

As NY Health Dept. Backs Marijuana Legalization, Attorneys Eye New Practice Area

Legalization would create a new area of law for attorneys in New York to practice that has only been addressed through the state's medical marijuana program.

By **Dan M. Clark** | July 13, 2018 at 04:50 PM

The State Department of Health recommended on Friday that New York state legalize marijuana for recreational use, partly because of the impact it would have on criminal justice reform.

Legalization would create a new area of law for attorneys in New York with an emerging industry that has so far only been addressed through the state's medical marijuana program.

[The report](#), commissioned earlier this year by Gov. Andrew Cuomo, found that “the positive effects of a regulated marijuana market in NYS outweigh the potential negative impacts.”

One of those positive effects would be fewer marijuana arrests in lower-income communities of color, the report said. Eighty-six percent of the people

arrested for marijuana possession in New York City last year were people of color, [according to](#) the state Division of Criminal Justice Services.

Experts from state agencies said in the report that the best way to reduce the discrepancy between marijuana arrests and race would be to legalize the drug. Sales tax from the drug could instead provide resources for workforce development or job creation, the report said.

The department also found that any evidence to suggest legalizing marijuana would lead to more motor vehicle crashes or crime around marijuana-related businesses is inconclusive. There has not been an increase in crime around medical marijuana dispensaries, the state said, and no statistically significant data on motor vehicle crashes exists.

Despite that conclusion, when one door closes for attorneys because of marijuana legalization, another opens, said Steven Epstein, a partner at Barket Epstein in the New York City metropolitan area.

“I think in the end it’s going to lead to safer roadways because you’ll have law enforcement officers trained to detect it where they weren’t before,” Epstein said.

He expects more investigations from law enforcement on driving offenses that involve marijuana. The agency recommended in the report that the state study how to detect and prevent impaired driving from marijuana use. Law enforcement can test for marijuana use with a saliva test currently, but those results are not always accurate.

There’s also the possibility that tax revenue from legalizing the drug could pay for new technology and training to test for sobriety, Epstein said.

“We can then take the taxes from the sale of marijuana and put it into the development of these devices,” Epstein said. “That revenue can be used to develop field tests for sobriety from marijuana.”

The state projects the sales tax revenue from legalizing marijuana could range anywhere from \$248.1 million to \$677.7 million each year based on a number of factors, like the amount consumed and different sales tax rates. They expect 1.29 million people in New York will purchase the drug during the first year after legalization.

That creates an opportunity for New York residents to start their own marijuana cultivation and distribution businesses. That’s not as easy as one might think, at least from a legal standpoint, said Daniel Shortt, a cannabis attorney with Harris Bricken in Seattle.

For one, attorneys will need to seek some sort of ethics guidance on working with marijuana clients.

“Normally the state bar association or the Supreme Court in that state will issue some kind of guidance for attorneys who want to participate in the state legal industry,” Shortt said. “Because marijuana is still illegal under federal law, it’s hard to reconcile that.”

Harris Bricken, purely by coincidence, has a lot of experience dealing with the legal marijuana industry. It has offices in Washington, California and Oregon—three states that have legalized the drug for recreational use.

The New York State Bar Association issued a guidance when the state legalized medical marijuana, but it did not cover recreational marijuana, according to Sara Payne, the cannabis team leader at Barclay Damon in Syracuse who represents medical marijuana company Etain Health.

“Now that we’re on that trajectory, I think it’s going to be very important to get another ethics opinion outlining the scope of attorney practice in counseling people in recreational marijuana activities,” Payne said.

The legal work after the guidance is released is similar to working with any other business, though it’s complicated by the federal ban on marijuana.

“When you first talk to a client, it’s important to advise them it’s against the federal law and we can’t advise them in violating the federal law,” Payne said. “There could be a point in time where a regulatory body could challenge the attorney-client privilege.”

Usually, the first step for a state moving toward legalization is to create an application process for prospective cultivators and distributors, Shortt said. The applications in these cases can be extremely complex given the age of the industry and the state’s law.

“These applications are usually very robust and clients need assistance with compliance with the law and with ensuring accuracy in the application for the agency,” Shortt said.

An attorney’s role after documents have been submitted is largely to counsel companies on the state law, which varies in each state. It’s unclear what New York’s law will look like, though there are proposals in the state legislature that would legalize marijuana.

A question would also have to be raised about the state’s already-active medical marijuana industry. Lawmakers would have to decide if those companies would be eligible to also participate in the recreational industry or if the two areas should remain separate. That could be done through the state

law, Shortt said, though states have also allowed regulatory agencies to set rules for companies.

“New York has a medical program so that needs to be reconciled as well,” Shortt said. “If there are current dispensaries it’s possible that they are able to participate in the recreational industry. All that would remain to be seen.”

Any legalization of the drug for recreational use would not happen until next year at the earliest. The legislature is scheduled to reconvene in Albany in January, and lawmakers have not expressed plans to take up marijuana-related legislation in a special session.

New York would join nine other states that have already legalized marijuana if lawmakers approve the state agency’s recommendation.