Ethical Issues in Representing Clients in the Cannabis Business: “One toke over the line?”

By Dennis A. Rendleman

One toke over the line sweet Jesus
One toke over the line
Sittin' downtown in a railway station
One toke over the line

Awaitin' for the train that goes home, sweet Mary
Hopin' that the train is on time
Sittin' downtown in a railway station
One toke over the line

When clients or potential clients visit a lawyer, they are hoping to find answers to problems. When the client is looking to establish a marijuana business in a state that allows medicinal and/or recreational use of marijuana, the need for legal advice is heightened beyond the normal complexity of starting any new business. The marijuana business is highly regulated in each jurisdiction that has allowed it, and the regulations are as complicated as any administrative rules ever adopted.

At present there are numerous areas of the law in which state law and federal law are either in direct conflict or, at least, inconsistent. Examples include, treatment of drones under federal aviation law versus privacy law at the state and local level; issues of voting rights versus voting suppression. There also are significant disputes as to the authority of state law versus municipal and home rule authority. For example, state legislatures restricting home rule authority of municipalities in areas of immigration/sanctuary/welcoming cities, minimum wage, and civil rights protections for various minorities. More recently, twenty-six Illinois counties have passed

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1 Ethics Counsel at American Bar Association, Chicago. The views expressed herein are solely those of the author and not those of the American Bar Association, the Standing Committee on Ethics and Professional Responsibility or the ABA House of Delegates, unless otherwise stated.


3 While under United States v. Causby, 328 U.S. 256 (1946), the Supreme Court determined that federal aviation law controlled airspace from the grass tops up, there were more than 280 state legislative proposals in 2016 regarding drones. Darlene Ricker, Navigating drone laws has become a growing and lucrative legal niche, ABA Journal (July 2017), http://www.abajournal.com/magazine/article/drone_law_attorneys.


5 Texas has adopted state law that prohibits localities from preventing local law enforcement from cooperating with federal immigration authorities, allows those local officers to ask individuals about their immigration status regardless of local policy or directive, and criminally punishes local authorities that do not cooperate with federal immigration detainer requests. Litigation is pending. See, e.g., THE TEXAS TRIBUNE, https://www.texastribune.org/tribpedia/sanctuary-cities/ (last visited Mar. 4, 2019). See also, Jim Hightower,
“gun sanctuary” resolutions purporting to direct county employees not to enforce various proposed state laws that the municipalities believe unconstitutionally restrict the Second Amendment.6

Most significantly, as of 7 November 2018, thirty-three states and the District of Columbia have laws permitting the manufacture, distribution and use of either recreational or medical marijuana or marijuana component laws or a combination. Indeed, during the course of composing this paper, the number of states adopting some legislation addressing cannabis in some form has changed so rapidly and become nuanced such that, while in 2017 there were only eight states where is was legal to use marijuana,7 now few states have not addressed the issue and some that have not legalized use, have decriminalized possession of small amounts.8 In the election of 2018, Michigan became the first midwestern state to vote by referendum to legalize recreational marijuana by 14% of the vote and medical marijuana was adopted by both Oklahoma and Utah.9

Regardless, the current federal Controlled Substances Act, 18 U.S.C. § 801 et seq., prohibits the production, distribution, sale, use, or possession of marijuana. The federal statute provides no exception for medical or other uses authorized or regulated by state law.10

In this world of rapidly changing and conflicting laws, a lawyer who wants to ensure a client operates within a state’s law but is confronted with conflicting federal law, must address the ethical precept that prohibits a lawyer from assisting a client in committing a crime or fraud. This paper argues that because the ABA Model Rules of Professional Conduct are rules of reason, it is unreasonable to prohibit a lawyer from providing advice and counsel to clients and to assist clients regarding activities permitted by relevant state or local law, including laws that allow the production, distribution, sale, and use of marijuana for medical or recreational purposes so long as the lawyer also advises the client that some such activities may violate existing federal law.

Conflicting Cannabis Laws

Federalism is a fundamental component of the U.S. Constitution with state government and federal government operating in both separate and contiguous spheres.11 One area in which concurrent


10 Robinson, supra note 7.

authority has existed is in criminal law, but there is ongoing controversy regarding contradictory federal and state laws covering cannabis.¹²

For most of American history, marijuana was legal to grow and consume. Beginning in the 1910s, however, a number of states moved to criminalize the drug for the first time…. During the 1920s and 1930s, marijuana came to be associated in the public imagination with both crime and black and Hispanic migrant workers….In 1937…, Congress passed the Marijuana Tax Act, which led to dropping marijuana from the Federal Pharmacopoeia, the list of permissible medicines approved by the federal government. [T]he American Medical Association (“AMA”) opposed the reclassification of marijuana, ….With the passage of the CSA [Controlled Substances Act] in 1970 marijuana was classified, along with LSD, heroin, and other serious narcotics as a Schedule I drug, defined as a drug with a high likelihood of addiction and no safe dose. Under the CSA, the manufacture, distribution and possession of Schedule I narcotics is prohibited and punishments can extend to life in prison for large volume manufacturers and dealers. (internal citations omitted)¹³

Contrary to the extreme treatment of marijuana under the CSA in 1970, there has been a steady trend in the opposite direction in both public policy and state law. A number of states have also decriminalized the possession of small amounts of marijuana.¹⁴

In the fall of 2013, reacting to the public policy changes brought about by the electorate in individual states and action by Congress (the Rohrabacher-Farr (now Rohrabacher-Blumenauer) Act) prohibiting the federal Department of Justice (“DOJ”) from using any money to prosecute medical marijuana in states where its use is legal under state law,¹⁵ the DOJ announced it would not prioritize enforcement of federal marijuana laws in states with their own robust marijuana regulations, specifying eight federal enforcement priorities to help guide state lawmaking.¹⁶

However, on January 4, 2018, the then Attorney General, Jefferson B. Sessions, repudiated that policy and issued a new memo that directed local U.S. Attorneys to “to follow well-established principles when pursuing prosecutions related to marijuana activities.”¹⁷ However, that Attorney

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¹³ Id.
¹⁴ States That Have Decriminalized, NORML, http://norml.org/aboutmarijuana/item/states-that-have-decriminalized (last visited Mar. 6, 2019).
¹⁵ Melina Delkic, How Jeff Sessions Plans to End Medical Marijuana Before the Year is Over, NEWSWEEK (Nov. 24, 2017), http://www.newsweek.com/will-jeff-sessions-medical-marijuana-718676. It should be noted that Congressman Dana Rohrabach (R. Calif) was defeated in the November 6, 2018, election and will not be returning to the new Congress. See Anne Applebaum, A Not So Fond Farewell to Dana Rohrabacher, Putin’s Best Friend in Congress, NEWSWEEK (Nov. 12, 2018), https://www.washingtonpost.com/news/global-opinions/wp/2018/11/12/a-not-so-fond-farewell-to-dana-rohrabacher-putins-best-friend-in-congress/?noredirect=on&utm_term=1e8f8c0b399b.
¹⁷ Justice News: Justice Department Issues Memo on Marijuana Enforcement, DEPARTMENT OF JUSTICE (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement. This is consistent with the current Attorney General’s unsubstantiated and generally scientifically contradicted claims that marijuana use is a contributory factor to the opioid crises. See C.J. Claramella, Jeff Sessions Says Opioid Addiction Starts With
General resigned upon request from the President; the acting attorney general did not alter Sessions’ action.\(^{18}\) During his confirmation hearing, new Attorney General William P. Barr stated that he saw no reason for the DOJ to “go after” companies that are in compliance with state laws.\(^{19}\)

Legal commentators have noted that the relationship between federal law and state law is muddled:

The U.S. Supreme Court has upheld the federal government’s ability to enforce the CSA [Controlled Substances Act] even against those complying with more lenient state marijuana laws. Because Congress has the authority under the Commerce Clause to prohibit even the purely intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA. But at the same time, states’ decisions to eliminate state marijuana prohibitions are simply beyond the power of the federal government. The federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws (such as by allowing regulated medical or recreational use), they may do so without running afoul of federal preemption.\(^{20}\) (internal citations omitted)

However, the wall between federal law and state law seems to hold strong when there is no other option. In *U.S. v. Schostag*,\(^{21}\) the Circuit Court of Appeals upheld a District Court ruling denying the defendant’s motion to modify his parole. Schostag was prescribed medical marijuana under Minnesota law for treatment of chronic pain. On supervised release for possession of a firearm and attempted possession of methamphetamine, the use and/or possession of marijuana was prohibited, even for medical purposes. Because the federal law still prohibited marijuana the fact that Minnesota authorized medical marijuana was insufficient to change the conditions of parole.\(^{22}\)

This has been further reinforced recently by the U.S. Customs and Border Protection agency confirming its policy of treating marijuana as a banned substance such that one who participates in the now legal Canadian cannabis industry will be treated as “drug traffickers” and be prohibited from entering the United States. Moreover, possession of marijuana at the border will remain

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\(^{20}\) Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, Cooperative Federalism and Marijuana Regulation, 62 UCLA L. REV. 74 (2015); See also, Gonzales v. Raich, 545 U.S. 1 (2005).

\(^{21}\) No. 17-2530 (8th Cir. 2018).

\(^{22}\) A comparable conflict arises for colleges and universities that receive federal funds (which includes student aid). Even though state law may authorize medical or recreational marijuana, a university must abide by federal law—not just the CSA, but also the federal Drug Free Campus Act and the Smoke Free Campus Act. See, e.g., Marissa Plescia, Medical marijuana legal in Illinois, illegal on campus, THE DAILY ILLINI (Oct. 29, 2018), https://dailyillini.com/features/2018/10/29/medical-marijuana-legal-in-illinois-illegal-on-campus/.
illegal even if the traveler is crossing from Canada into a state that has legalized medicinal or recreational use.  

**Lawyer’s Representation Is Not Endorsement, but Lawyer Must Provide Candid Advice**

ABA Model Rule 1.18 addresses the status of individuals who consult lawyers. Model Rule 1.18(a) states: “A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

Because an individual becomes a prospective client does not either imply or mandate that a full attorney/client relationship will result. Either the prospective client or the lawyer may determine that an attorney/client relationship will not be appropriate. Should the lawyer and the prospective client determine to proceed with a formal relationship, Model Rule 1.2(b) makes clear that the lawyer’s representation of the client is not an endorsement of the client’s “political, economic, social or moral views or activities.”

Additionally, regardless of the client’s position and whether the lawyer endorses that position, Model Rule 2.1 requires the lawyer to exercise independent professional judgment and render candid advice. Equally important, Model Rule 2.1 authorizes the lawyer to include not only the law, but other considerations such as “moral, economic, social and political factors” in advising the client.

As noted in Comment [2] to Rule 2.1, “[p]urely technical legal advice … can sometimes be inadequate.” Rather, “[a] client is entitled to straightforward advice expressing the lawyer’s honest assessment” according to Comment [1]. Indeed, Comment [5] warns that “when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 [Communication] may require the lawyer offer advice if the client’s course of action is related to the representation.”

**U.S. v. McIntosh** illustrates the important role lawyers play in providing advice to help clients safely navigate conflicting state and federal laws. On December 16, 2004, Congress adopted a “rider” to an omnibus appropriations bill funding federal government operations that prohibited any funds appropriated to the Department of Justice from being used to prevent listed states from implementing their state laws regarding medical marijuana. In the 9th Circuit Court of Appeals, ten

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25 MODEL RULES OF PROF’L CONDUCT R. 1.2(b) reads: “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”

26 MODEL RULES OF PROF’L CONDUCT R. 2.1, Advisor, reads: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”


30 833 F.3d 1163 (9th Cir. 2016).
cases from California and Washington state involving various federal indictments were consolidated. All claimed that the rider should thwart the DOJ prosecutions.\textsuperscript{31} The court concluded that the rider would not be violated if the DOJ was prosecuting defendants for conduct that was not authorized by the state medical marijuana laws. Therefore, the defendants were entitled to evidentiary hearings to determine if their conduct was authorized by the state medical marijuana laws. To meet this standard, upon remand, the district court determined that a defendant had to show by “a preponderance of the evidence that he has strictly complied with California’s medical marijuana laws.”\textsuperscript{32} The draft plan originally released to regulate medical marijuana in California was 211 pages.\textsuperscript{33}

It is highly probable that a client who is involved in the marijuana industry in California, will need the candid advice and counsel of a lawyer to understand the application of these plans, regardless of how the inconsistency between state and federal law is ultimately resolved.

**Existing ABA Model Rules and Ethics Opinions**

The ABA Model Rules of Professional Conduct do not prohibit a lawyer from counselling or assisting a client regarding participation in or withdrawal from business and other opportunities that have occurred because a state law permits medical and/or recreational use of cannabis.

ABA Model Rule of Professional Conduct 1.2(d) reads:

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.

Comment [9] elaborates on this provision:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable


\textsuperscript{32} U.S. v. McIntosh, 2017 WL 2695319 (N.D. Calif.).

conduct and recommending the means by which a crime or fraud might be committed with impunity.

Directly related in this circumstance, Model Rule 8.4(b) states: “It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”.

Model Rule 1.2(d) contemplates legality as a binary concept, not an ambiguous situation with conflicting federalism issues. Cases discussing Model Rule 1.2(d) mirror this distinction. For example, a Colorado lawyer advised a client to offer his ex-wife real estate in exchange for favorable testimony in criminal case; an Indiana lawyer advised a father to ignore a court order and not return his child to the mother; a New Jersey lawyer was disbarred for advising a client to invent defense evidence for a drunk-driving case.34

Reviewing other provisions in the Model Rules for insight, it is noteworthy that the Preamble and Scope to the Model Rules paragraph [14] states: “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.”

Model Rule 2.1, Advisor, is relevant:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Excerpts from Model Rule 2.1, Comments [1] and [2] are on point:

A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. … However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. … Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations … are predominant.

Existing Rules and Ethics Opinions from Other Jurisdictions

A number of states have addressed the Rule 1.2(d) issues presented by state legalization of medical and recreational marijuana with either or both rule changes and ethics opinions. In general, the debate has been between a strict “textual” approach versus a more client-centric policy approach founded on reasonableness.

34 See People v. Gifford, 76 P.3d 519 (Colo. O.P.D.J. 2003); In re Scionti, 630 N.E.2d 1358 (Ind. 1994); In re Edson, 530 A.2d 1246 (N.J. 1987).
Several states have issued ethics opinions permitting lawyers to represent clients in the marijuana business relying on the state’s Rule 1.2(d) as written. The State Bar of Arizona was the first to issue an opinion. Arizona Ethics Opinion 11-01 (2011) concluded that a lawyer does not violate the Arizona Rules of Professional Conduct when the lawyer advises and assists a client under the Arizona Medical Marijuana Act, but the lawyer also must explain to the client that the client’s conduct may violate the Controlled Substance Act.\(^{35}\)

The Colorado Bar Association reached the same conclusion in Opinion 125 (2013)\(^{36}\) as did the Connecticut Bar Association in Opinion 2013-02 (2013). Connecticut noted specifically, “It is our opinion that lawyers may advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act. Lawyers may not assist clients in conduct that is in violation of federal criminal law. Lawyers should carefully assess where the line is between those functions and not cross it.”\(^{37}\) The Washington State Bar Association opined that a lawyer may advise a client setting up and operating a marijuana business under Washington law and, as a matter of competence, should advise the client of federal law.\(^{38}\)

The state disciplinary agencies in Florida, Massachusetts, and Minnesota have resolved the issue by advising that lawyers will not be disciplined for advising clients attempting to comply with state marijuana laws.\(^{39}\) For example, the Florida State Bar, in lieu of either an amendment to the state rules of professional conduct or an ethics opinion, adopted a non-prosecution disciplinary policy that reads:

> The Florida Bar will not prosecute a Florida Bar member solely for advising a client regarding the validity, scope, and meaning of Florida statutes regarding medical marijuana or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy.\(^{40}\)

Illinois illustrated the “belt and suspenders” approach when the Illinois State Bar Association issued Professional Conduct Advisory Opinion 14-07\(^{41}\) and the Illinois Supreme Court amended the Illinois Rules of Professional Conduct. Citing the Preamble at paragraph [14] (“The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes

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\(^{35}\) Ariz. Ethics Op. 11-01 (2011) (“[W]e decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client’s proposed conduct is in “clear and unambiguous compliance” with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits.”)


of legal representation and of the law itself.”), Advisory Opinion 14-07 concludes a lawyer may provide legal services to a client under the Illinois cannabis law. However, the opinion also urged the Illinois Supreme Court to amend Illinois Rule 1.2(d) to specifically authorize such lawyer conduct.

Effective January 1, 2016, the Supreme Court of Illinois amended the Illinois Rules of Professional Conduct, Rule 1.2(d) as follows:

(d) 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

(1) discuss the legal consequences of any proposed course of conduct with a client,

(2) and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and

(3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.\(^42\)

Comment 10 to the Illinois Rules succinctly expresses the purpose for this amendment:

Paragraph (d)(3) was adopted to address the dilemma facing a lawyer in Illinois after the passage of the Illinois Compassionate Use of Medical Cannabis Pilot Program Act effective January 1, 2014. The Act expressly permits the cultivation, distribution, and use of marijuana for medical purposes under the conditions stated in the Act. Conduct permitted by the Act may be prohibited by the federal Controlled Substances Act, 21 U.S.C. §§801-904 and other law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by Illinois law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (d)(3) is not restricted in its application to the marijuana law conflict. A lawyer should be especially careful about counseling or assisting a client in other contexts in conduct that may violate or conflict with federal, state, or local law.\(^43\)

The Ohio Board of Professional Conduct reached the opposite conclusion in Opinion 2016-6. Strictly construing Ohio Rule 1.2(d), it found that Rule 1.2(d) prohibits a lawyer from assisting a client in a marijuana business allowed under state law because the lawyer knows marijuana is

\(^{42}\) ILL. SUP. CT. R. 1.2.

\(^{43}\) Id.
illegal under federal law. But subsequent to the advisory opinion, the Ohio Supreme Court amended Ohio Rule 1.2(d) by adding a (d)(2) which reads:

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.

Also in the stricter textual category is the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee and Professional Guidance Committee that jointly concluded that under Pennsylvania Rule 1.2(d) a lawyer could not counsel or assist a client on the manufacture, distribution, dispensation and possession of marijuana as they are crimes under federal law regardless of whether authorized under state law. However, a lawyer may explain the potential consequences of a proposed course of conduct, including discussion of state and federal law.

Perhaps most illustrative of the unsettled, but evolving, state approaches is found in Maine. Originally, the Maine Professional Ethics Commission concluded that role of the lawyer is limited. “While attorneys may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law, the Rule forbids attorneys from counseling a client to engage in the business or to assist a client in doing so.” This statement provided little guidance.

Several years later, the Commission re-evaluated that opinion noting that the consensus from other states was that lawyers “may ethically assist a client in legal matters expressly permissible under state law even if it may violate applicable federal law within certain parameters.” However, it continued to emphasize that Maine lawyers should stress to marijuana clients the risks that exist from the conflict between state and federal law. The Commission also recommended that the Maine Supreme Court amend its applicable rule of lawyer conduct.

As of the date of this article, in addition to Illinois, a number of other states including Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Washington have also addressed this question.

49 Id.
Most recently, California, adopted new California Rules of Professional Conduct Rule 1.2.1 and, most relevant, Comment 6:

Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.  

What is the Crime?

While the focus heretofore has been on the distinction between the federal Controlled Substances Act and various state laws making the use of medicinal and/or recreational marijuana legal or decriminalized. It also has been argued that lawyers who counsel or assist a client in any state marijuana related activities may be charged with federal crimes of aiding, abetting, being an accessory to a crime or a co-conspirator. This is particularly possible for, as Tom Wolfe quoted a New York Judge in The Bonfire of the Vanities, “a grand jury would ‘indict a ham sandwich,’ if that’s what you wanted.”

In that vein, this author has discovered only one U.S. lawyer who has been charged in connection with representation of a client engaged in a marijuana business. And that appears to have been more based upon local politics than actual criminal conduct. First, it was San Diego, California; second, the prosecutor was a high profile political figure who opposed the legalization of medical marijuana and who resigned from office to run for higher office in the midst of the case after California had voted to allow recreational marijuana. The prosecutor sought to search the lawyer’s client files to find evidence to support claim that the lawyer removed evidence from the client’s facility prior to a medical marijuana facility inspection. The illegal conduct alleged against the client was processing of pot infused products such as topical creams and canisters for vaping that were allegedly illegal under the medical marijuana law.

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53 There have been a few cases where lawyers were disciplined for conduct related to their personal use of marijuana, see, e.g., In re Edwards, 97 CH 28 (Ill. 1997), In re Barton, 22 DB Rptr. 266 (Ore. 2008), In re Quinlisk, 2016PR00091 (Ill. 2017).

While this demonstrates the risks a lawyer may encounter in a hostile environment, it also illustrates why a marijuana client needs legal advice. No disciplinary action was ever taken against the lawyer.

Application of Model Rules When State and Federal Laws Conflict

The Model Rules of Professional Conduct are primarily intended for adoption by state supreme courts as state rules to govern the conduct of lawyers admitted to practice law in jurisdictions. The Model Rules are also frequently used as models for various federal district and circuit courts, although those courts generally rely upon the states for primary admission and discipline of lawyers. Indeed, Congress has clarified that state supreme court disciplinary rules apply to lawyers employed by the Department of Justice and other agencies.55

Model Rule 1.2(d) was intended by the drafters to prohibit a lawyer assisting a client in clear criminality. ABA Formal Opinion 85-352 addressed the somewhat analogous question of a lawyer’s ability to advise and advocate for a client on the preparation of tax returns. At issue was how “aggressive” a lawyer could be in pursuing positions that were not explicitly stated in prior rulings by the IRS. After advising that the ethical standards for tax matters were no different than for any other civil matter, the Committee concluded that, on this question, there was no difference between the roles of “advisor” or “advocate”. While there are particular practices in the field of taxation, the general principle remains that a lawyer may advise and represent a client by pursuing a course of conduct in filing a return that the lawyer in good faith believes is “warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law.”

This is an application of the language in Rule 1.2(d) colloquially referred to as the “good faith exception”. The Rule explains that a lawyer “may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” As New York State Bar Association Opinion 1024 noted: “Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy.”56

Adopting this interpretation of Model Rule 1.2(d) would make amendment of the Model Rules unnecessary. While amendment may be appropriate on a state by state basis, it is not appropriate

for the Model Rules. Indeed, to suggest such an amendment is necessary and appropriate would require a de facto determination of the legal question of whether the federal or state law has primacy.

While, as noted above, several states with medical or recreational marijuana laws have chosen to amend their rules of lawyer conduct to address the perceived conflict, it is not necessary. But, regardless of whether a state has amended its rules of conduct to match its rules on marijuana, at a minimum, one can argue that since the lawyer is admitted to practice by a state, the state has precedence over the ethical governance of lawyers.

This point is supported by the action of the federal district court in Colorado. The federal court had followed the practice of adopting the Colorado Rules of Professional Conduct in “lockstep” with the state. However, upon the state’s adoption of Comment 14 to Colorado Rule 1.2(d) that allowed Colorado attorneys to assist clients with conduct-permitted under the Colorado marijuana laws, but not under federal law, the federal court diverged. Instead of adopting Colorado Comment 14, the federal court limited the attorney’s conduct to advising the client. This has been interpreted to mean not assisting the client in any conduct.  

While there have been no disciplinary actions confronting the conflict between the ethics rules of a federal court versus the ethics rules of the state, the open question is whether a lawyer admitted to both the state and federal bars in Colorado or any other state would be subject to discipline for advising and assisting a non-federal, state-only client.

A Lawyer May Ethically Advise a Client When State and Federal Laws Conflict

It is the opinion of this author that a lawyer does not violate the Model Rules of Professional Conduct, specifically Rule 1.2(d) or Rule 8.4(b), when a lawyer advises and/or assists a client under state law in operating or withdrawing from a business of medical or recreational marijuana to the extent that it is authorized by that jurisdiction. As do several of the state ethics opinions, the author recognizes that the lawyer who provides legal advice and services to a client in the cannabis business must be extremely careful and fully advise the client of the conflicting laws and the risks and challenges resulting. Indeed, Rules 1.1: Competence and 1.4: Communication (a)(2) and (b) mandate such conduct by the lawyer.


59 MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) & (b) (2017).
The fact that a conflict exists between federal authorities and thirty-four jurisdictions over cannabis and that this conflict is reflected in contradictory laws is not something that was contemplated by the drafters of Rule 1.2(d). Rather, the rule contemplates a more straightforward situation where a client intends direct illegality, such as that discussed in ABA Formal Opinion 463 (Client Due Diligence, Money Laundering and Terrorist Financing). 60 It does not require an interpretation of Rule 1.2(d) that forces a lawyer to choose between state or federal law when both are applicable to a client in the jurisdiction in which the lawyer practices and no other authority—the courts, Congress, the Executive Branch—has chosen to make the law clear. The lawyer’s obligation is to fully advise the client on all applicable law.

The activities that may be considered within a normal representation for other clients may take a different cast when a marijuana business allowed by state law is involved. For example, a lawyer who served as general counsel for two medical marijuana dispensaries was publicly censured in Colorado. The lawyer had established IOLTA accounts at a bank to use for paying taxes and bills for each of the dispensaries. However, the bank did not allow accounts that were connected with cannabis businesses. 61 Though the lawyer knew of the bank’s policy, he did not disclose the purpose of the accounts to the bank. Consequently, the lawyer was found to have violated Colorado Rule 8.4(c) prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation (comparable to ABA MRPC Rule 8.4(c)). 62

60 The Model Rules of Professional Conduct and the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (“Good Practices Guidance”) are consistent in their ethical principles, including loyalty and confidentiality. The Good Practices Guidance provides information to help lawyers recognize and evaluate situations where providing legal services may assist in money laundering and terrorist financing. By implementing the risk-based control measures detailed in the Good Practices Guidance where appropriate, lawyers can avoid aiding illegal activities in a manner consistent with the Model Rules.

61 The Department of Justice issued a memorandum discussing its policy on prosecution of financial crimes in connection with cannabis business. See JAMES COLE, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS, GUIDANCE REGARDING MARIJUANA RELATED FINANCIAL CRIMES (FEB. 14, 2014), http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202014%20(2).pdf. Ironically, the Colorado credit union that sought approval from the Federal Reserve was successful in litigation to obtain federal recognition, Fourth Corner Credit Union v. Federal Reserve Bank of Kansas, No. 16-1016 (10th Cir. 2017). Subsequent to the reverse and remand ordered by the 10th Circuit and in settlement of the matter, the Federal Reserve Bank of Kansas City granted, with conditions, the Colorado credit union a “master account” required to do business with other banks. Marijuana Credit Union Granted Conditional Account by Federal Reserve Bank (Feb. 9, 2018), https://www.westword.com/marijuana/colorado-marijuana-credit-union-granted-conditional-account-by-federal-reserve-bank-9969837. Review of bank practices reveal numerous banks, included industry leaders, have accepted business from the marijuana industry. See Tom Angell, More Banks Working With Marijuana Businesses, Despite Federal Moves, FORBES (June 14, 2018), https://www.forbes.com/sites/tomangell/2018/06/14/more-banks-working-with-marijuana-businesses-despite-federal-moves/#483ab571b1b2. Indeed, Treasury Sec. Steven Mnuchin, has suggested in several appearances before congressional committees that he would like to see marijuana businesses be able to access banking services. Tom Angell, Trump Treasury Secretary Wants Marijuana Money In Banks, FORBES (Feb. 6, 2018), https://www.forbes.com/sites/tomangell/2018/02/06/trump-treasury-secretary-wants-marijuana-money-in-banks/#487efef83a53.

62 People v. Furtado, No. 15PDJ056 (Colo. 2015).
Similarly, should the present conflict between the state and local laws and the federal government change, the lawyer will be required to reevaluate the nature and scope of representation that is allowed. For example, if the U.S. Supreme Court were to rule that a state’s recreational marijuana law was unconstitutional and that the CSA was supreme, a lawyer in that state would be confronted with a Rule 1.2(d) issue if a client wanted the lawyer’s representation for establishment of a recreational marijuana business. Model Rule 1.2, Comment [13] is instructive in explaining “[i]f a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law…the lawyer must consult with the client regarding the limitations on the lawyer’s conduct.” This would not, however, restrict the lawyer from advising or representing the client in, for example, bringing a marijuana business into compliance or in winding down such business. Nor would Rule 1.2(d) contradict a lawyer’s advocacy under Rule 3.1 for modification or reversal of any change.⁶³

Conclusion

A lawyer does not violate the Model Rules of Professional Conduct, particularly Rules 1.2(d) and 8.4(c), by advising and/or representing a client in establishing, operating, or withdrawing from a medical or recreational business involving marijuana permitted by state law despite the existence of a conflict in laws between federal, state, and/or local jurisdictions. However, it is incumbent on the lawyer to fully inform the client of such conflicts and the potential risks involved. To do otherwise would deprive the client of legal advice and representation when it is most needed.