

Legal Ethics and Marijuana: Representing Clients

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Controlled Substances Act 21 U.S.C. § 801 et seq.

The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. 21 U.S.C. § 802

Controlled Substances Act 21 U.S.C. § 841 et seq.

- ▶ “Marihuana” includes hemp, medical marijuana and recreational marijuana, regardless of THC content, and is a Schedule I drug
- ▶ Schedule I: high potential for abuse; no currently accepted medical use in treatment in the United States; lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812
- ▶ Illegal to possess, manufacture, distribute, etc.

Legalization of Cannabis

- ▶ Thirty states have legalized medicinal marijuana under state regulatory regimes.
- ▶ Nine states have legalized recreational marijuana under state regulatory regimes.
- ▶ The Farm Bill allows cultivation of industrial hemp in certain circumstances (is marketing, transport, etc. allowed?)

Rule 1.2(d) of the Code of Professional Responsibility

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.

Comments to Rule 1.2(d)

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

Comments to Rule 1.2(d)

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. 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. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Comments to Rule 1.2(d).

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Comments to Rule 1.2(d).

[13] If 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 or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Solution 1: Rule 1.2(d) allows attorneys to ethically represent Cannabis businesses

- ▶ With limitations
- ▶ Colo. Ethics Op. 125 (2013): lawyer may advise client about state or federal law governing marijuana use or commerce **but may not assist client** in marijuana transactions such as drafting or negotiating contracts that would violate federal law
- ▶ Colo. Rule of Prof'l Conduct 1.2, cmt. [14]: "A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, 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" Colo. Ethics Op. 125 (2013) revoked

Solution 1: Rule 1.2(d) allows attorneys to ethically represent Cannabis businesses (with limits)

- ▶ Ariz. Ethics Op. 11-01 (2011): permissible under Rule 1.2(d) for lawyer to **assist** clients wishing to start businesses or engage in other actions permitted under Arizona Medical Marijuana Act
- ▶ Conn. Ethics Op. 2013-02 (2013): lawyer may advise and represent client concerning state requirements for licensing and regulation of businesses that grow or dispense marijuana for medical purposes but must inform client that such businesses violate federal criminal statutes, and lawyer **may not assist** client in criminal conduct

Solution 1: Rule 1.2(d) allows attorneys to ethically represent Cannabis businesses (with limits)

- ▶ N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1024 (2014): added different dimensions to the analysis and concluded that lawyers **may provide legal assistance beyond merely discussing the legality of the client's conduct**. In its analysis, the New York opinion drew attention to Rule 8.4(b).
- ▶ Wash. St. Bar Opinion 201501: Refers to Cole Memorandum and Rule 8.4 in opining that **attorney may ethically assist client in marijuana business** under state law

Does Attorney General Sessions' disavowment of the Cole Memorandum affect these opinions?

Solution 2: Rule 1.2(d) does not allow attorneys to ethically represent Cannabis businesses

- ▶ Me. Ethics Op. 199 (2010): Rule 1.2 makes no “distinction between crimes which are enforced and those which are not,” so lawyer must “determine whether the particular legal service being requested rises to the level of assistance in violating federal law”
- ▶ Supreme Court of Ohio Bd. of Prof’l Conduct, Op. 2016-6: similar to Maine, very narrow interpretation, listed negotiating contracts, forming business entities, and property transactions as not allowable; OHIO RULES OF PROF’L CONDUCT r. 1.2(d)(2) (2016): (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. (e) Unless otherwise required by law

Solution 2: Rule 1.2(d) does not allow attorneys to ethically represent Cannabis businesses

- ▶ The California Supreme Court recently approved new ethics rule 1.2.1. Most importantly to attorneys representing clients with respect to marijuana, Comment 6 explains that 1.2.1(b) allows attorneys to advise a client on California laws that may conflict with tribal or federal law.
- ▶ “drafting or administering, or interpreting or complying with California law”

Solution 3: Amend Rule 1.2

West Virginia

(e) A lawyer may counsel **or assist** a client regarding conduct expressly permitted under Senate Bill 386, the West Virginia Medical Cannabis Act, authorizing the use of marijuana for medical purposes and any state rules, regulations, orders, policies and procedures implementing the aforesaid act, as amended. In these circumstances, the lawyer shall advise the client regarding related federal law.

“Counseling” v. “Assisting”

- ▶ “Counseling” by a lawyer within the meaning of the Section means providing advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client’s action.
- ▶ “Assisting” a client refers to providing, **with a similar intent**, other professional services, such as preparing documents, drafting correspondence, negotiating with a non-client, or contacting a governmental agency.

Restatement (Third) of the Law Governing Lawyers § 94, Comment a. (2000).

- ▶ Kamin and Wald (2013) seem to argue for a similar intent requirement (Does it matter?)

Sam Kamin and Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?, 91 Or. L. Rev. 869 (2013).

Clearly Permissible Legal Services

- ▶ Criminal defense
- ▶ Political Advocacy and Lobbying
- ▶ Advising Clients on the State of the Law

Clearly Prohibited Legal Services

Introductions, etc. to facilitate business

People v. Morley, 725 P.2d 510 (Colo. 1986)
(prostitution)

Questionable Legal Services

- ▶ Compliance work
- ▶ Negotiation and drafting (leases, contracts, etc.)

References

- ▶ Phil Cherner, Marijuana and Your License to Practice Law: A Trip through the Ethical Rules, Halfway to Decriminalization, 41 J. LEGAL PROF. 19-35 (2017).
- ▶ Mark J. Fucile, The Intersection of Professional Duties and Federal Law as States Decriminalize Marijuana, 23 No. 1 Prof. Law. 34 (2015).
- ▶ Sam Kamin and Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?, 91 Or. L. Rev. 869 (2013).
- ▶ Jesse Montoya, To Discipline or Not to Discipline: A Framework for New Mexico to Analyze the Ethics of Medical Marijuana Representation, 47 N.M. L. Rev. 357 (2017) (Student Note).
- ▶ Eli Wald, Eric B. Liebman, and Amanda R. Bertrand, Representing Clients in the Marijuana Industry: Navigating the State and Federal Rules 44-AUG Colo. Law. 61 (2015).

References

- ▶ American Bar Association, Model Rules of Professional Conduct 2017.
- ▶ Ariz. Ethics Op. 11-01 (2011).
- ▶ Washington State Bar Association, Opinion 201501 (2015).
- ▶ Colorado Bar Association, Formal Opinion 124 (April 23, 2013, amended December 10, 2013).
- ▶ Colo. Ethics Op. 125 (2013).
- ▶ Colo. Rule of Prof'l Conduct 1.2.
- ▶ Conn. Ethics Op. 2013-02 (2013).
- ▶ Me. Ethics Op. 199 (2010).
- ▶ New Mexico Bar Association, Formal Opinion 2016-1 (August 2016) (issued after State Supreme Court advised in letter that the Court would not approve explicit amendments to RPC 1.2(d) and 8.4 (a)).
- ▶ N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1024 (2014).
- ▶ OHIO RULES OF PROF'L CONDUCT r. 1.2(d)(2) (2016).
- ▶ Supreme Court of Ohio Bd. of Prof'l Conduct, Op. 2016-6.
- ▶ People v. Morley, 725 P.2d 510 (Colo. 1986).
- ▶ Restatement (Third) of the Law Governing Lawyers § 94 (2000).
- ▶ West Virginia Rules of Professional Conduct, Rule 1.2.

Thank you.

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