to review the RFA process and the most commonly submitted questions.

Each completed application must be submitted to the NJDOH pursuant to the instructions of the NJDOH no later than 3 p.m. on Aug. 15.

The expectation of the NJDOH is to divide the permits, to the extent possible, as follows: up to 38 in the northern region, up to 38 in the central region, and up to 32 in the southern region. The breakdown would include:

Northern Region

Cultivation endorsements:	8
Manufacturing endorsements:	10
Dispensary endorsements:	20

Central Region

Cultivation endorsements:	8
Manufacturing endorsements:	10
Dispensary endorsements:	20

Southern Region

Cultivation endorsements:	8
Manufacturing endorsements:	10
Dispensary endorsements:	14

The NJDOH will seek applications from both for-profit and nonprofit entities.

Entities may submit a maximum of three applications in this RFA and may only submit one application for a cultivation endorsement and one application for a manufacturing endorsement. Additionally, applicants for cultivation endorsements may only submit an application for one tier of canopy size as set forth in the RFA. A separate application is required for each endorsement.

Each application shall be accompanied by an application fee, comprised of two payments made payable to the state treasurer, one in the amount of \$18,000 (refundable) and one in the amount of \$2,000 (non-refundable). For unsuccessful applicants, the NJDOH will destroy the check for \$18,000 once award decisions are issued.

The review and award schedule will reportedly be determined based on the volume of applications received, and the notice provides that the department may stagger awards by endorsement with cultivators first, manufacturers second, and dispensaries third.

Should you have any questions regarding the RFA, please visit the website of the NJDOH medicinal marijuana program, which can be found at <https://www.nj.gov/health/medicalmarijuana/>. ■

Lisa Gora is a corporate and health law attorney at Wilentz, Goldman & Spitzer, P.A. in Woodbridge, and is a member of the firm's cannabis law team. She also serves as secretary of the NJSBA's Cannabis Law Committee and is on the board of the Health Law Section.

New Jersey Employers May Not Discriminate for Employees' Use of Medical Marijuana

by Ruth A. Rauls and Gillian A. Cooper

On March 27 of this year, the New Jersey Appellate Division reversed the lower court's dismissal of a complaint that alleged discrimination based on an employee's use of medical marijuana. In doing so, the Appellate Division held that employers may be required to accommodate an employee's use of medical marijuana. Accordingly, employers should take note of this decision in New Jersey regarding an employee's medical marijuana use and the interplay of the New Jersey Law Against Discrimination (NJLAD) and the New Jersey Compassionate Use Medical Marijuana Act.

In *Wild v. Carriage Funeral Holdings, Inc., et al.*,¹ the plaintiff sued his former employer, defendant Carriage Funeral Holdings, Inc., and others, alleging discrimination in violation of the NJLAD for his use of medical marijuana permitted by the Compassionate Use Act. As part of his cancer treatment, the plaintiff received a recommendation for the use of medical marijuana from a healthcare provider. In 2016, while working a funeral, the plaintiff's vehicle was struck by another vehicle that ran a stop sign. The plaintiff was taken by ambulance to the hospital. Carriage advised the plaintiff that a blood test was required before he could return to work. The plaintiff advised Carriage that he used medical marijuana for his disability.

Several days later, the plaintiff was informed that Carriage was unable to "handle" his marijuana use, and that his employment was "being terminated because they found drugs in [his] system." The plaintiff received a letter stating he had been terminated because he failed to disclose his use of medication that might adversely affect his ability to perform his job duties.

The plaintiff filed a lawsuit alleging the defendants violated the NJLAD because he had a disability (cancer) and was legally treating that disability in accordance with his physician's directions and in conformity with the Compassionate Use Act. The defendants filed a motion to dismiss and the trial judge determined that the Com-

passionate Use Act "does not contain employment-related protections for licensed users of medical marijuana" and, in accepting the plaintiff's own allegations, the adverse employment action was taken due to a positive drug test and a violation of Carriage's drug use policy.

The Appellate Division disagreed with the trial court, holding that just because the Compassionate Use Act states an employer is not required to accommodate a medical marijuana user, does not mean that such a requirement is not imposed by other legislation. Based on the allegations in the pleading, the Appellate Division concluded the plaintiff pleaded the elements of a *prima facie* case under the NJLAD.

In reaching its decision, the Appellate Division discussed the Compassionate Use Act's interplay with the NJLAD. The Compassionate Use Act expressly declares that nothing about it "shall be construed to require...an employer to accommodate the medical use of marijuana in any workplace." The plaintiff, however, was not seeking an accommodation to use medical marijuana in the workplace. Rather, he alleged that he sought an accommodation that would allow his continued use of medical marijuana "off-site" or during "off-work hours."

Employers should continue to monitor the expanding legalization of medical marijuana across the country and review their drug-testing policies and procedures with counsel for compliance with state statutes. If an employee advises he or she uses medical marijuana, would fail a drug test, or refuses to take a drug test, employers should consult with counsel before taking disciplinary action. ■

Ruth A. Rauls is a partner at Saul Ewing Arnstein & Lehr LLP, and member of the firm's cannabis law practice, which counsels state cannabis license applicants and awardees, ancillary service and product providers, investors, management companies and various other entities that are affected by federal and state marijuana laws. She focuses her practice on litigation and employment related matters. Gillian Cooper is

an associate at Saul Ewing Arnstein & Lehr LLP, and a member of the firm's labor and employment law practice, developing policies and counseling employers on day-to-day issues that affect business operations.

Endnote

1. A-3072-17T3 (App. Div. March 27, 2019).

Division of Medical Marijuana Signals Need for More Licensees in Biennial Report

by Seth Tipton

In April, the New Jersey Department of Health, Division of Medical Marijuana issued its mandated biennial report on the status of the medical marijuana program during 2016 and 2017. According to the requirements of the Compassionate Use Medical Marijuana Act, the division is required to report to the governor and the Legislature the status of three criteria: 1) whether the maximum amount of medical marijuana allowed is meeting the needs of patients; 2) whether any existing alternative treatment center (ATC) has charged excessive prices; and 3) whether there are enough ATCs to meet the needs of qualifying patients.

Two-Ounce Limit

Analyzing historical patient data collected pursuant to the act, the division noted that up to 8.62 percent of patients bought up to the two-ounce limit in half of the months in 2017, and more than a quarter of all patients bought up to the limit at least once in 2017. These purchase records were also likely lower than the demand because patients would probably purchase more medical marijuana if it were reimbursable under insurance programs. Echoing a conclusion reached in Executive Order 6, the division recommended increasing the two-ounce per month limit and removing the limit altogether for terminal patients.

Excessing Pricing

Using illegal cannabis prices gleaned from Priceofweed.com, a crowd-sourced data website for cannabis prices, the division reported to the governor that the average price for illegal cannabis in New Jersey was \$343.52 per ounce. Legal medical marijuana sold from one of the existing six ATCs with sales tax included averaged \$397.19 per ounce without discounts and \$361.26

per ounce with eligible discounts, making illegal cannabis cheaper than medical marijuana in all cases. Making matters worse, these statistics were skewed by a single ATC that offered prices much lower than the averages. In fact, five of the six ATCs charged almost \$100 more per ounce over the illegal prices. As a result, the division reported that while the cost did not appear “excessive,” there should be an effort to lower prices by increasing competition in the marketplace.

Licenses

Taking a cue from its reporting on pricing, the division also assessed the current and future market trends for medical marijuana. Presently, the report found, ATCs were able to meet the demands of existing patients, albeit with some purchasing limits. However, if enrollment continued on the same upward pattern as it had in 2018—adding nearly 3,000 patients a month—it would be “imperative” that the program add between 24 and 50 cultivation sites and 90 medical dispensaries. The need was underscored by the division’s “drive time analysis,” which showed that patients in large areas of the state could not drive to an ATC within 30 minutes. ■

Seth R. Tipton is a partner with Florio Perrucci Steinhardt & Cappelli LLC, and concentrates his practice in corporate law, cannabis law, real estate development and commercial lending. With the firm, he has been involved in the legislation legalizing medical marijuana in both New Jersey and Pennsylvania. He has represented numerous applicants for medical marijuana permits in both states, guiding them on private capital raises, application requirements and real estate. Tipton also regularly counsels clients on all aspects of formation and compliance for cannabis companies, and serves as a co-chair for the New Jersey State Bar Association’s Cannabis Law Committee.