

## Ethical Implications of Marijuana for Lawyers

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### I. Introduction

Over half the states now permit medical or recreational use of marijuana. *See generally* David L. Hudson, Jr., *Not So Fast: Lawyers Advising Clients on Marijuana Laws May Run Afoul of Ethics Rules Even in States Where the Drug Is Legal*, ABA Journal, Jan. 2017, at 24. Although marijuana in varying amounts has been decriminalized in the states concerned, growing, distributing and possessing marijuana remain illegal under federal criminal law. *See* 21 U.S.C. §§ 812(b)(1), 841, 844.

This dichotomy creates an uncomfortable intersection for lawyers working with state-authorized marijuana businesses. ABA Model Rule of Professional Conduct 1.2(d) generally permits a lawyer to advise a client on the legal consequences of a proposed course of action, but prohibits a lawyer from assisting a client in the commission of a crime:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>1</sup>

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<sup>1</sup> All states except California have adopted versions of the ABA Model Rules. California Rule of Professional Conduct 3-210 is somewhat similar to, but worded differently than, ABA Model Rule 1.2(d): “A member shall not advise the violation of any law . . . unless the member believes in good faith that such law is invalid[.]” *See* San Francisco County Bar Association Opinion 2015-1 (2015) (analyzing the issue of lawyer-assistance of marijuana businesses under California law); Los Angeles County Bar Association Opinion No. 527 (2015) (same).

This paper and the accompanying presentation examine two primary elements of this dichotomy. First, the regulatory landscape is briefly surveyed for context. Second, the varying approaches states have taken to address this dichotomy are discussed.<sup>2</sup>

## II. Regulatory Context

The federal Controlled Substances Act (CSA) has listed marijuana as a Schedule I controlled substance since it was adopted in 1970. *See* 21 U.S.C. § 801, *et seq.*; Pub.L. 91-513, Title II, Oct. 27, 1970. In the context of medical marijuana, the United States Supreme Court rejected a constitutional challenge to the CSA in the comparatively recent past. *See Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed.2d 1 (2005) (under the Commerce Clause).

Under the Supremacy Clause of the United States Constitution, states are generally prohibited from immunizing conduct through state law that is prohibited under federal law. The Second Circuit, for example, put it this way: “Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized.” *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013). State courts have acknowledged this as well, with, for example, the Oregon Supreme Court noting: “To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so.” *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 529 (Or. 2010).

Notwithstanding the federal prohibition, the United States Department of Justice (DOJ) under the Obama Administration issued a series of memoranda addressing enforcement of federal law in states that had decriminalized medical and/or recreational marijuana. *See generally* Mark J. Fucile, *The Intersection of Professional Duties and Federal Law as States Decriminalize Marijuana*, 23 No. 1 ABA Professional Lawyer 34, 35 (2015) (discussing DOJ policies). Usually referred to by their authors—respectively, Deputy Attorney Generals Ogden and Cole—the memoranda were addressed to United States Attorneys and provided guidance in exercising prosecutorial discretion on enforcement of the CSA. *Id.* The memoranda generally counseled that federal resources should not ordinarily be focused on marijuana businesses or their customers in jurisdictions where they were operating in conformance with state regulatory structures. *Id.*

Whether the Trump Administration will continue the policy articulated by the Ogden and Cole memoranda remains to be seen—especially in light of Attorney General Sessions’ statements opposing decriminalization when he was in the Senate. *See generally* Christopher Ingraham, *Sessions on Enforcing Federal Marijuana Laws: “It Won’t Be an Easy Decision,”* Washington Post, Jan. 10, 2017 (web); Melissa Hoffman, *Legal Pot Rolls Along. For Now.*, National Law Journal, Jan. 30, 2017 at 1; Thomas Clouse, *Fate of Legal Marijuana Up in Air*

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<sup>2</sup> By focusing on advising and assisting marijuana businesses, it is important to note that other aspects of state Rules of Professional Conduct may also come into play for lawyers. For example, questions of personal use of marijuana may arise under state variants of ABA Model Rule 8.4(b), which addresses criminal acts that reflect “adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer [.]” Lawyers who are contemplating joining with a client in a marijuana business should carefully consult their state versions of ABA Model Rule 1.8(a), which governs lawyer-client business ventures. Finally, many states have lawyer oaths that oblige lawyers to uphold federal as well as state law. *See, e.g.*, Ore. Rev. Stat. 9.205(2).

*after Senate Confirms Sen. Sessions as Attorney General*, Spokane Spokesman-Review, Feb. 8, 2017 (web). As discussed further in the next section, in the absence of the corresponding federal decriminalization of marijuana, federal enforcement policy has been *the* key element for legal ethics authorities in analyzing lawyers' ability to assist marijuana businesses under state variants of ABA Model Rule 1.2(d).

### III. Legal Ethics Analysis

As noted earlier, ABA Model Rule 1.2(d) and its state counterparts have been the focus of legal ethics analysis on the extent to which lawyers may permissibly “advise” and “assist” state-authorized marijuana businesses.

Comment 9 to ABA Model Rule 1.2 reflects the primary analytical distinction between “advising” and “assisting”:

“There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”

“Advising” on the legal consequences of a course of conduct is, in many respects, a lawyer’s traditional stock in trade and has not been controversial in the marijuana context.

“Assisting,” by contrast, becomes problematic when a lawyer knowingly helps a client further illegal conduct. Comment 10 to ABA Model Rule 1.2, for example, notes: “A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.” Further, lawyers have been disciplined for assisting clients in drug-related criminal activity. *See, e.g., In re Goldberg*, 520 A.2d 1147 (N.J. 1987) (lawyer disciplined under, among others, New Jersey RPC 1.2(d) for assisting client in illegal narcotics conspiracy); *In re Wolff*, 788 N.W.2d 594 (N.D. 2010) (lawyer disciplined under, among others, North Dakota 1.2(d) for assisting client in purchasing illegal narcotics).

Some of the services that lawyers provide clients involved in state-authorized marijuana businesses fit within the definition of “advising”—such as analyzing state regulations to explain the scope of activities permitted.

Many more, however, are within the realm of “assisting”—such as forming corporate entities, negotiating leases and handling employment issues. These mundane, but central, forms of “assistance” are in many respects identical to services that lawyers have provided clients in more traditional businesses for years.

The legal ethics authorities that have examined issues relating to state-authorized marijuana businesses, therefore, have typically focused on the “assisting” prong of ABA Model Rule 1.2(d) rather than the “advising” prong.

In the absence of a change in federal law corresponding to state statutes decriminalizing and regulating medical and/or recreational marijuana, two general approaches have emerged at the state level.<sup>3</sup>

First, some states have counseled that lawyers cannot assist state-permitted marijuana businesses because the conduct violates federal law. Colorado, for example, reached this conclusion in an ethics opinion in 2013 (Colorado Bar Association Formal Opinion 125) before this approach was superseded by a new comment—Comment 14—to its RPC 1.2 in 2014. Ohio followed a similar trajectory—initially concluding in an ethics opinion (Ohio Board of Professional Conduct Opinion 2016-6) that assistance was not permitted before the opinion was superseded by a rule amendment soon after. The experience in Colorado and Ohio illustrates that although a purely textual analysis of ABA Model Rule 1.2(d) may yield a restrictive reading of “assistance,” practical realities have pushed states toward amendments to either their comments or rules to allow assistance in addition to advice. Even in these states, however, some ambiguity remains—with, for example, the United States District Court for Colorado opting out of Comment 14 to Colorado RPC 1.2 through the Court’s Local Attorney Rule 2(b)(2).

Second, other states have concluded that lawyers may permissibly assist state-authorized marijuana businesses as long as the Federal Government maintains the policy reflected in the Ogden and Cole memoranda of not actively prosecuting such businesses that conform to state regulations. The form for reaching this end has varied. Arizona and New York, for example, have reached this conclusion in state bar ethics opinions. *See* Arizona State Bar 11-01 (2011); New York State Bar Ethics Op. 1024 (2014). Florida, by contrast, issued policy guidance that, in essence, immunizes lawyers from regulatory prosecution and Minnesota has done the same as a part of its medical marijuana statute. *See* Bruce E. Reinhart, *Up in Smoke or Down in Flames? A Florida Lawyer’s Legal and Ethical Risks in Advising a Marijuana Industry Client*, 90 No. 3 Florida Bar Journal 20 (2016); Minn. Stat. Ann. § 152.32(2)(i). Washington and Nevada, in turn, amended the comments to their versions of RPC 1.2. *See* Washington RPC 1.2, cmt. 18; Nevada RPC 1.2, cmt. 1.<sup>4</sup> Oregon and Alaska amended the text of their versions of RPC 1.2. *See* Oregon RPC 1.2(d); Alaska RPC 1.2(f).

#### IV. Conclusion

Moving forward, two observations are warranted.

First, as illustrated by Colorado and Ohio, the approaches taken by individual states in the wake of the increasing decriminalization of at least marijuana for medical purposes and often for recreational use as well have continued to evolve. The evolution effectively recognizes that the practical needs of state-authorized marijuana businesses for “assistance” on routine legal tasks are not fundamentally different in many respects from clients in other businesses.

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<sup>3</sup> The states cited are intended to be illustrative rather than encyclopedic. This area is evolving very rapidly and practitioners should carefully consult the most recent guidance provided by courts and bar associations in their jurisdictions.

<sup>4</sup> Washington also issued an ethics opinion supplementing the comment. *See* Washington State Bar Association Advisory Op. 201501 (2015).

Second, whether the tie to federal enforcement policy is explicit, as in Washington, or implicit, as in Oregon, that nexus remains central to the analysis of state variants of ABA Model Rule 1.2(d)—as long as marijuana remains prohibited at the federal level.<sup>5</sup> If the Trump Administration’s approach to prosecutorial discretion in this regard varies significantly from the Obama Administration, then bar associations, courts and lawyers will likely be forced to reexamine their approaches to this issue.

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<sup>5</sup> Comment 18 to Washington RPC 1.2 is prefaced: “At least until there is a change in federal enforcement policy[.]” Oregon’s amended RPC 1.2(d) states: “In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”