

ARKANSAS ETHICS COMMISSION

Post Office Box 1917
Little Rock, Arkansas 72203-1917
(501) 324-9600 Fax (501) 324-9606
Toll Free (800) 422-7773

Sharon K. Trusty
Chairman

Sybil Jordan Hampton
Vice Chairman

Tony Juneau
Ashley Driver Younger
Alice Eastwood

Graham F. Sloan
Director

Jill Rogers Barham
Drew Blankenship
Raymond Boyles
Staff Attorneys

Teresa Keathley
Dona Bowry
Director of Compliance



ADVISORY OPINION NO. 2017-EC-001 Issued June 23, 2017

The Arkansas Ethics Commission (the "Commission") has received a written advisory opinion request from Attorney Brandon Lacy of Jonesboro, Arkansas. He stated that he represents a business entity that intends to obtain Arkansas medical marijuana cultivation and/or dispensary licenses to be issued by the Arkansas Medical Marijuana Commission (the "AMMC"). In his request, Mr. Lacy seeks clarification concerning the employment of lobbyists to pursue the licenses.

The Arkansas Medical Marijuana Amendment of 2016, which was commonly known as Issue 6, appeared on the November 8, 2016, ballot in Arkansas as an initiated constitutional amendment. It was approved and became the 98th Amendment to the Arkansas Constitution. The General Assembly passed twenty-three (23) separate acts amending Amendment 98 during the 2017 regular session. Those acts were incorporated into Amendment 98 by Act 1 of the First Extraordinary Session of 2017.

The AMMC was created under § 19 of Amendment 98. The AMMC administers and regulates the issuance of licenses to operate medical marijuana dispensaries and cultivation facilities, and works with the support of Alcoholic Beverage Control to implement and enforce the requirements of the amendment. On May 8, 2017, the AMMC's Rules and Regulations Governing the Application For, Issuance, and Renewal of Licenses for Medical Marijuana Cultivation Facilities and Dispensaries in Arkansas (the "Licensure Rules") went into effect. The application for cultivation and dispensary licenses will open in July of 2017.

Ark. Code Ann. § 21-8-402(10) defines "lobbying" as communicating directly or soliciting others to communicate with any public servant with the purpose of influencing legislative action or administrative action. As a threshold matter, it must be determined whether or not the AMMC's decisions concerning the issuance of licenses constitute either legislative action or administrative action.

Section 500(i) of the Ethics Commission's Rules on Lobbyist Registration and Reporting (the "Lobbyist Rules") define "legislative action" to mean introduction, sponsorship, consideration, debate, amendment, passage, defeat, approval, veto, or any other official action or nonaction on any bill, ordinance, law, resolution, amendment, nomination, appointment, report, or other matter pending or proposed before a committee or house of the General Assembly, a quorum court, or a city council or board of directors of a municipality. Because the AMMC is not one of the enumerated legislative bodies, the Commission concludes that the AMMC's decisions concerning licenses are not "legislative action."

Section 500(a) of the Lobbyist Rules define "administrative action" to mean any decision on, or proposal, consideration, or making of any rule, regulation, ratemaking proceeding, or policy action, other than ministerial action, by a governmental body. Section 500(m) of the Lobbyist Rules define "ministerial action" to mean an action in which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his or her own judgment upon the propriety of the act being done.

The AMMC's Licensure Rules, in Section IV.9, provide that the AMMC will consider several criteria, many of which appear to be subjective, based on merit to evaluate license applications. For example, an applicant for a cultivation license must demonstrate ability to operate a business and provide proof that an applicant's proposed facility will provide a benefit to the community in which the facility is to be located. This appears to go beyond the scope of "ministerial action" because each member of the AMMC will have to exercise his or her own judgement in evaluating the applications. Accordingly, the Commission concludes that the AMMC's decisions concerning the issuance of cultivation and/or dispensary licenses do constitute "administrative action."

Mr. Lacy has requested an advisory opinion concerning the following questions:

Question No. 1

Whether it is a prohibited act to enter into an agreement in which the lobbyist is compensated for his or her lobbying efforts during the license application process with a percentage of the entity's revenue if the entity is ultimately successful in obtaining a cultivation and/or dispensary license.

Ark. Code Ann. § 21-8-607(b)(4)(A) provides that no person engaged in lobbying shall contract to receive or accept compensation that is dependent in any manner upon the success or failure of a legislative or administrative action. A lobbyist entering into an agreement to be compensated for lobbying efforts during the license application process with a percentage of the applying entity's revenue *if the entity is ultimately successful* in obtaining a cultivation and/or dispensary license falls squarely within the prohibition set forth in Ark. Code Ann. § 21-8-607(b)(4)(A) because the payment would be dependent upon the entity successfully receiving a license or licenses.

Question No. 2

Whether it is a prohibited act for the entity to grant, in exchange for the lobbyist's engagement in lobbying activity on the entity's behalf during the license application process, any percentage ownership interest in the entity.

Again, Ark. Code Ann. § 21-8-607(b)(4)(A) provides that no person engaged in lobbying shall contract to receive or accept compensation that is dependent *in any manner* upon the success or failure of a legislative or administrative action. While a license does not necessarily ensure profitability in a medical marijuana enterprise, successfully obtaining the license is a necessary step in such an endeavor. Such an arrangement appears to violate the spirit and the letter of the statute. Thus, the Commission concludes that agreeing to engage in lobbying activity to obtain a license in exchange for receipt of an ownership interest in a licensed entity would be a violation of Ark. Code Ann. § 21-8-607(b)(4)(A).

It should be noted that the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission refrains from opining about the permissibility of a specific past event.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

ARKANSAS ETHICS COMMISSION

By: 
Drew Blankenship, Staff Attorney