Marijuana Seminar –November 9, 2017

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1. **Federal Law**
    A. Marijuana remains illegal under federal Controlled Substances Act
        i. In 1970 Congress determined that marijuana was a Schedule I controlled substance that "has no currently accepted medical use in treatment in the United States," See 21 USCS § 812(b)(1)(B).
    B. Federal Consolidated Appropriations Act 2017; None of the funds appropriated to the Department of Justice may be used to prevent states from implementing medical marijuana laws.

2. **RI and MA Ethics Issue**
    A. RI Rules of Professional Responsibility; Rule 1.2(c)[previously Rule 1.2(d)]; "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal..."
    B. Ethics Opinion RI; Ethics Advisory Panel Decision 2017-01
    C. Board of Bar Overseers Policy on Marijuana

3. **Rhode Island**

A. Decriminalized; Section 21-28-4.01.

i. Personal Use Decriminalized for less than 1 ounce

ii. Misdemeanor for 1 oz-1 kg

B. The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, Section 21-28.6 et. seq. ("Hawkins-Slater"); Section 21-28.6 et. seq.

i. Medical Marijuana legal since 2005

ii. Caregivers

iii. Cardholders

iv. Cultivators; Applications closed April 30, 2017; 58 applicants on website; 15 have issued licenses

1. Locations (approved or pending): Warwick, West Warwick, North Kingston, Central Falls, Cranston, Richmond, Pawtucket, Providence, Exeter, Hopkinton, South Kingstown, Cumberland, East Providence, Charlestown, North Smithfield.

v. Cooperatives

vi. Compassion Centers –only 3 (Slater in Providence, Summit in Warwick and Greenleaf in Portsmouth); Legislation pending to increase number of Compassion Centers

vii. <u>Relationship to Local Zoning.</u> Hawkins-Slater gives deference to municipalities and their zoning laws, but such deference is limited to compassion centers, licensed cultivators, and cooperative cultivators, all of who operate on a larger scale than the individual.

1. *§ 21-28.6-14(a)(7)* (provides that cooperative cultivations must display documentation that the location and cultivation comply with applicable municipal housing and zoning codes)

2. *§ 21-28.6-16(i)* (provides that licensed cultivators, who sell medical marijuana to compassion centers, must abide by all zoning ordinances)

4. **Rhode Island Case Law**

A. *Baird Properties LLC v, Town of Coventry*, 2015 R.I. Super. LEXIS 111 Judge Rubine (August 2015)

i. Court upheld Zoning Board in enforcing local zoning ordinance that prohibited agriculture and horticulture activities in Coventry's I-1 zone.

ii. Appellant argued that growing medical marijuana constitutes the manufacture of pharmaceuticals, a permitted use in the I-1 zone. Town argued that growing marijuana was horticulture and therefore prohibited in the I-1 zone.

iii. Question before the Court was whether the Coventry Zoning Board was correct in finding that the Appellant's activity in growing marijuana as a caregiver was prohibited horticulture rather than permitted manufacturing of pharmaceuticals.

iv. Court found that growing medical marijuana was a horticultural exercise, but not traditional agricultural land use

v. Court upheld Coventry Zoning Board finding that caregivers violated local zoning ordinance, which did not permit horticulture in an industrial district.

vi. Court found that growing marijuana in a warehouse was not traditional agricultural land use, it was not protected by Right to Farm Act.

vii. No mention of possible applicability of Section 45-24-37(g) of RI Zoning Enabling Act, which permits plant agriculture in all zones in RI.

B. *Carlson v. Zoning Board of Review of The Town of South Kingston*, C.A. No. WC-2014-0557; Judge Gallo (November 2016)

i. Court overturns Zoning Board determination that growing marijuana inside an old movie theatre by a medical marijuana patient constitutes "agricultural products manufacturing" which was prohibited in the zoning district in South Kingstown.

ii. Court references Section 45-24-37(g) of RI Zoning Enabling Act, which permits plant agriculture in all zones in RI.

iii. Query: Although Carlson dealt with patient growing marijuana, is the broad language in 45-24-37(g) in conflict with 21-28.6-16 (Licensed cultivators must comply with all zoning laws).

C. *R.I. Patient Advocacy Coalition Fund (RIPAC) v. Town of Smithfield*, 2017 R.I. Superior Court LEXIS 150 (Sept. 27, 2017; Judge Licht)

i. Successful challenge at preliminary injunction stage preventing Town from enforcing Ordinance regulating cultivation and distribution of medical marijuana.

ii. RIPAC sought preliminary injunction challenging local zoning ordinance. Likelihood of success analysis applied in deciding to grant injunctive relief.

iii. Stated purpose of Smithfield's Ordinance was "to regulate the cultivation and distribution of medical marijuana." Zoning Ordinance Amendment § 1(B). The Smithfield Ordinance was relatively comprehensive, addressing patient cultivation, caregiver cultivation, cooperative cultivation, and compassion centers. Broadly speaking, the Ordinance restricts who can grow marijuana, where and how it can be grown, and creates a licensing procedure for potential growers.

Pre-emption of Local Ordinances

iv. Superior Court ruled that Hawkins-Slater pre-empts local ordinances; and that other state statutes may also pre-empt provisions of the Smithfield Ordinance:

a. Portions of the Ordinance dealing with the requirements of the building in which the marijuana will be grown are likely pre-empted by State Building Code. See *G.L. 1956 § 23-27.3-100.1.7* ("[T]he local

cities and towns shall be prohibited from enacting any local building codes and ordinances in the future.").

b. Municipal Fire Safety Ordinances must be approved by Fire Safety Code Board *§ 23-28.1-2(b)(3)*.

v. Court in ***RIPAC v Smithfield*** states regulation of personal medical marijuana cultivation may be outside the scope of the authority granted to municipalities under the *Zoning Enabling Act*. The Zoning Enabling Act allows municipalities to enact a zoning ordinance, which is defined as "[a]n ordinance . . . that establish[es] regulations and standards relating to the nature and extent of uses of land and structures[.]" *Sec. 45-24-31(72)*. A use is "[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." *Sec. 45-24-31(65)*. The word "use" "traditionally has been understood to refer to the type of activity that is allowed at a particular site, such as residential, educational, religious, industrial, retail or mining." *Lord Family Windsor, LLC v. Planning & Zoning Comm'n of Windsor*, 288 Conn. 730, 954 A.2d 831, 836-37 (Conn. 2008).

vi. Court stated that there are "*de minimis*" uses of private property which are neither regulated nor contemplated by the zoning regulations." *In re Scheiber,* 168 Vt. 534, 724 A.2d 475, 478 (Vt. 1998); see also *City of New Orleans v. Estrade,* 200 LA. 552, 555, 8 So. 2d 536 (La. 1942) ("But, surely, it

could not be seriously contended that it is a violation of the zoning ordinance for one to erect a shuffle-board or a badminton court in his own yard for the use and enjoyment of himself, his family and friends, or that it is illegal for children to engage in their various games and amusements in the yards of their homes.").

vii. Town argued that 45-24-37(g) gave it authority under the Zoning Enabling Act to regulate marijuana. Section 45-24-37(g) provides that plant agriculture permitted is permitted in all zoning districts, except where prohibited for public health and safety reasons.

viii. RIPAC argued that 45-24-37(g) did not apply because growing medical marijuana was not plant agriculture; This argument would seem to be contrary to RIPAC's broader interest of preventing towns from restricting the growing of marijuana in any district. *See Carlson v. Zoning Board of Review*, *supra*.

ix. Federal Controlled Substances Act does not pre-empt Hawkins-Slater Act.

x. **HOLDING**: In granting injunctive relief enjoining enforcement of the Ordinance, Court ruled that the regulation of personal medical marijuana cultivation may be outside the scope of the authority granted to municipalities under the *Zoning Enabling Act*. This would appear to be in conflict with Judge Rubine's decision in *Baird* in which the

Court upheld the local ordinance prohibition against horticulture in Coventry's I-1 district.

D. *State v. Ellis*, 2016 R.I. Super. LEXIS 41 (Judge Stone 2016): Smell of bunt marijuana, alone, will not justify a warrantless search.; Consistent with Massachusetts law. *See Commonwealth v. Cruz*, 459 Mass. 459 (2011).

5. **Rhode Island Legislation Regarding Recreational Marijuana**

A. Joint Resolution creating 15 member special legislative commission to study, review and make recommendations regarding legalization of marijuana and report back to the General Assembly on or before March 1, 2018.

B. Website of commission has 19 members including 6 members of the General Assembly, Director of Dept of Health, President of RI Police Chiefs Assn, Asst Attorney General, Mental Health Professional, Criminal Defense Attorney, President of the Chamber of Commerce, a doctor from the Substance Abuse and Mental Health Leadership Council of RI and a couple of others.

C. Commission had first meeting on October 25, 2017.

D. Department of Health is currently drafting regulations mandating testing of marijuana for compassion centers, cultivators, and cooperatives.

6. **Massachusetts Law**

    A. Medical Marijuana; Chapter 94C

    B. Recreational Marijuana Law; Chapter 94G**;** Regulation of the Use and Distribution of Marijuana Not Medically Prescribed

        i. 1 ounce outside residence

        ii. 10 ounces inside residence

        iii. Grow 6 plants

        iv. Can give 1 oz or less to person over 21;

        v. Marijuana taxed at up to 20 percent, second lowest rate in the country; The voter-approved law called for a 12 percent tax on marijuana, but Massachusetts lawmakers nearly doubled it.

            1. 6.25 percent sales tax, a 10.75 percent excise tax, and a 3 percent "local option" that cities and towns will be able to levy.

        vi. Retail marijuana shops slated to open July 2018 instead of the January 2018 date that voters approved in November.

        vii. Medical marijuana remains untaxed

7. **EMPLOYMENT LAW/ISSUES**

    A. **Massachusetts Employment Law**

        i. Pending in Supreme Judicial Court

        ii. *Barbuto v. Advantage Sales & Mktg., LLC*; 477 Mass. 456 (2017) Employer may not terminate or refuse to hire an employee with Crohn's disease for using medical marijuana outside of work.

1. Employee worked one day and was fired for failing drug test.
2. Defendant asserts that MA law does not expressly protect employees who use medical marijuana.
3. Plaintiff claims that decriminalization statute protects job protection; claims that MA disability protection law requiring reasonable accommodations for a disability protects employees right to work even after failing drug test.
4. Court relies on the marijuana act itself, which declares that patients shall not be denied "any right or privilege" on the basis of their medical marijuana use. St. 2012, c. 369, § 4.
5. A handicapped employee in Massachusetts has a statutory "right or privilege" to reasonable accommodation under G. L. c. 151B, § 4.
6. Court held that the plaintiff may seek a remedy through claims of handicap discrimination in violation of *G. L. c. 151B*, --- plaintiff's discrimination claims. Court also ruled that there is no implied statutory private cause of action under the medical marijuana act and that the plaintiff has failed to state a claim for wrongful termination in violation of public policy.

B. **Rhode Island Employment Law**

i. *Callaghan v, Darlington Fabrics Corp.*; 2017 RI Superior Court LEXIS 88

1. RI Employer refused to hire applicant due to status as cardholder
2. Court determined that there is a private right of action under Hawkins-Slater; implied right of action.
3. Employer cannot refuse to employ a person due to his or her status as a cardholder or for medical marijuana use.
4. Hawkins-Slater; 21-28.6-6; Prohibits an employer (and school and landlord) from refusing to employ a person solely due to his or her status as a cardholder.
5. Section 21-28.6-7 provides that a registered qualified patient shall not be considered to be under the influence solely for having marijuana metabolites in his or her system.
6. BUT, an employer is not required to accommodate the medical use of marijuana in any workplace. *Section 21-28.6-7(b)(2)* states that "[n]othing in this chapter shall be construed to require . . . [a]n employer to accommodate the medical use of marijuana in any workplace."
7. Court notes that 21-28.6-7(a)(1) does not permit any task under the influence of marijuana that would constitute negligence or professional malpractice.

8. Court determines that Plaintiff also stated a claim under the Rhode Island Civil Rights Act of 1990 which prohibits, inter alia, discrimination based on disability in the making and enforcement of contracts. *Sec. 42-112-1(a)*. RICRA is expansive, and "provides broad protection against all forms of discrimination in all phases of employment."

ii. Drug testing is very limited and restricted in RI by Section 28-6.5-1.

1. Only if reasonable grounds to believe that employee is under the influence. Even then cannot terminate, but instead must refer for substance abuse treatment.