RAIN & ZEPP
A PROFESSIONAL LAW CORPORATION

Industry Law in Cannabis Country

Omar Figueroa, Esq.

www.omarfigueroa.com

info@omarfigueroa.com

May a lawyer ethically represent a client pursuing a cannabis enterprise?

Imagine This Scenario

Mary Jane comes to you for a consultation. She wants to open up a cannabis dispensary in the city supplied with cannabis grown on her rural property.

Mary Jane's Questions

1) How much cannabis can I grow?

2) Do I need to set up a corporation and get a business license? Can you help me with the process?

3) I can't grow my entire supply for the dispensary. Can you send your big cultivation clients to my dispensary? I can give you a percentage for the referral.

4) How can I transport my harvest without getting busted? Should I have a secret compartment?

5) I've been seeing a lot of helicopters and reading about raids around here. Where should I hide my cash in case I get raided? Should I put it in the bank, bury it, or put it in an offshore account?

California Cannabis Law Timeline

1996
Prop 215

- Legalized for Medical Use
- Medical recommend-ation needed
- Patients and Primary Caregivers

2004
SB 420

- State ID cards for medical
- Limited Immunity (Collectives & Coops)

2010
SB 1449

- Prop 19 on the Ballot
- Possession of up to 1 ounce decriminalized
- Infraction and up to $100 fine
- No Jury Trial

2016
MCRSA

- Established Bureau of Medical Marijuana Regulation (BMMR)
- Dual licensing: local permit & state license

2016
AUMA

- "Legalized" Non-Medical Use for Adults 21 and Over
- Dual licensing
- Reduced criminal penalties

2017
MAUCRSA

- Combined Medical and Adult Use Regulatory Systems
- Dual licensing
- Bifurcated licensing: M-Type 7 A-Type 7

Federal Law

Crime to Grow, Sell, or Possess Marijuana

And

"Whoever commits an offense against the United States or aids, abets, **counsels**, commands, induces or procures its commission, is punishable as a principal."

18 U.S.C. § 2(b)

Federal Penalties for Marijuana

Amount of Marijuana	First Offense	Second Offense
1,000 kilograms or more marijuana mixture/ 1,000 or more marijuana plants	Not less than 10 yrs. or more than life	Not less than 20 yrs. or more than life.
100 to 999 kilograms marijuana mixture or 100 to 999 marijuana plants	Not less than 5 yrs. or more than 40 yrs	Not less than 10 yrs. or more than life
50 to 99 kilograms marijuana mixture, 50 to 99 marijuana plants	Not more than 20 yrs	Not more than 30 yrs
less than 50 kilograms marijuana or 1 to 49 marijuana plants	Not more than 5 yrs	Not more than 10 yrs

Continuing Criminal Enterprise (CCE) "Kingpin" (21 U.S.C. 848)

1st offense: 20 year mandatory minimum

→→→→→→→→→→→→→→→→→→→→ 20 years to life and up to $2 million

2nd offense: 30 mandatory minimum

→→→→→→→→→→→→→→→→→→→→ 30 years to life and up to $4 million

Mandatory life imprisonment

Any offense, if the offender is: 1) a "principal administrator, organizer, or leader", and; 2) the enterprise grosses $10 million during any twelve-month period or the violation involved at least 30,000 or more plants and/or kilograms

→→→→→→→→→→→→→→→→→→→→ life and up to $4 million

Asset forfeiture upon conviction

Ninth Circuit Manual of Modern Criminal Jury Instructions

9.30 CONTROLLED SUBSTANCE—CONTINUING CRIMINAL ENTERPRISE
(21 U.S.C. § 848)

The defendant is charged in [Count _____ of] the indictment with engaging in a continuing criminal enterprise in violation of Section 848 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the violation[s] of [*specify drug law violation*] [as charged in [Count[s] _____ of] the indictment];

Second, the violation[s] [was] [were] part of a series of three or more violations committed by the defendant over a definite period of time, with the jury unanimously finding that the defendant committed each of at least three such violations;

Third, the defendant committed the violations together with five or more other persons. The government does not have to prove that all five or more of the other persons operated together at the same time, or that the defendant knew all of them;

Fourth, the defendant acted as an organizer, supervisor or manager of the five or more other persons; and

Fifth, the defendant obtained substantial income or resources from the violations.

"Income or resources" means receipts of money or property.

Racketeering (RICO) 18 U.S.C. 1963

Commission of a pattern of racketeering activity including one or more narcotic or dangerous drug felony to invest in, acquire, operate or participate in the affairs of an interstate enterprise.

Any offense, narcotic and dangerous drugs ➔➔➔➔➔➔➔➔➔ Up to 20 years or life (if the maximum for the predicate is life) and up to $250,000

No Consigliere Defense

Consigliere - a member of a criminal syndicate who serves as an adviser, especially to the crime boss. The word was popularized by the novel The Godfather (1969) and its film adaptation.

DOJ Ogden Memorandum 2009

Federal resources should not be focused on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."

"Prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department."

DOJ Cole Memoranda

2011 - Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

2013 - Guidance Regarding Marijuana Enforcement

DOJ Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (2011)

"Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law."

"State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in the transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial crimes."

DOJ Guidance Regarding Marijuana Enforcement (2013)

<u>Enforcement Priorities are to Prevent:</u>

- Distribution of marijuana to minors
- Sales revenue going to criminal enterprises, gangs, and cartels
- Diversion from legal states to other states
- State-authorized activity from being used as a cover for illegal activity
- Violence and use of firearms in cultivation and distribution
- DUI and other adverse public health consequences
- Growing on public lands: public safety and environmental dangers
- Possession or use on federal property

DOJ Weasel Words

“ This memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law.”

DOJ Policy Statement Regarding Marijuana Issues in Indian Country

"The eight priorities in the Cole Memorandum will guide the U.S. Attorneys' marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country."

"Good people don't smoke marijuana."

More Federal Enforcement?

- Concerns about a federal crackdown on medical and adult use cannabis after years of a hands-off approach during Obama administration.
- Attorney General Jeff Sessions has spoken out against marijuana legalization, saying it leads to violence and addiction.
  - DOJ Task Force on Crime Reduction and Public Safety (Feb. 9, 2017)
  - New DOJ Memo on Charging and Sentencing policy (May 10, 2017)
  - Marijuana Subcommittee
  - Sessions reply to Colorado Governor John Hickenlooper (July 24, 2017)

Situation constantly changing

AG Memo on Department Charging and Sentencing Policy (May 10, 2017)

- AG Sessions issued a new memo to federal prosecutors instructing them to charge the most serious provable offense and to impose the maximum allowable sentence, including mandatory minimums.
- Decisions to vary from stated policy must be approved by a U.S. Attorney, Assistant Attorney General, or other designated supervisor, and the reason(s) for deviation must be documented.
- Explicitly overrides Holder-era *Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases* (Aug. 12, 2013) and *Guidance Regarding §851 Enhancements in Plea Negotiations* (Sept. 24, 2014), which both gave prosecutors discretion on how to charge and sentence when dealing with low-level non-violent drug offenders.
- Implicitly overrides other previous inconsistent DOJ policies, including potentially the *Cole* memo.

Letter from Sessions to Hickenlooper, (July 24, 2017)

Dear Governor Hickenlooper:

Thank you for your letter of April 3, 2017, which I have attached to this letter as Exhibit A for your convenience. As we discussed in our subsequent meeting at the end of April, I am pleased that you share my concern for public health and safety and my belief that the federal and state governments should work together to address our country's concerns with marijuana. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a crime. The Department remains committed to enforcing the Controlled Substances Act in a manner that efficiently applies our resources to address the most significant threats to public health and safety. I look forward to working with you on these issues. As you know, the Office of National Drug Control Policy led a trip to Colorado to work with your staff on these issues, and the Department sent a representative on that visit.

After our meeting, I re-read with interest the statement in your letter that you "have worked . . . to establish robust regulatory structures that prioritize public health and public safety," and that you believe that the 2013 Cole Memorandum, its eight enforcement priorities, and related memoranda are an "indispensable" part of the "framework" in your state. In that regard, I would note the concluding paragraph: "nothing herein [in the Cole Memorandum] precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest." Thus, the memorandum "does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law."

I also recently read the 2016 report by the Rocky Mountain High Intensity Drug

Letter from Sessions to Hickenlooper, (July 24, 2017)

- "Emergency Department rates likely related to marijuana increased 49 percent" after Colorado enacted "recreational marijuana" laws;
- "Marijuana-related traffic deaths increased 62 percent" after Colorado enacted "recreational marijuana" laws and operators tested positive for marijuana in 21 percent of traffic deaths in 2015, more than double the rate for 2009; and
- "Marijuana-related exposures increased 100 percent" after Colorado enacted "recreational marijuana" laws.

These findings are relevant to the policy debate concerning marijuana legalization. I appreciate your offer to engage in a continuing dialogue on this important issue. To that end, please advise as to how Colorado plans to address the serious findings in the Rocky Mountain HIDTA report, including efforts to ensure that all marijuana activity is compliant with state marijuana laws, to combat diversion of marijuana, to protect public health and safety, and to prevent marijuana use by minors. I also am open to suggestions on marijuana policy and related matters as we work to carry out our duties to effectively and faithfully execute the laws of the United States. You may direct your response and suggestions to the Intergovernmental Affairs and Public Liaison within the Office of Legislative Affairs, which can help coordinate any communications logistics. I look forward to your response.

Sincerely,

Jefferson B. Sessions III
Attorney General

Marijuana Related Financial Crimes Even if Client Doesn't "Touch the Plant"

Financial transactions involving proceeds generated by marijuana related conduct can form the basis for prosecution under:

- Money laundering statutes (18 U.S.C. §§1956 and 1957)
- Unlicensed money transmitter statute (18 U.S.C. § 1960)
- Failing to identify/report financial transactions that involve proceeds of marijuana-related violations of the Controlled Substances Act (Bank Secrecy Act)

Consultants Charged in State Court: South Dakota "Adult Playground"

- The Flandreau Santee Sioux Tribe hired consultants from Colorado to help with their plans to open the first marijuana resort on tribal land.
- South Dakota's Attorney General charged Eric Hagen and Jonathan Hunt with conspiracy and attempt to possess marijuana for their assistance to the tribe.
- They allegedly helped the tribe smuggle cannabis seeds from the Netherlands.
- The tribe has not been charged, but has ceased plans for the "adult playground."

Federal Preemption Limited

21 U.S.C. § 903.

Application of State law:

"No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together."

Consolidated Appropriations Act, 2017

§ 538. None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arkansas, Arizona, **California**, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, **to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana**.

United States v. McIntosh (9th Cir., Aug. 16, 2016, No. 15-10117.)

The Ninth Circuit held that federal marijuana defendants can present a "strict compliance with state law" medical cannabis quasi-defense to federal charges in federal court.

"Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana. We leave to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate."

*Narrow Holding

*No Federal Injunction

U.S. v. Pisarski, Order by Judge Seeborg Granting Motion for Temporary Stay (August 8, 2017)

United States District Court
Northern District of California

B. Defendant's Strict Compliance with California Medical Marijuana Law

Pisarski and Moore's case presents something of a temporal conundrum. They have admitted and pleaded guilty to possession, cultivation, and possession for sale. They have not been charged with or admitted to any sales, and the government has not offered any evidence of sales. The government has also failed to offer any evidence of an impending sale as of July 2012, and the defendants have only offered limited evidence of such — evidence that Pisarski may have, sometime after July 2012, provided marijuana to the Covello Cut Off and/or Ramrattan collectives, should the 327 plants on the Humboldt County property have yielded sufficient marijuana to distribute. The parties thus agree defendants' strict compliance with California law can only be assessed as of the date of the charged conduct — July 10, 2012. It is not apparent, however, that the MPAA would have required on that date defendants show that any potential future sale would be fully compliant with its requirements.

Although the MPAA offers immunity from prosecution for possession for sale, its relevant provision does not speak to the issue of prospective compliance, but rather seems concerned with contemporaneous conditions. California case law does not offer much further guidance with respect to how compliance can be assessed prospectively in such circumstances, except

U.S. v. Pisarski, Order by Judge Seeborg

patients under the CUA). In the face of, but consistent with, such minimal guidance, it would seem the best approach to determining the applicability of the collective cultivation defense in the case of a defendant charged with possession for sale would be to require of the defendant a showing proportional to the imminence and definiteness of the alleged sale. That is to say, where a sale is imminent and the features of the sale definite, the defendant must show every aspect of that sale was compliant with the terms of MPAA; where, however, any future sale is purely speculative, the defendant must show only that, by the time of such sale, he could ensure compliance.

This case falls between these two extremes, but toward the latter end of that spectrum; defendants may, at some date after July 10, 2012, have distributed marijuana to the Covello Cut Off and/or Ramrattan collectives. Neither party has brought forth any evidence with respect to when or under what conditions such sales would have occurred, how much marijuana would have been sold, or what it would have been sold for.

Defendants have not made an exhaustive or optimal evidentiary showing, but have sufficiently indicated that, to the extent any of the yield of their 327 marijuana plants would have been sold, it would have been sold to a collective on a not-for-profit basis. Their evidence indicates that, had any sale occurred, it would have been to the Covello Cut Off and/or Ramrattan collectives for reimbursement only. Importantly, defendants' evidence indicates any potential sale was sufficiently far into the future that, by the time of such sale, they would have had ample time to ensure every aspect of it complied with the MPAA.[4]

The government has not offered any evidence to the contrary. It argues defendants fail to establish any sale would have been not-for-profit, but defendants have proffered, through

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[4] Defendants' evidence contemplates only Pisarski distributing marijuana to the Covello Cut Off and/or Ramrattan collectives, and neither party has offered any evidence as to Moore's potential sales activities. Yet because Pisarski and Moore operated on the same property and both pleaded guilty to conspiracy to manufacture and possess with intent to distribute marijuana, the only inference the record supports is that Moore's plea and admissions contemplate sales, with Pisarski, to the Covello Cut Off and/or Ramrattan collectives. Thus, his ability to invoke the collective cultivation defense is evaluated on this basis.

California Rules of Professional Conduct

Rule 3-210:

"A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal."

Example of a Meritorious Challenge

Challenge the Constitutionality of the schedule 1 classification of marijuana:

Schedule 1 drugs are classified as having a high potential for abuse, having no currently accepted medical use in treatment in the U.S., and there is a lack of accepted safety for use of the drug or other substance under medical supervision.

Schedule 1 drugs include heroin, LSD, ecstasy, peyote, and marijuana.

The constitutionality of the Schedule 1 classification of marijuana has been challenged recently in U.S. v. Pickard. The Court stated:

- "The evidence of record shows there are serious, principled differences between and among prominent, well-informed, equivalently credible experts."
- "To say the landscape with respect to marijuana has changed significantly since 1970, in many ways, is an understatement."

Crime Exception to the Attorney-Client Privilege

- **Bar Association of San Francisco Ethics Opinion 2015-1:**

"The lawyer should warn the client that their communications may not be privileged in the event of litigation."

- **Bus. & Prof. Code § 6068(e)(1):**

A lawyer must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

- **Evidence Code § 956:**

The "crime fraud" exception to the attorney-client privilege applies if the lawyer's services are obtained to help the client to plan or to commit a crime.

- ***People v. Clark* (1990) 50 Cal.3d 583, 621-23:**

A client's mere disclosure of intent to commit a crime is privileged. But there is NO privilege where he seeks legal assistance to plan or perpetrate a crime.

Current Case: *People v. Jessica McElfresh* (2017)

- Jessica McElfresh, a California criminal defense attorney, is currently being charged with several felonies related to her representation of a medical cannabis business.
- The complaint alleges that Ms. McElfresh conspired with clients to hide evidence of illegal activity from local inspectors. The complaint relied on a privileged email communication between Ms. McElfresh and her client.
- Judge Rogers initially ruled that attorney-client privilege should no longer apply to certain records because of the crime-fraud exception and the illegality of marijuana under federal law.
- Judge Halgren later ruled that since the search warrant was based on alleged violations of state law, the federal prohibition on marijuana does not automatically mean that the crime-fraud exception to the privilege applies.
- This case could have a chilling effect on other lawyers serving the cannabis industry.

San Francisco, CA

Bar Association of San Francisco Ethics Opinion 2015-1:

"A California attorney may ethically represent a California client in respect to lawfully forming and operating a medical marijuana dispensary and related matters permissible under state law, even though the attorney may thereby aid and abet violations of federal law. However, the attorney should advise the client of potential liability under federal law and relevant adverse consequences and should be aware of the attorney's own risks."

Los Angeles, CA

Los Angeles County
Bar Association Opinion No. 527:

"A member may advise and assist a client regarding compliance with California's marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California's marijuana laws, a member must limit the scope of the member's representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law."

CA Supreme Court Committee on Judicial Ethics Opinions

CJEO Formal Opinion 2017-010:

"An interest in an enterprise involving the sale or manufacture of marijuana that is in compliance with state and local law is still in violation of federal law pursuant to the Controlled Substances Act. (21 U.S.C. §§ 801-904.) A violation of federal law violates a judge's explicit obligation to comply with the law (canon 2A) and is an activity that involves impropriety or the appearance of impropriety (canon 2). Moreover, such extrajudicial conduct may cast doubt on a judge's capacity to act impartially. (Canon 4A(1).) Therefore, the committee advises that a judicial officer should not have an interest in an enterprise that involves the sale or manufacture medical or recreational marijuana."

Issued April 19, 2017

Proposed New and Amended California Rules of Professional Conduct

Adopted by the Board of Trustees on March 9, 2017

Not operative until approved by the Supreme Court of California

Rule 1.2.1 Advising or Assisting the Violation of Law

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(b) Notwithstanding paragraph (a), a lawyer may:

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

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

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.

Proposed New and Amended California Rules of Professional Conduct

Comment

[1] There is a critical distinction under this rule 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. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code § 6068(a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code § 6068(e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

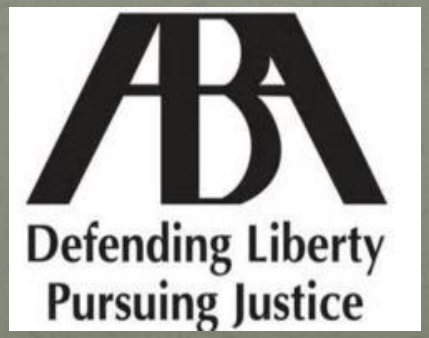
[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.

[5] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. See rule 1.4(a)(4).

[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.

ABA Rule 1.2 (d)

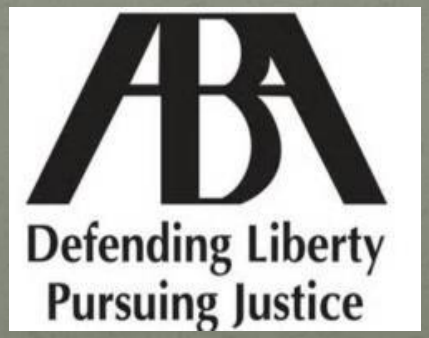
A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the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



ABA Rule 1.2 (d) Comment 9

Comment 9 succinctly captures the essential difference between “advising” and “assisting”:

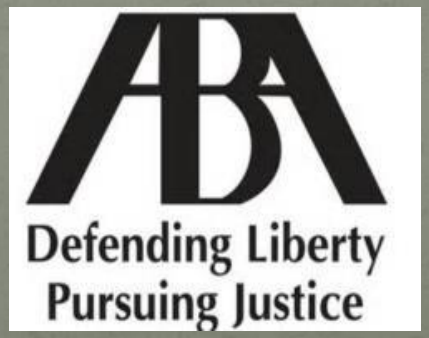
“There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”



ABA Rule 8.4 (b)

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



Colorado

Colorado Supreme Court adopted Comment [14] to amend Rule 1.2(d):

"A lawyer may counsel a client regarding the validity, scope, and meaning of [Colorado's Constitutional marijuana provision] and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

Washington

Washington Supreme Court added comment [18] to Rule 1.2:

"At least until there is a subsequent change of federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders and other state and local provisions implementing them."

Oregon

Oregon Supreme Court Adopted 1.2(d):

"A lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. 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."

Nevada

Nevada Supreme Court adopted

Comment [1] to Nevada Rule of Professional Conduct 1.2:

"A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution article 4, section 38, and NRS chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

Alaska

Alaska Supreme Court added 1.2(f):

"A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy."

Hawaii

Hawaii Supreme Court amended Rule 1.2(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 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, and may counsel or assist a client regarding conduct expressly permitted by Hawai'i law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct."

Massachusetts

Board of Bar Overseers and

Office of Bar Counsel Policy on Medical Marijuana:

"The Massachusetts Board of Bar Overseers and Office of the Bar Counsel will not prosecute a member of the Massachusetts Bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, or other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy."

Arizona

State Bar of Arizona Ethics Opinion 11-01:

An attorney may assist a client in engaging in medical marijuana in compliance with Arizona law, provided that:

(1) At the time, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void, or otherwise invalid

(2) The lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law

(3) The lawyer advises the client regarding possible federal law implications

Connecticut

- The Superior Court amended Rule 1.2(d) and its Official Commentary to make clear that lawyers are permitted to assist clients concerning conduct permitted under state law provided clients are also counseled about the legal consequences of the client's proposed conduct under other applicable law.

- The Official Commentary to Rule 8.4 was modified to add the following language:

"Counseling or assisting a client with regard to conduct expressly permitted under Connecticut law is not conduct that reflects adversely on a lawyer's fitness notwithstanding any conflict with federal or other law."

Illinois

Supreme Court of the State of Illinois Amended Rule 1.2(d):

(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) 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.

New York

New York State Bar Association

Ethics Opinion 1024:

A lawyer may assist a client in conduct designed to comply with state medical marijuana law.

The lawyer must take careful guidance from the United States Department of Justice.

New Jersey

Amendment to Rule 1.2(d):

"A lawyer may counsel a client regarding New Jersey's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy."

Florida

The Florida Bar Board of Governors adopted the following policy:

"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 and local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy."

District of Columbia

DC Bar Counsel Article (2015):

"The Bar Counsel is not out to prosecute lawyers who, in good faith, assist clients in conduct that is in strict compliance with District of Columbia law."

"We anticipate exercising discretion similar to that laid out in the Department of Justice guidance memos."

"Our office will not hesitate to step in if an attorney's marijuana use adversely affects his or her ability to ethically and competently practice law."

Maryland

Ethics Docket No. 2016-10:

Lawyers are permitted to advise about cannabis businesses and are permitted to own cannabis business ventures; however this is only an advisory opinion that offers no immunity. Attorney use is not addressed.

Pennsylvania

Joint Formal Opinion 2015-100:

In response to this opinion, rules were amended by adding a new paragraph to rule 1.2. Lawyers "may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct."

North Dakota

Opinion 14-02:

"An attorney who lives in Minnesota and is approved to use medical marijuana cannot be licensed to practice law in North Dakota and practice law without violating 8.4(b)."

Ohio

Ohio Board of Professional Conduct, Opinion 2016-6:

"A lawyer may counsel or assist a client regarding conduct expressly permitted under Substitute H.B. 523 of the 131st General Assembly [Ohio's medical marijuana law] authorizing the use of marijuana for medical purposes and any state statutes, rules, orders or other pro-visions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law."

New Mexico

Ethics Formal Opinion 2016-01:

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal. A lawyer may, however, 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."

According to the NM State Bar, the rule prohibits a lawyer from counseling or assisting a marijuana business. Lawyers licensed in NM and practicing in other jurisdictions are not immune even if the other jurisdictions permit such counseling and advice.

Minnesota

Immunity included in
Medical Marijuana Statute:

"An attorney may not be subject to disciplinary action by the Minnesota Supreme Court or professional responsibility board for providing legal assistance to prospective or registered manufacturers or others related to activity that is no longer subject to criminal penalties under state law pursuant to sections 152.22 to 152.37."

Maine

Professional Ethics Commission, Opinion 215:

"…specific instance of the marijuana laws, lawyers should not be subject to discipline for counseling or assisting clients to engage in conduct that conforms to Maine law, merely because that conduct violates a federal law, so long as federal authorities have declared they have no intention of enforcing the federal law against those who are complying with relevant state law." Lawyers should advise on federal laws as well.

New Hampshire

No formal opinions yet, but:

August 30, 2016 bar association ethics committee requested guidance from the NH Supreme Court on amendment of 1.2(d).

Louisiana

No formal opinions yet, but:

Louisiana Bar Association Rules of Professional Conduct Committee discussed the issue in November 2016. The Committee refused to recommend changes to the rule, citing federal supremacy, opining that such permission to advise would be illegal.

Practice Tips

- Inform your client of current state laws and how to avoid state violations.
- Assist your client only in matters conforming to state law.
- Inform your client of the risks associated with the business under federal law.
- Advise your client on how to minimize the risk of federal prosecution in accordance with the DOJ memoranda.
- Advise your client on limitations of confidentiality.
- Warn your client that, if he engages in violations of state law, or in a manner that invites federal prosecution, you may withdraw from representation.

Back to Sweet Mary Jane

Mary Jane comes to you for a consultation. She wants to open up a cannabis dispensary in the city supplied with cannabis grown on her rural property.

Legal Advice
v.
Business Advice

Mary Jane's Questions

1) How much cannabis can I grow?

- You may advise her on the different license categories for cultivation within the state and county, and how to comply with both.
- You may assist her in the licensing application process for her local area.
- You MUST advise her of the federal law and penalties.

Mary Jane's Questions

2) Do I need to set up a corporation and get a business license? Can you help me with the process?

- You may advise her of the different entities and the benefits and drawbacks of each.
- You may help with the process of incorporation/formation and obtaining a business license.
- You may advise her on the state and local laws associated with the business.
- You MUST advise her of the federal law and penalties.

Mary Jane's Questions

3) I can't grow my entire supply for the dispensary. Can you send your big cultivation clients to my dispensary? I can give you a percentage for the referral.

- You may not disclose the names or information pertaining to other clients.
- You may not obtain any financial interest in the profits of the federally illegal business.

Mary Jane's Questions

4) How can I transport my harvest without getting busted? Should I have a secret compartment?

- You may advise her of the state and local regulations for transportation of cannabis.
- You may advise her on the state and local cannabis licenses, including a distribution license, and aid her in the process of obtaining a license.
- You MUST advise her of the federal law and penalties.
- You MUST advise her on the law related to secret compartments and advise against concealment within a secret compartment.

Mary Jane's Questions

5) I've been seeing a lot of helicopters and reading about raids around here. Where should I hide my cash in case I get raided? Should I put it in the bank, bury it, or put it in an offshore account?

- You cannot advise her on where to put her money, especially if you are aware that it was obtained through illegal means.

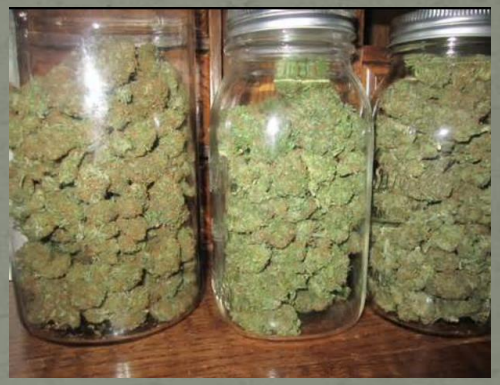
- You should advise her of the financial crimes discussed previously.
- You should warn her of the "crime fraud" exception to the attorney-client privilege.

Jailed and Disbarred

- Richard Brizendine laundered nearly $400,000 for his client known as “Pops.”
- Pops owned marijuana dispensaries throughout Southern California that generated more than $25 million.
- Brizendine was given bulk cash from marijuana sales, which he deposited into a variety of bank accounts in $10,000 or less increments to avoid federal filing requirements.
- Brizendine was sentenced to 3 months in prison and 2 years supervised release.

No Bartering with Weed for Legal Fees

- James Meca, a Louisiana attorney, accepted marijuana as payment for legal fees.
- A sting operation resulted in his arrest when an informant told the sheriff's office that his attorney told him he would accept a "backpack full of marijuana" in exchange for legal representation.
- He was sentenced to 6 months in jail and a year of probation.



- He enrolled in a drug treatment program.
- The Louisiana Disciplinary board found Mecca violated the Rules of Professional Conduct, but considered his remorse and progress in treatment. They recommended a one year deferred suspension of his law license.

Questions?

Presentation Created By:

Law Offices of Omar Figueroa
7770 Healdsburg Ave., Suite A
Sebastopol, CA 95472

(707) 829-0215

info@omarfigueroa.com

www.omarfigueroa.com

Special thanks to associate Lauren Mendelsohn