



CANNABIS AND CBD OIL ADVERTISING ON RADIO AND TELEVISION: WORTH THE RISK?

OPINION PROVIDED BY OUR LEGAL COUNSEL AT JACKSON KELLY

West Virginia legalized medical cannabis in 2017, but the use, possession, cultivation or distribution of cannabis remains illegal under federal law as a Schedule I substance. In addition, cannabidiol (CBD) oils generally remain illegal under federal law as Schedule I substances, with a couple of limited exceptions. Further, advertisements for cannabis and other Schedule I substances are prohibited under the Controlled Substances Act (CSA). As a result of overlapping state and federal jurisdiction and conflicting state and federal law enforcement priorities, broadcasters considering airing medical cannabis or CBD oil advertisements run the risk of federal prosecution until federal law legalizes such activity.

In April 2017, Senate Bill 386 created the Medical Cannabis Act, which allows for cannabis to be certified for medical use by a West Virginia resident with a serious medical condition. On April 3, 2018, the West Virginia Secretary of State filed its "Notice of an Emergency Rule," which is currently in effect as the legislative rule goes through the full rule-making process. West Virginia's emergency rule regulates advertising by medical cannabis organizations, meaning dispensaries and growers/processors. Under the rules, these organizations must comply with federal regulations governing prescription drug advertising and marketing in the advertising/marketing of medical cannabis. As defined by the rule, "advertising" means "the publication, dissemination, solicitation, or circulation, for a fee, that is visual, oral, written, or electronic to induce directly or indirectly an individual to patronize a particular dispensary or to purchase particular medical cannabis." Advertisements for medical cannabis cannot contain statements that are deceptive, false, or misleading, contain any content that can reasonably be considered to target individuals under the age of 21, specifically encourage the transportation of medical cannabis items across state lines or otherwise encourage illegal activity, or display consumption of medical cannabis items. Further, organizations must include certain legible statements in their advertisements, whether it be via print, billboard, television, radio or internet, including (1) "Do not operate a vehicle or machinery under the influence of this drug," and (2) "Keep out of the reach of children." Furthermore, organizations may not utilize television, radio, billboards, print media or internet advertising unless it has reliable evidence that no more than 30 percent of the audience for the program, website, etc. is reasonably expected to be a minor. Notably, this state-legal medical cannabis program is considered illegal under federal law.

On the topic of CBD oils, the DEA's stance up until recently has focused on cannabis and its derivatives as Schedule I drugs and their illegality in all circumstances. On September 28, 2018, the DEA made an exception when it issued its final order placing "certain drug products that have been approved by the [FDA] and which contain [CBD] in Schedule V of the [CSA]." This limited

exception by the DEA was in direct response to the FDA's approval of Epidiolex, an oral solution consisting of CBD, for the treatment of seizures associated with Lennox-Gastaut syndrome and Dravet syndrome. Moreover, the recent passage of the 2018 Farm Bill effected another limited exception when it legalized industrial hemp and hemp-derived CBD with less than 0.3 percent THC, but not CBD derived from cannabis that does not meet the definition of "hemp" under federal law. Accordingly, the Farm Bill does not broadly legalize all CBD products—only those that contain CBD derived from legally produced industrial hemp with less than 0.3 percent THC—so CBD generally remains an illegal Schedule I substance under federal law. Because the CBD-exception determination is made beyond stations, we advise stations not to advertise CBD oils.

The takeaway: regardless of the State of West Virginia's stance, advertising cannabis is a felony at the federal level, meaning radio and television stations advertising medical marijuana or illegal CBD oils may be at risk for prosecution under federal law. In fact, West Virginia United States Attorney Mike Stuart has vowed to aggressively enforce federal marijuana laws in the State of West Virginia. It follows that West Virginia broadcasters, who are already federally regulated and maintain federal licenses from the FCC, may face federal prosecution by disseminating or airing medical cannabis or CBD oil advertisements despite West Virginia's legalization. As a result, stations should be careful in the type of ads they accept for broadcasting and should be especially careful to avoid ads which appear to advertise medical cannabis, CBD oil products or dispensaries. And, even though some West Virginia lawmakers plan to make marijuana reform a priority during the 2019 Legislative Session, broadcasters should plan to steer clear of violating federal law.

As always, we will be happy to help review ads and to give our best advice as these matters arise.

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