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Smokin' Hot: Ethical Issues for Lawyers Advising Business Clients in States with Legalized Medical or Recreational Marijuana

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Smokin' Hot: Ethical Issues for Lawyers Advising Business Clients in States with Legalized Medical or Recreational Marijuana

*Michael H. Rubin**

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I. AN ATTORNEY'S DUTIES AS A PROFESSIONAL AND AN ATTORNEY'S
DUTIES TO UPHOLD THE LAW

The Model Rules of Professional Conduct of the American Bar Association (“ABA”) and each state’s corresponding rules set forth two distinct responsibilities that are separate and apart from an attorney’s duties to a client. The first deals with a lawyer’s duties as a professional and as an officer of the court. The second deals with a lawyer’s obligation to uphold the law. The Rules of Professional Conduct, however, do not address what a lawyer must or should do when federal law criminalizes actions that are permissible under state law.

Both sets of responsibilities—the responsibility to the court and the responsibility to uphold the law—rest on two unstated assumptions: that laws are “just” and that there is an appropriate way to challenge unjust laws.¹ Although the legal system strives to provide a mechanism for just results, the Rules of Professional Conduct do not provide any procedure for lawyers to maintain their licenses while helping clients comply with state laws when these laws decriminalize matters that violate federal criminal statutes.

1. *United States v. McDaniels*, 379 F. Supp. 1243, 1249 (E.D. La. 1974), contains an oft-quoted statement about the difference between actual justice and the mere appearance of justice:

However elusive the concept may be, there is a universal human feeling, not confined to philosophers, lawyers, or judges, that there is a quality known as justice, and that it is the aim of legal institutions to achieve it. . . . This feeling that justice is a supreme goal, this sense that it is a predicate to organized society, is no mere yearning, for it is only in a fair proceeding, one that comports with our sense of justice, that we can with any legitimacy call another human being to account.

Justice must not only be done; it must be seen to be done. The interest of justice requires more than a proceeding that reaches an objectively accurate result; trial by ordeal might by sheer chance accomplish that. It requires a proceeding that, by its obvious fairness, helps to justify itself.

This language occurs in an opinion granting a motion for a new trial in a criminal case in which the prosecution used its peremptory challenges in a way that led to the claim that the challenges were racially motivated.

A. *Lawyers as Officers of the Court*

Lawyers are officers of the court² and the Rules of Professional Conduct admonish them that they cannot “make a false statement of fact or law” to a tribunal or fail to correct previous misstatements to the court.³ Litigators owe a higher duty to a court than they do to opposing counsel in out-of-court negotiations.⁴ Federal courts have the inherent powers to punish lawyers for behavior that does not violate state or federal statutes or court rules.⁵

A tension always exists between the “robust debate” that the First Amendment allows and an attorney’s criticism of the court.⁶ Lawyers have

2. *See, e.g.*, *Maracich v. Spears*, 570 U.S. 48, 62 (2013) (distinguishing between an attorney’s actions as a “commercial actor” in soliciting clients and an attorney’s duty “as an officer of the court”).

3. MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 2018).

4. For example, compare MODEL RULES OF PROF’L CONDUCT r. 4.1 (dealing with out-of-court negotiations), with MODEL RULES OF PROF’L CONDUCT r. 3.3 (which addresses an attorney’s obligation of candor to the Court). Under MODEL RULES OF PROF’L CONDUCT r. 3.3(a), “[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” Under MODEL RULES OF PROF’L CONDUCT r. 4.1(a), however, a lawyer may not “make a false statement of material fact or law to a third person.”

Rule 3.3 applies to all statements of fact or law, whether material or not. Rule 4.1 is limited to “material” facts and is silent about statements of law. *See also* Michael H. Rubin, *The Ethics of Negotiation: Are There Any?*, 56 LA. L. REV. 446 (1995).

5. *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991).

6. *See* Rebecca Aviel, *Rule 8.5(G) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018). *See also, e.g.*, *Fieger v. Thomas*, 872 F. Supp. 377, 385 (E.D. Mich. 1994):

It is a rare and unfortunate day when the judges of this district must sanction an attorney for conduct involving criticism of the bench, *Robust debate regarding judicial performance is essential to a vital judiciary*. If an attorney, after reasonable inquiry, has comments about a judicial officer’s fitness for service, he or she may and should express them publicly. Conversely, baseless factual allegations contribute nothing to judicial accountability and undermine public trust in the courts.

(quoting *Standing Comm. on Discipline v. Yagman*, 856 F. Supp. 1384 (C.D. Cal. 1994), *rev’d*, 55 F.3d 1430 (9th Cir. 1995)).

a duty under Rule of Professional Conduct (“RPC”) 8.2 to not make false or reckless statements about a judge⁷ or impugn a judge’s integrity.⁸

Courts tend to enforce RPC 8.2 sanctions even when lawyers claim that the First Amendment protects their words or activities.⁹ The U.S. Supreme Court has stated that lawyers’ First Amendment rights may be “extremely circumscribed” in certain instances,¹⁰ and many courts have found that a lawyer’s First Amendment rights may be more limited than those afforded to the public.¹¹ For example, courts have sanctioned

7. MODEL RULES OF PROF’L CONDUCT r. 8.2(a):

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

8. *Id.* r. 8.2.

9. *See, e.g.*, Bd. of Prof’l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008 (Wyo. 2009); Notopoulos v. Statewide Grievance Comm., 890 A.2d 509 (Conn. 2006).

10. *See In re Cobb*, 838 N.E.2d 1197, 1210–11 (Mass. 2005):

The Supreme Court has said that “[i]t is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed Even outside the courtroom, a majority of the Court in two separate opinions in the case of *In re Sawyer*, [360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959),] observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.’ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The Court went on to say that ‘the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of’ other kinds of speech protected by the First Amendment.

11. *See, e.g.*, *In re Pyle*, 156 P.3d 1231 (Kan. 2007); *see also In re Johnson*, 729 P.2d 1175, 1178 (1986) (involving a candidate for the office of county attorney in which this court found that Johnson should be disciplined for false, unsupported criticisms, and misleading statements about his opponent). In *In re Pyle*’s discussion of the First Amendment and lawyer speech, the court said:

A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publicly. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

lawyers for language used in their court filings (including unfounded allegations of *ex parte* contacts),¹² for statements accusing courts of ignoring the law to achieve a result,¹³ for statements in a letter that a judge is ““an embarrassment to this community,””¹⁴ for improperly accusing a

Our *Johnson* case also stands for the proposition that a lawyer cannot insulate himself or herself from discipline by characterizing questionable statements as opinions.

156 P.3d at 1242.

12. See, e.g., *Davidson*, 205 P.3d at 1012–13. In *Davidson*, a lawyer was sanctioned for, among other things, putting the following language into a court filing:

How can an attorney have gotten a trial date from a judge who was not assigned to the case? That could only be done by having engaged in improper *ex parte* communications with the court. . . . It is obvious enough that Respondent filed his reassignment motion to achieve a procedural and tactical advantage. Yet no one notified the Petitioner of opposing counsel’s communications with [the judges] . . . at the time those communications occurred much less took any action to determine whether Petitioner would stipulate to the reassignment of the case or to the trial date. . . . It has been rumored that if one is affiliated with [opposing counsel’s law firm], favoritism may be accorded her by [the judge] or those in his office. Because opposing counsel is with the law firm [], Petitioner believes that favoritism was at play here.

Id. (last alteration in original).

13. See *In re Wilkins*, 777 N.E.2d 714, 715–16 (Ind. 2002). In *In re Wilkins*, an appellate lawyer received a sanction (which was reduced on rehearing, 782 N.E.2d 985 (Ind. 2003)) for the following language in a brief:

The Court of Appeals’ published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases. Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

Id. at 715–16, 716 n.2.

14. *Notopoulos*, 890 A.2d at 512.

judge of incompetence and bias,¹⁵ and for internet postings containing unfounded accusations against a judge.¹⁶

B. The Difficulties Lawyers Face in Counseling Clients Concerning State-Legalized Marijuana Activities

The bulk of the Rules of Professional Conduct deal with the lawyer–client relationship. RPC 1.2 sets forth both the scope of representation and the allocation of authority between the lawyer and the client. The allocation of authority specifically deals with situations in which the client seeks advice for actions that might be criminally prosecuted.

15. See *In re Evans*, 801 F.2d 703, 706 (4th Cir. 1986). In *In re Evans*, a lawyer was disbarred for criticizing a judge without investigating the basis of the charge. The court stated that the “failure to investigate, coupled with his unrelenting reassertion of the charges . . . convincingly demonstrates his lack of integrity and fitness to practice law.” *Id.* The court also stated:

A court has the inherent authority to disbar or suspend lawyers from practice. *In re Snyder*, 472 U.S. 634, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985). This authority is derived from the lawyer’s role as an officer of the court. *Id.* Moreover, as an appellate court, we owe substantial deference to the district court in such matters:

On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 529–30, 6 L.Ed. 152 (1824). See also *In re: G.L.S.*, 745 F.2d 856 (4th Cir. 1984). In this case, we can only conclude that the district court’s disbarment of Evans, based on his violation of the rules of professional conduct, is amply supported by the record and did not exceed the limits of the court’s discretion.

Evans’ letter, accusing Magistrate Smalkin of incompetence and/or religious and racial bias, was unquestionably undignified, discourteous, and degrading. Moreover, it was written while the Brown case was on appeal to this Court and was thus properly viewed by the district court as an attempt to prejudice the administration of justice in the course of the litigation.

Id. (emphasis added).

16. See *Office of Disciplinary Counsel v. Wrona*, 908 A.2d 1281 (Pa. 2006).

RPC 1.2(d) states that a lawyer may not “counsel a client to engage” in conduct that a lawyer “knows is criminal or fraudulent” or “assist a client” in such actions.¹⁷ This rule contains an unwavering mandate that does not allow for the possibility of actions that are criminal under federal law but perfectly legal under state law.

Although Official ABA Comments 9 and 10 to RPC 1.2 discuss the distinction between counseling clients about the law and counseling clients to evade or violate the law,¹⁸ nothing in the text of RPC 1.2 or the

17. MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2018), entitled “Scope Of Representation And Allocation Of Authority Between Client And Lawyer,” provides:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.

18. *Id.* r. 1.2 cmt. 9 provides:

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.*

(emphasis added).

Id. r. 1.2 cmt. 10 provides:

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

comments permit a lawyer to assist a client in complying with state laws that conflict with federal statutes. Rule 1.2(d) permits a lawyer to discuss the consequences of such actions with the client and to “make a good faith effort to determine the validity, scope, meaning, or application of the law,” but this permission is narrow in scope. A lawyer may warn a client about the meaning, scope, or application of the law or may assist a client in challenging the application of the law. Neither the Rule nor its comments, however, allow a lawyer to assist a client by drafting or negotiating a contract to engage in activities that are lawful under state law if federal law criminalizes those activities.

Because of the strictures of ABA Model RPC 1.2, twelve states¹⁹ have amended their versions of RPC 1.2 to permit lawyers to counsel clients about state laws as long as they also warn the clients about federal laws, and eleven states have issued ethics opinions on the subject.²⁰ These revisions and opinions, however, neither insulate lawyers and clients from federal prosecution nor provide a safe harbor for a lawyer to maintain a license to practice law if the attorney is charged with aiding and abetting a violation of the Controlled Substances Act.²¹

Implicit in the Model Rules' permission for lawyers to counsel clients about the validity of the law and to assist clients in challenging laws is the assumption that there exists both a legal basis to challenge a law—for example, by asserting that the law is unconstitutional—as well as an impartial judiciary that will properly determine whether a law is “valid.” If a federal criminal law is valid, however, the Model Rules neither address the situation in which state laws may be inconsistent with federal laws nor provide a mechanism for a lawyer to assist a client in complying with these state laws.

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.

(emphasis added).

19. This number is accurate as of the date this Article is being written.

20. *See* Appendix A and Appendix B *infra* (containing redlined versions of state variations to MODEL RULES OF PROF'L CONDUCT r. 1.2).

21. *See* discussion *infra* Part II.A (discussing the Controlled Substances Act).

A rapidly expanding universe of articles addresses the ethical difficulties lawyers face in dealing with the intersection between state and federal marijuana laws.²² This Article is part of that ongoing analysis.

22. See, e.g., MICHAEL NEWTON WIDENER, JOINT TENANCIES: PROPERTY LEASING IN CANNABIS COMMERCE (ABA Book Publ'g 2018); Robert T. Wright, *Ethical and Legal Risks as Counsel in Bliss Marijuana Market*, 52 GONZ. L. REV. 607 (2017); Anna El-Zein, *Caught in a Haze: Ethical Issues for Attorneys Advising on Marijuana*, 82 MO. L. REV. 1171 (2017); Jill Beathard, *Keep Calm and Follow State Law: Marijuana Attorneys React to Sessions Memo*, 95 DENV. L. REV. ONLINE 112 (2018); 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); Andrew King, *Navigating the Weeds of State-Legal Medical Marijuana*, 52 ARK. LAW. 18 (2017); *Conflicting state and federal marijuana laws create ethical complications for lawyers*, ABA NEWS (Mar. 24, 2014), https://www.americanbar.org/news/abanews/aba-news-archives/2014/03/conflicting_statean.html [<https://perma.cc/8PDT-H2SD>] (last visited Feb. 8, 2019); Eric Mitchell Shumann, *Clearing the Smoke: The Ethics of Multistate Legal Practice for Recreational Marijuana Dispensaries*, 6 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 332 (2016); Bruce E. Reinhart, *Up in Smoke or Down in Flames? A Florida Lawyer's Legal and Ethical Risks in Advising a Marijuana Industry Client*, 90 FLA. B.J., Mar. 2016, at 20 <https://www.floridabar.org/news/tfb-journal/?durl=/DIVCOM/JN/jnjournal01.nsf/Articles/CF521B8A51D73DD685257F640075B666> [<https://perma.cc/8EGV-NY7T>] (last visited Feb. 8, 2019); Ian Wagemaker, *Professional Ethics—The High Risk Of Going Green: Problems Facing Transactional Attorneys And The Growth Of The State-Level Legal Marijuana Industries*, 37 W. NEW ENGLAND L. REV. 370 (2015) <http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1743&context=lawreview> [<https://perma.cc/STJ4-9D3A>] (last visited Feb. 8, 2019); Phil Cherner, *Marijuana and Your License to Practice Law: A Trip Through the Ethical Rules, Halfway to Decriminalization*, PHIL CHERNER (Mar. 2017), <http://www.philcherner.com/Articles/2014%20Ethics%20of%20pot%20lecture.pdf> [<https://perma.cc/6KCU-UFNT>] (last visited Feb. 8, 2019); Bruce E. Reinhart, *Dazed and Confused*, ABA CRIM. JUST. MAG. (Winter 2017) https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/CJ_v031n04_Reinhart.authcheckdam.pdf [<https://perma.cc/MM39-RCGA>] (last visited Feb. 8, 2019); Wilson Elser, *The Legal Ethics of Advising the Cannabis Client*, LEXOLOGY (Sept. 19, 2017), <https://www.lexology.com/library/detail.aspx?g=43af25b0-e4ef-4c4e-87d2-a2a08a5dc591> [<https://perma.cc/45S5-Z8F2>] (last visited Feb. 8, 2019); Manuela Bowles & Amanda Connor, *Marijuana Advertising on Social Media*, 26 NEV. LAW., June 2018, at 21, https://www.nvbar.org/wp-content/uploads/NevadaLawyer_June2018_Marijuana-Advertising.pdf [<https://perma.cc/JST7-G3SJ>] (last visited Feb. 8, 2019); Karen J. Bernstein, *Counseling Marijuana Clients on Intellectual Property*, 90 N.Y. ST. B.J., July/Aug. 2018, at 20; Michael L. Salad & Brittany A. Bonetti, *Banking and Marijuana-Related Businesses*, 314 N.J.

II. FEDERAL MARIJUANA LAWS

A. *The Controlled Substances Act*

The federal Controlled Substances Act (“CSA”)²³ classifies marijuana as a “Schedule 1 drug,” placing it in the same category as heroin, LSD, and other narcotics. Those who manufacture, distribute, or possess Schedule 1 narcotics, including marijuana, can be subject to punishments that can include life in prison for large manufacturers and dealers.

Congress authorized the Attorney General to issue regulations under the CSA.²⁴ Only the Attorney General may “register an applicant” to manufacture or distribute a Schedule I controlled substance, such as marijuana, and the registrant cannot do anything with the substance other than what is specified in the Attorney General’s registration.²⁵ Registration is mandatory for “every person who manufactures or distributes any controlled substance” or who proposes to engage in these activities.²⁶ The Act contains only three exemptions from federal registration:²⁷ (1) for agents and employees of properly registered manufacturers, distributors, and dispensers; (2) for a “common or contract carrier or warehouseman, or an employee thereof, whose possession of the controlled substance or list I chemical is in the usual course of his business or employment”; and (3) for those for whom a registered dispenser has prescribed a drug.

Penalties under the CSA can be severe, especially for manufacturers and distributors. One who possesses or distributes over 1,000 marijuana plants or 1,000 kilograms²⁸ or more “of a mixture or substance containing a detectable amount of marijuana” “shall be sentenced” to a minimum of ten years in prison.²⁹ The government may increase the penalties to 20

LAW., Feb. 2018, at 60; Jack Fersko, Lydia C. Stefanowicz & Charles J. Wilkes, *‘Legal’ Marijuana: The Implications for Commercial Real Estate*, 314 N.J. LAW., Oct. 2018, at 54; Brian P. Sharkey & David L. Disler, *Are New Jersey Law Firms Prepared for the Legalization of Marijuana?*, 314 N.J. LAW., Oct. 2018, at 32; Erica E. Flores, *Accommodating Employee Use of Medical Marijuana*, 99 MASS. L. REV. 72 (2018); Spenser Owens, *High Priorities: Land Use, Marijuana, and Meta-Values*, 10 WASH. U. JURIS. REV. 293 (2018); Lucia Moran, *Emerging from the Smoke: Does an Employer Have a Duty to Accommodate Employee’s Medical Marijuana After Garcia v. Tractor Supply Company?*, 48 N.M. L. REV. 194 (2018).

23. 21 U.S.C. §§ 801–904 (2018).

24. *Id.* § 821.

25. *Id.* § 823.

26. *Id.* § 822(a).

27. *Id.* § 822(c).

28. One thousand kilograms is equivalent to 2,204.62 pounds, or 1.1 tons.

29. 21 U.S.C. § 841(b)(1)(A)(vii).

years or life imprisonment, depending on other factors.³⁰ Possession or distribution of 220 pounds of marijuana-containing substances or 100

30. 21 U.S.C. § 841(b) states:

(1)(A) In the case of a violation of subsection (a) of this section involving— * * *

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; * * *

*such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein. (B) In the case of a violation of subsection (a) of this section involving— * * **

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

marijuana plants requires a minimum imprisonment of “not less than five years.”³¹

The CSA is part of a long line of state and federal laws regulating marijuana.³² Despite entreaties to change federal marijuana laws,³³ Congress has not modified the CSA. Although the federal government refuses to reclassify marijuana, more than 30 states have legalized

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(emphasis added).

31. *Id.* § 841(a)(1)(B).

32. For a history of cannabis regulation in the United States, see Jennifer Goldstein, *Weeding Out Ethical Issues: The Budding Cannabis Industry and Your License to Practice Law*, EPSTEIN BECKER GREEN (Jan. 31, 2016), <http://www.ebglaw.com/content/uploads/2016/04/WEEDING-OUT-ETHICAL-ISSUES-THE-BUDDING-CANNABIS-INDUSTRY-AND-YOUR-LICENSE-TO-PRACTICE-LAW-Epstein-Becker-Green-Robert-D-Reif-Fellowship.pdf> [https://perma.cc/F8WN-ZZ7J] (last visited Jan. 13, 2019). *See also* Shumann, *supra* note 22.

33. *See generally* NORML, <https://norml.org> [https://perma.cc/VT4R-TR4Y] (last visited Feb. 8, 2019).

marijuana in one form or another. The chart attached as Exhibit A sets forth the status of state laws as of the date this Article was written.³⁴

Even the ABA has recognized that marijuana law is an area in which many lawyers seek to be involved. ABA's *Law Practice Today* publication ran an article entitled *How to Become a Cannabis Attorney*³⁵ and has released a book entitled *Joint Tenancies: Property Leasing in Cannabis Commerce*.³⁶

B. The Cole Memorandum, the Rohrabacher–Blumenauer Amendment, and the Ninth Circuit's McIntosh Decision

Under Attorney General Eric Holder during the Obama Administration, the U.S. Department of Justice ("DOJ") issued what has become known as the Cole Memorandum,³⁷ which relates to prosecutorial discretion and which was based on the presumption that states that had enacted "laws legalizing marijuana in some form" also "implemented strong and effective regulatory and enforcement systems" that are "less likely to threaten the federal priorities."³⁸

The Trump Administration's first Attorney General, Jeff Sessions, withdrew the Cole Memorandum and its progeny on January 4, 2018,³⁹ a

34. The chart is current as of December 12, 2018. Although several states that do not permit medical or recreational marijuana are considering changes to those laws, any legislative actions after December 12, 2018 are beyond the scope of this Article and its exhibits.

35. Neil Juneja, *How to Become a Cannabis Attorney*, ABA L. PRAC. TODAY (Jan. 14, 2016), <http://www.lawpracticetoday.org/article/how-to-become-a-cannabis-attorney/> [<https://perma.cc/3CMN-JU62>] (last visited Feb. 8, 2019).

36. WIDENER, *supra* note 22.

37. See *Memorandum for all United States Attorneys, Guidance Regarding Marijuana Enforcement*, DEP'T JUST. (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/D3V9-YD6J>]. Three Cole memoranda dealing with marijuana exist: one dated June 29, 2011, one dated August 29, 2013, and one dated February 14, 2014. For more on this subject, see Jack Fersko, Jo Ann Gambale & Mitchel S. Kay, *The Business of Marijuana: Will States' Rights Prevail?*, AM. COLL. REAL ESTATE LAWS. (Mar. 1, 2018), https://www.greenbaumlaw.com/media/publication/490_ACREL_Cannabis_Article_small.pdf [<https://perma.cc/MWB4-A7U4>].

38. *Id.*

39. See *Memorandum for all United States Attorneys, Marijuana Enforcement*, DEP'T JUST. (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/HQ4U-S3X9>] (last visited Feb. 8, 2019).

short time after California's recreational marijuana statute took effect.⁴⁰ Former Attorney General Sessions reportedly said that regular marijuana use is "only slightly less awful" than heroin dependence,⁴¹ and was quoted as stating that the government needs "to send that message with clarity—that good people don't smoke marijuana."⁴² He also was critical of efforts to legalize marijuana.⁴³

Since 2014, Congress has enacted riders to various spending bills that have restricted the use of federal funds to prevent certain states from implementing laws legalizing medical marijuana.⁴⁴ Known as the Rohrabacher–Blumenauer Amendment, and sometimes referred to as

40. Bruce Haring, *Recreational Marijuana Legalized in California Jan. 1, But New Law Is Smoky*, DEADLINE HOLLYWOOD (Dec. 31, 2017, 6:01 PM), <http://deadline.com/2017/12/recreational-marijuana-legalized-in-california-jan-1-but-new-law-is-smoky-1202234036/> [<https://perma.cc/TA9M-WA5L>] (last visited Feb. 8, 2019).

41. Eli Watkins, *Pot Activists have been holding their breath for months on Jeff Sessions*, CNN POL. (June 17, 2017, 8:35 AM), <http://www.cnn.com/2017/06/17/politics/jeff-sessions-marijuana/index.html> [<https://perma.cc/U8X3-R3HP>] (last visited Feb. 8, 2019).

42. Rick Anderson, *Sessions says he has 'serious concerns' about legal marijuana. Now states wonder what's next*, L.A. TIMES (Aug. 9, 2017, 7:50 PM), <http://www.latimes.com/nation/la-na-sessions-marijuana-20170809-story.html> [<https://perma.cc/C5FM-7WHS>] (last visited Feb. 8, 2019).

43. Tom Agnell, *Jeff Sessions Slows Marijuana Legalization (Again)*, FORBES (Sept. 20, 2017, 12:43 PM), <https://www.forbes.com/sites/tomangel/2017/09/20/jeff-sessions-slams-marijuana-legalization-again/#74a457ad27d1> [<https://perma.cc/ZMY8-XAV4>] ("I've never felt that we should legalize marijuana. It doesn't strike me that the country would be better if it's being sold on every street corner. We do know that legalization results in greater use." (quoting U.S. Attorney General Jeff Sessions)) (last visited Jan. 13, 2019).

44. In 2014, Congress passed a rider to an omnibus spending bill. That rider provides:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

H.R. Res. 83, 113th Cong. (2014) (enacted).

Section 542,⁴⁵ this restriction has been carried forward into every appropriation bill since that date. The scope of the Amendment is limited to the states listed in text of the Amendment,⁴⁶ but since the Amendment's original passage in 2014, its text has expanded and now includes 46 states.⁴⁷

Although the Amendment appears directed solely at “prevent[ing] States from implementing” their own medical marijuana statutes, the Ninth Circuit held in *McIntosh* that the Amendment might provide a basis for courts to enjoin expenditure of funds for criminal prosecution of certain federal crimes in enumerated states if state law permits the prosecuted matter.⁴⁸ Noting that the Rohrabacher–Blumenauer Amendment might not be renewed and that funds might be allocated (or at least not prohibited) for such prosecutions in the future, the Ninth Circuit remanded the case, stating that if the DOJ:

wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they

45. H.R. Res. 2029, 114th Cong. (2015) (enacted).

46. At the time this Article is being written, the limitation on the DOJ remains in effect for the states listed in the amendment, as well as for the District of Columbia, Guam, and Puerto Rico.

47. At the time this Article is being written, the Rohrabacher–Blumenauer Amendment does not cover the following states: Idaho, Kansas, Nebraska, and South Dakota.

48. *United States v. McIntosh*, 833 F.3d 1163, 1172–73 (9th Cir. 2016): Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities. It is “emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought.” A “court sitting in equity cannot ‘ignore the judgment of Congress, deliberately expressed in legislation.’” Even if Appellants cannot obtain injunctions of their prosecutions themselves, they can seek—and have sought—to enjoin DOJ from *spending funds* from the relevant appropriations acts on such prosecutions. When Congress has enacted a legislative restriction, like § 542, that expressly prohibits DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court’s direct denial of a request for such injunctive relief.

(citations omitted).

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.⁴⁹

The case law that both relies on and distinguishes *McIntosh* continues to proliferate.⁵⁰ As long as the Rohrabacher–Blumenauer Amendment or

49. *Id.* at 1179. A discussion of *McIntosh* and its implications is beyond the scope of this Article. For some of the many articles dealing with this topic, see, e.g., Matthew A. Melone, *Federal Marijuana Policy: Homage to Federalism in Form; Potemkin Federalism in Substance*, 63 WAYNE L. REV. 215 (2018); Cara E. Alsterberg, *State and Federal Powers Clash of Medical Marijuana in United States v. McIntosh*, 47 GOLDEN GATE U. L. REV. 89 (2017); Daniel Haley, *United States v. McIntosh: Ninth Circuit Limits Federal Prosecutors from Spending to Enforce Marijuana Laws in Medicinal States*, 48 ST. MARY'S L.J. 573 (2017); Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017); Robert A. Mikos, *Making Preemption Less Palatable: State Poison Pill Legislation*, 85 GEO. WASH. L. REV. 1 (2017); and Jake Greenberg, *Florida's Medical Marijuana Industry Remains Hazy*, 19 FLA. B.J. 18 (2017).

For an analysis of what *McIntosh* means for the Internal Revenue Code's prohibition against business deductions for expenditures in connection with the illegal sale of drugs, see Bill Greenberg & Rebecca Greenberg, *26 USC Section 280E: Will the Dragon Now Be Slayed?*, 25 J.L. & POL'Y 549 (2017).

50. See, e.g., *United States v. Gilmore*, 886 F.3d 1288 (9th Cir. 2018) (holding that *McIntosh* does not prohibit the use of federal funds to prosecute the growing of marijuana on federal land even though state law permitted it); *United States v. Carrillo*, No. 2:12-cr-00185-TLN, 2018 WL 4638418 (E.D. Cal. Sept. 26, 2018) (holding that a defendant charged with growing marijuana on private property is entitled to an evidentiary hearing about whether his conduct "strictly complied with state law"); *United States v. Campbell*, No. CR-18-5-BU-DLC, 2018 WL 6728062 (E.C. MT Dec. 21, 2018) (dealing with the burden of proof in a *McIntosh* evidentiary hearing); *Patients Mut. Assistance Collective Corp. v. Commissioner*, 151 T.C. No. 11 (U.S. Tax Court Nov. 29, 2018) (holding that the Rohrabacher–Blumenauer Amendment does not apply to the IRS); *United States v. Gentile*, No. 1:12-cr-00360-DAD-BAM, 2017 WL 1437532 (E.D. Cal. Apr. 24, 2017), *appeal pending*, No. 17-10254 (9th Cir. 20--) (holding that a defendant who did not strictly comply with the state's medical marijuana law could not prohibit the federal government's use of funds in prosecuting him); *United States v. Ragland*, No. 2:15-cr-20800, 2017 WL 2728796 (E.D. Mich. June 26, 2017) (holding that neither *McIntosh* nor the Amendment prohibit funding for prosecutions for matters that are not directly related to state marijuana laws); *White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416 (Ariz. Ct. App. 2016) (holding that federal law does not preempt state law or prohibit a local

some form of it continues, it would appear that litigation concerning the federal government's ability to use funds to prosecute federal criminal marijuana laws in states that have legalized marijuana, at least for activities that strictly comply with state law, also will continue.

Under current DOJ policy, each individual U.S. Attorney has the prosecutorial discretion to determine whether to enforce the federal anti-marijuana law in states that have legalized marijuana, subject to restrictions that the Rohrabacher–Blumenauer Amendment may impose and the interpretation of that Amendment the Ninth Circuit gave in the *McIntosh* case.

The Cole Memorandum, even when it was in effect, had no impact on bankruptcy cases. Not only have several federal courts refused to allow marijuana-related businesses to seek bankruptcy court protection,⁵¹ but the head of all U.S. bankruptcy trustees issued a policy letter on April 26, 2017, stating that U.S. Trustees should move to dismiss or object to all matters involving marijuana assets.⁵²

zoning authority from passing reasonable zoning regulations to allow the establishment of a medical marijuana dispensary authorized by state law).

51. See, e.g., *In re Rent–Rite Super Kegs W. Ltd.*, 484 B.R. 799, 809 (Bankr. D. Colo. 2012); *In re Jerry L. Johnson*, 532 B.R. 53 (Bankr. W.D. Mich. 2015); *In re Arenas*, 535 B.R. 845 (B.A.P. 10th Cir. 2015); *In re McGinnis*, 453 B.R. 770 (Bankr. D. Or. 2011).

52. See *Letter From Executive Officer for United States Trustees, Clifford J. White III*, DEP'T JUST. (Apr. 26, 2017), https://www.justice.gov/ust/file/marijuana_assets.pdf/download [<https://perma.cc/6DKE-GC2W>]:

I know that in the past few years, the United States Trustees have reached out to you to ensure that we are informed about all cases assigned to you that involve marijuana assets, which are proscribed under federal law and may not be administered under the Bankruptcy Code.

This directive pertains even in cases in which such assets are not illegal under state law. In recent months, we have noticed an increase in the number of bankruptcy cases involving marijuana assets. This is to reiterate and emphasize the importance of prompt notification to your United States Trustee whenever you uncover a marijuana asset in a case assigned to you. Our goal is to ensure that trustees are not placed in the untenable position of violating federal law by liquidating, receiving proceeds from, or in any way administering marijuana assets. In some cases, trustees move to dismiss or object to a chapter 13 plan confirmation on grounds unrelated to the controlled substance. You should continue to file any motions or objections you deem appropriate. It is the policy of the United States Trustee Program that United States Trustees shall move to dismiss or object in all cases involving marijuana assets on grounds that such assets may not be administered under the

C. *The Cole Memo and State Ethics Rules 1.2 and 8.4*

Because ABA Model Rule 1.2(d) prohibits a lawyer from counseling or assisting a client in “conduct that the lawyer knows is criminal or fraudulent,” at least five states have amended their versions of this Rule to permit a lawyer to both counsel and assist clients in complying with state marijuana laws.⁵³ Another five states have amended their versions of RPC 1.2 to allow counseling and assistance for matters state law permits, but these amendments are not expressly limited to marijuana legislation.⁵⁴ An additional eight states have issued comments to their Rules or promulgated ethics opinions concerning an attorney’s ability to counsel or assist clients in complying with state marijuana laws.⁵⁵ Of all of the states that have made these changes, at least four of them rely either explicitly or implicitly on the Cole Memorandum.⁵⁶

To the extent that a lawyer is assisting a client in complying with state laws involving acts made criminal under federal law, there is the potential for the government to charge an attorney as an aider and abettor in the crime.⁵⁷ Although state changes to their versions of the Rules of Professional Conduct may provide some comfort to lawyers advising clients engaged in state-authorized marijuana activities, these changes do not insulate lawyers from federal prosecution.

But none of the 17 states with rule changes, comments, or ethics opinions permitting lawyers to assist clients in complying with state laws

Bankruptcy Code even if trustees or other parties object on the same or different grounds.

I appreciate your continued and heightened attention to our directive for prompt notification of all cases involving marijuana assets. I am grateful for all the work you do every day to uphold the integrity of the bankruptcy system and to satisfy the highest fiduciary standards.

(last visited Jan. 13, 2019).

53. *See infra* Exhibit B. These states include: Alaska; New Jersey; Ohio; Oregon; and West Virginia.

54. *See infra* Exhibit B. These states include: Connecticut; Hawaii; Illinois; North Dakota; and Pennsylvania.

55. *See infra* Exhibits A and B. These states include: California; Colorado; Maryland; Minnesota; Nevada; New York; Rhode Island; and Washington.

56. *See infra* Exhibit B. Those states include: Connecticut; Maine; Rhode Island; and Vermont. At the time of the writing of this paper, these states have not formally changed rules, comments, or opinions to delete the reference to the Cole Memorandum.

57. *See* discussion *infra* Part V.

that conflict with federal criminal statutes⁵⁸ have amended its version of RPC 8.4, which states that 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.”⁵⁹ Courts around the country have disciplined lawyers and suspended or revoked their licenses to practice law because of illegal drug activities.⁶⁰

Whether a state has altered its Rules of Professional Conduct, made changes to the comments to the rules, or issued an ethics opinion, lawyers who advise clients on compliance with state marijuana laws must rely on the hope that state disciplinary officials will not take action against them for violations of RPC 8.4. For example, the Florida Bar Board of Governors has adopted a policy of not prosecuting its members for

58. See *infra* Exhibit A. The states that have not yet made rule changes or issued opinions include: Arizona; Arkansas; Delaware; Georgia; Iowa; Louisiana; Massachusetts; Michigan; Montana; New Hampshire; and Texas.

59. MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR ASS’N 2018):

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

(rule is entitled “Misconduct”).

60. See, e.g., *In re Clegg*, 41 So. 3d 1141, 1155 (La. 2010) (use of cocaine); *Office of Disciplinary Counsel v. Alderman*, 734 S.E.2d 737 (W. Va. 2012) (suspension of license related to misdemeanor criminal drug convictions); *In re Nixon*, 49 A.3d 1193 (table) (Del. 2012) (suspension of license following finding of large quantity of marijuana and other drugs in lawyer’s possession).

assisting clients in complying with Florida's medical marijuana laws.⁶¹ On the other hand, North Dakota, a state which has a medical marijuana program,⁶² has changed its RPC 1.2 to permit lawyers to counsel clients "regarding conduct expressly permitted by North Dakota law."⁶³ Yet, the State Bar Association of North Dakota has not withdrawn a 2014 ethics opinion that a lawyer may be sanctioned under RPC 8.4 for using medical marijuana in the state, even if the attorney received a valid prescription for it from a state in which medical marijuana is legal and obtained legalized cannabis product in that state from a licensed dispensary.⁶⁴

61. The policy states:

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.

Gary Blakenship, *Board Adopts Medical Marijuana Policy*, FLA. B. (June 15, 2014), <https://www.floridabar.org/the-florida-bar-news/board-adopts-medical-marijuana-advice-policy/> [<https://perma.cc/CX8G-7BDD>].

62. See N.D. CENT. CODE § 19-24.1 (2018).

63. N.D. RULES OF PROF'L CONDUCT r. 1.2(e), available at <https://www.ndcourts.gov/rules/Conduct/frameset.htm> [<https://perma.cc/2Q7S-LCQS>] (last visited Feb. 8, 2019) (effective Feb. 1, 2017).

64. *North Dakota Ethics Committee Opinion 14-02*, ST. B. ASS'N N.D. (Aug. 12, 2014), https://www.lcc.leg.mn/mctrtrf/meetings/11062014/North_Dakota_Bar_Opinion.pdf [<https://perma.cc/AWG6-W9Q5>] (last visited Jan. 13, 2019). Ethics Committee Opinion 14-02 states:

QUESTION PRESENTED

The Ethics Committee has been asked to render its opinion on whether Attorney may live and use medical marijuana prescribed by a physician in Minnesota and be licensed to practice law in North Dakota.

OPINION

Based on the facts presented below, Attorney would not be able to live and use medical marijuana prescribed by a physician in Minnesota while being licensed to practice law in

North Dakota. The conduct would be a violation of N.D.R. Prof. Conduct 8.4(b). . . .

As Attorney acknowledges, federal law designates the use of marijuana for any purpose, even a medical one, as a crime. . . . In short, federal law and North Dakota law and policy show that Attorney's conduct would be unlawful and unethical. Attorney's conduct (participating in a medical marijuana treatment program) would constitute a "pattern of repeated offenses" that indicates indifference to legal obligations and constitutes a violation of N.D.R. Prof. Conduct 8.4(b).

D. The U.S. Supreme Court, the Controlled Substances Act, and the Impact of Federal Laws on State Officials

The U.S. Supreme Court has held that there is no medical exemption for medical marijuana under the Controlled Substances Act.⁶⁵ It also has held that Congress may criminalize homegrown marijuana even if state laws permit it.⁶⁶

Although state officials may decide not to enforce federal laws, the current administration has indicated that the federal government is not constrained in enforcing federal laws that conflict with state statutes.⁶⁷

A similar state–federal confrontation arose a decade before the Civil War. The federal Fugitive Slave Act of 1793 gave federal imprimatur to the validity of slavery nationwide by requiring the return of runaway slaves, no matter where they were found. The 1793 Fugitive Slave Act was designed to give teeth to Article IV, Section 2, clause 3 of the Constitution.⁶⁸

65. In *United States v. Oakland Cannabis Buyers' Cooperative*, the Court upheld a federal injunction against a cooperative organized to distribute marijuana to qualified patients for medical purposes. 532 U.S. 483, 491 (2001). Justice Thomas, writing for the majority, stated that “we need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable.” *Id.* The Court ruled that there is no common law medical necessity exemption in the CSA to allow for distribution of marijuana for medical use. *Id.* (“[The CSA’s] provisions leave no doubt that the defense [of necessity] is unavailable.”).

66. In *Gonzales v. Raich*, the Court held that the Commerce Clause permits Congress to limit marijuana activity, stating:

[L]imiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents’ activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is “superior to that of the States to provide for the welfare or necessities of their inhabitants,” however legitimate or dire those necessities may be. Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause . . . so too state action cannot circumscribe Congress’ plenary commerce power.

545 U.S. 1, 29 (2005) (citations omitted) (emphasis added).

67. *But see* Rohrabacher–Blumenauer Amendment limitations on DOJ prosecutions of state-legalized marijuana, H.R. Res. 2029, 114th Cong. (2015) (enacted).

68. U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence

In 1842, the issue arose of whether state officials were required to enforce the federal Fugitive Slave Act. In *Prigg v. Pennsylvania*,⁶⁹ the Supreme Court held that state officials in free states did not have to assist in the hunting or recapture of slaves under either the 1793 Act or the Constitution. *Prigg*, however, was a decision that merely refused to impose a duty on officials in free states.

Despite not requiring state officials to enforce federal law, the majority opinion in *Prigg* strongly supported slavery, stating that not only may a slave owner retrieve his slave “in every State of the Union” but also that the federal government is required, “through its own proper departments, legislative, executive, or judiciary,”⁷⁰ to enforce these rights.

of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”).

69. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

70. A more extensive quote from *Prigg* follows:

The owner of a fugitive slave has the same right to seize and take him in a state to which he has escaped or fled, that he had in the state from which he escaped: and it is well known that this right to seizure or recapture is universally acknowledged in all the slaveholding states. The court have not the slightest hesitation in holding, that under and in virtue of the constitution, the owner of the slave is clothed with the authority in every state of the Union, to seize and recapture his slave; wherever he can do it without any breach of the peace, or illegal violence. In this sense, and to this extent, this clause in the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.

The constitution does not stop at a mere annunciation of the rights of the owner to seize his absconding or fugitive slave, in the state to which he may have fled. If it had done so, it would have left the owner of the slave, in many cases, utterly without any adequate redress.

The constitution declares that the fugitive slave shall be delivered up on claim of the party to whom service or labor may be due. It is exceedingly difficult, if not impracticable, to read this language, and not to feel that it contemplated some further remedial redress than that which might be administered at the hand of the owner himself

It cannot well be doubted, that the constitution requires the delivery of the fugitive on the claim of the master: and the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.

Congress subsequently eviscerated the *Prigg* restriction involving state officials by passing the Fugitive Slave Act of 1850. Under this new iteration, state officials who did not arrest a runaway slave were liable for a substantial monetary fine, and those who aided a runaway could be subject to both a fine and up to six months in prison. On the other hand, officials who captured a runaway could get a bonus and a promotion.⁷¹

Prigg and its progeny serve as a reminder that federal officials can enforce federal laws even if state officials refuse to do so.

III. A SELECTIVE LOOK AT SOME STATE RULES OF PROFESSIONAL CONDUCT INVOLVING MARIJUANA

A detailed analysis of each state's changes to RPC 1.2, whether through revision of the rule itself, through comments to that rule, or through ethics opinions involving marijuana, is beyond the scope of this Article. Exhibits A and B to this Article excerpt pertinent provisions from states that have dealt with this issue; however, it may be instructive to consider a few states that have both legalized marijuana and addressed lawyers' concerns in rules, comments, or opinions to illustrate the problems lawyers may face if they advise clients engaged in marijuana activities state law permits but federal law prohibits.

In 2010, New Jersey's legislature passed the Compassionate Use of Medical Marijuana Act ("CUMMA"),⁷² which distinguishes "between medical and non-medical uses of marijuana." Although the Act contains

The clause relating to fugitive slaves is found in the national constitution, and not in that of any state. It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government; nowhere delegated or intrusted to them by the constitution. *On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, executive, or judiciary, as the case may require, to carry into effect all the rights and duties imposed upon it by the constitution.*

41 U.S. at 540–41 (emphasis added).

71. The 1850 Fugitive Slave Act also contained a distinct lack of due process, for a purported owner need only submit an application to the court claiming that a person was a runaway slave; this declaration was "full and conclusive evidence of the fact of escape" and provided the only evidence needed to arrest the supposed runaway. *See* Fugitive Slave Act, § 10, 9 STAT. 462, 465 (1850) (repealed 1864). In fact, the law expressly provided for arrest or seizure "*without process.*" *Id.* (emphasis added).

72. N.J. REV. STAT. §§ 24:6I-1 to 24:6I-16 (West Supp. 2013).

safe harbors for qualified patients and bona fide physicians, nothing in the Act addresses attorneys. The New Jersey Department of Health has issued program rules,⁷³ but these are expressly based upon Obama-era statements from the DOJ.⁷⁴

New Jersey RPC 1.2 permits an attorney to “counsel a client regarding New Jersey’s medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws.”⁷⁵

73. *Medical Marijuana Program Rules*, ST. N.J. DEP’T HEALTH, http://www.nj.gov/health/medicalmarijuana/documents/final_rules.pdf [<https://perma.cc/2ZLS-K2FG>] (last visited Feb. 8, 2019) (new rules adopted at N.J. ADMIN. CODE § 8:64 (2018)).

74. *Id.* The “Federal Standards Statement” section of New Jersey’s medical marijuana program rules states, in part:

On October 19, 2009, United States Attorney General Eric Holder announced formal guidelines for the exercise of investigative and prosecutorial discretion by Federal prosecutors in states that have enacted laws authorizing the use of marijuana for medical purposes (enforcement guidelines). The accompanying press release describes the enforcement guidelines as establishing, “that the focus of federal resources should not be on individuals whose actions are in compliance with existing state laws, while underscoring that the [United States] Department [of Justice] will continue to prosecute people whose claims of compliance with state and local law conceal operations inconsistent with the terms, conditions, or purposes of those laws.” “Attorney General Announces Formal Medical Marijuana Guidelines,” Press Release, October 19, 2009, available at <http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html> [<https://perma.cc/FV4U-H4B2>]. In announcing the guidelines, Attorney General Holder stated, “It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medicinal marijuana, but we will not tolerate drug traffickers who hide behind claims of compliance with state law to mask activities that are clearly illegal.” The enforcement guidelines are available at <http://www.justice.gov/opa/documents/medicalmarijuana.pdf> [<https://perma.cc/L62H-HDH9>].

75. *See* MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 2018). N.J. RULES OF PROF’L CONDUCT r. 1.2 is not identical to the ABA Model Rule. The New Jersey version provides:

(a) A lawyer shall abide by a client’s decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall

Yet, New Jersey has not amended its version of RPC 8.4, which makes it professional misconduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness” or to “engage in conduct that is prejudicial to the administration of justice.” One can contemplate a situation in which a federal official claims that counseling a client on how to engage in activities that federal law prohibits, if not a criminal act in and of itself, is prejudicial to the administration of justice.

Ohio has amended its RPC 1.2, using language similar to that of New Jersey’s amended Rule,⁷⁶ but has likewise not changed its RPC 8.4.

Although New York has not amended its version of RPC 1.2 to add a marijuana exemption, the New York State Bar has issued an ethics opinion stating that lawyers may advise clients about the state’s marijuana laws based on the assumption that advising clients when state and federal law

abide by the client’s decision on the plea to be entered, jury trial, and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

A lawyer may counsel a client regarding New Jersey’s medical 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.

N.J. RULES OF PROF’L CONDUCT r. 1.2 (emphasis added).

76. OHIO RULES OF PROF’L CONDUCT r. 1.2(d)(ii); AM. BAR ASS’N (Sep. 3, 2014), https://www.americanbar.org/content/dam/aba/publications/litigation_news/OH-rule-1-2.authcheckdam.pdf:

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.

[<https://perma.cc/ZV3L-H9U2>] (last visited Feb. 8, 2019).

contradict one another “is highly unusual if not unique.”⁷⁷ The opinion, however, does not address whether federal law supersedes state law.⁷⁸

77. See *Ethics Opinion 1024*, N.Y. ST. B. ASS'N (Sept. 4, 2014), <http://www.nysba.org/CustomTemplates/Content.aspx?id=52179> [<https://perma.cc/CH7T-8ME3>]:

Lawyers may advise clients about the lawfulness of their proposed conduct and assist them in complying with the law, but lawyers may not knowingly assist clients in illegal conduct. . . .

5. This ethical restriction reflects lawyers' fundamental role in the administration of justice, which is to promote compliance with the law by providing legal advice and assistance in structuring clients' conduct in accordance with the law. See also Rule 8.4(b) (forbidding “illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer”). Ideally, lawyers will not only attempt to prevent clients from engaging in knowing illegalities but also discourage clients from conduct of doubtful legality:

The most effective realization of the law's aims often takes place in the attorney's office, . . . where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose. . . .

The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality. Am. Bar Ass'n & Ass'n of Am. Law Sch., Professional Responsibility Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958). The public importance of lawyers' role in promoting clients' legal compliance is reflected in the attorney-client privilege, which protects the confidentiality that is traditionally considered essential in order for lawyers to serve this role effectively. See, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

6. It is counter-intuitive to suppose that the lawyer's fundamental role might ever be served by assisting clients in violating a law that the lawyer knows to be valid and enforceable. *But the question presented by the state's medical marijuana law is highly unusual if not unique:* Although participating in the production, delivery or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws

Minnesota has issued an ethics opinion⁷⁹ that lawyers may advise clients on state marijuana laws, but one commentator has warned that although the opinion provides protection from disciplinary action against “Minnesota attorneys who assist clients acting in accordance with Minnesota state law,” the opinion offers “absolutely no safe harbor from federal (or state) prosecution.”⁸⁰

Maryland has issued a similar Ethics Opinion,⁸¹ relying on Obama-era guidance, but it refrains from dealing with whether, if federal law

that legalize and extensively regulate medical marijuana. Both the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to promote their compliance with state law and current federal policy. Under these unusual circumstances, for the reasons discussed below, the Committee concludes that RPC 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.

(last visited Feb. 8, 2019) (emphasis added).

78. See *Gonzales v. Raich*, 545 U.S. 1 (2005).

79. *Ethics Opinion 23*, MN LAWS. PROF'L RESPONSIBILITY BD. (Apr. 3, 2015), <http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2023.pdf> [<https://perma.cc/Z8AH-LEYV>].

80. Siama Y. Chaudhary, *Ethics Opinion 23 and Medicinal Marijuana*, MINN. LAW. (May 4, 2015), <http://lprb.mncourts.gov/articles/Articles/Ethics%20Opinion%20No.%2023%20and%20Medicinal%20Marijuana.pdf> [<https://perma.cc/2BRC-538T>] (last visited Feb. 8, 2019).

81. *Maryland Ethics Opinion 2016-10*, 49 MD. B.J. 40 (Aug. 2016), states in part:

An attorney may always advise a client as to the consequences of conduct. That is the attorney's role. However, even though the CSA continues to criminalize medical marijuana use, this Committee believes that the method for applying the Maryland Rules of Professional Conduct adopted in the MRPC preamble allows legal services to further the policy goals and expressly authorized activities under state law and allows attorneys to advise clients conducting medical marijuana activities within the State as to the ramifications of their activities as well as to also actively provide legal services beyond advice, including contract construction, negotiations, assistance in procuring state licenses, and any other legal service necessary to protect or promote business activities sanctioned by the statute, or to comply with the Maryland State Legislature's regulatory scheme of a business.

Paragraph 14 of the preamble to the MRPC states: “The Maryland Lawyers' Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and

supersedes state law, an attorney advising a client about conduct that is valid under state law but may violate federal law is at risk under either RPC 1.2 or 8.4.

Arizona has enacted a Medical Marijuana Act,⁸² and even though the Arizona State Bar has issued an opinion that permits lawyers to counsel clients about the Act,⁸³ news reports state that the Arizona Supreme Court “won’t alter laws for lawyers in marijuana matters” and have quoted an Arizona lawyer who said that this situation will “leave lawyers at risk over what they can tell clients who want to get into the marijuana business.”⁸⁴

of the law itself.” The Maryland Medical Marijuana Law creates, governs, and legally sanctions an industry new to Maryland. Prohibiting attorney services would serve to molest and inhibit activities allowed by state law and express federal acquiescence. As the Illinois State Bar opined with regard to its enacted medical marijuana law: “It creates a classic example of a business in serious need of legal advice and counsel.” Illinois Opinion No. 14-07 at 3. As that body concluded:

Given the conflict between federal and state law on the subject of marijuana as well as the accommodation provided by the Department of Justice, the provision of legal advice to those engaged in nascent medical marijuana businesses is far better than forcing such businesses to proceed by guess work.

(emphasis added).

82. ARIZ. REV. STAT. §§ 36-2801-2819, 43-1201 (2019).

83. *State Bar of Arizona Ethics Opinion 11-01*, ST. B. AZ. (Feb. 2011), <https://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710> [<https://perma.cc/7HLX-TBLN>] (last visited Feb. 8, 2019).

84. Howard Fischer, *AZ Supreme Court won’t alter laws for lawyers in marijuana matters*, TUCSON.COM (Sep. 7, 2016), http://tucson.com/news/local/az-supreme-court-won-t-alter-laws-for-lawyers-in/article_71af5bb8-dccb-5df0-84d4-37b55238efbe.html [<https://perma.cc/J7RS-MPEW>] (last visited Feb. 8, 2019). *See also* Howard Fischer, *High court: Lawyer’s can’t help clients get medical marijuana*, AZ. CAPITOL TIMES (Sep. 7, 2016), <http://azcapitoltimes.com/news/2016/09/07/high-court-lawyers-cant-help-clients-get-medical-marijuana/> [<https://perma.cc/759Y-DWGU>]:

The Arizona Supreme Court won’t repeal rules that threaten lawyers with disbarment if they help clients get, sell or use marijuana legally under a 2010 voter-approved law. Without comment, the high court has rejected a petition that would legally let lawyers help clients deal with the Arizona law that allows certain individuals to possess and certain businesses to sell and grow marijuana. The justices gave no reason for their decision.

In doing so, the court is affirming existing rules that forbid attorneys from assisting clients “in conduct that the lawyer knows is criminal.”

Regardless of whether a state has amended its version of RPC 1.2, adopted an additional comment to RPC 1.2, rendered an ethics opinion on medical marijuana, or plans to do so,⁸⁵ one publication warns: “[f]ederal enforcement priorities can change, however, leaving attorneys subject to criminal prosecution.”⁸⁶ Further, the co-chair of the ABA Section of Litigation’s Ethics & Professionalism Committee has stated: “[l]awyers, like the citizens of those states, cannot pick and choose among the criminal laws they must follow. They cannot decide to favor their state laws and ignore the federal criminal law on the same topic.”⁸⁷

The federal criminalization of marijuana impacts not only lawyers and their clients, but also banks and financial institutions.

That is significant: While the Arizona Medical Marijuana Act makes marijuana legal for some, the sale, possession and use of the drug remain a felony for all under federal law.

More to the point, attorney Patricia Sallen, who urged the high court to alter the rules, said it leaves attorneys at risk over what they can—and cannot—tell clients who want to get into the marijuana business. That is important because an attorney can be reprimanded, suspended or even disbarred for violating the rules. . . .

The problem the rule creates for attorneys does not bother Maricopa County Attorney Bill Montgomery, who actively opposed what Sallen was trying to do. He said no matter what Arizona voters have already decided or may decide in November, attorneys have taken an oath to defend both state and federal laws. And that, said Montgomery, means they cannot counsel anyone on activities that remain federal crimes.

Nor was Montgomery concerned that the ethical rules could result in some individuals and businesses being without legal help as they try to navigate state laws legalizing marijuana.

“You’re not entitled to (legal) help to break federal law,” he said.

“That’s called a conspiracy,” Montgomery continued. “And that makes the attorney an accomplice.”

(last visited Feb. 8, 2019).

85. See Andrea Geraghty, *Dazed and Confused: Clearing the Ethics Weeds in the Marijuana Business*, 35 AM. COLL. REAL ESTATE LAWS. 6 (Aug. 2017).

86. Stephen Carr, *Ethics Board Advises Attorneys to Avoid Medical Marijuana Client*, ABA (June 27, 2017), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2016/ethics-board-advises-attorneys-to-avoid-medical-marijuana-patients/> [<https://perma.cc/3TRF-G8P7>] (last visited Feb. 8, 2019).

87. *Id.*

IV. BANKING AND MARIJUANA

Banks are wary to accept cash from marijuana businesses, even if they are state-licensed.⁸⁸ The Federal Deposit Insurance Corporation (“FDIC”) can forcibly close a bank if it engages in illegal activities.⁸⁹ Banks are required to file a Suspicious Activity Report (“SAR”) of transactions involving funds from illegal activities.⁹⁰ The SAR is confidential, and a bank cannot disclose it to its customer.⁹¹

A business must file a report with the IRS if it receives over \$10,000 in cash in the ordinary course of its business.⁹² The same rule applies to individuals who receive over \$10,000 in cash in the ordinary course of business.⁹³ The business or person need not receive the \$10,000 at one time; payments made at different times that total \$10,000 or more trigger reporting requirements if the transactions are “related.”⁹⁴

In addition, any person who deposits or withdraws \$10,000 or more from a bank triggers the need for the bank to file a currency transaction report (“CTR”).⁹⁵ This requirement applies to single transactions as well as “structured” transactions, for which the person deposits or withdraws the amounts over time.⁹⁶ It is a crime for a bank not to file a CTR.⁹⁷

88. See, e.g., Nathaniel Popper, *As Marijuana Sales Grow, Start-Ups Step In for Wary Banks*, N.Y. TIMES (Feb. 16, 2016), <https://www.nytimes.com/2016/02/17/business/dealbook/as-marijuana-sales-grow-start-ups-step-in-for-wary-banks.html> [<https://perma.cc/3VS6-3XJZ>] (last visited Feb. 8, 2019). But see also: Jessica Bartlett, *More Banks Enter Marijuana Industry as Recreational Sales Start*, BOS. B.J. (Dec. 25, 2018) <https://www.bizjournals.com/boston/news/2018/12/13/more-banks-enter-marijuana-industry-as.html> [<https://perma.cc/6YT6-TG5J>] (last visited Feb. 8, 2019); and Hilary Bricken, *Cannabis Banking Blues: How Best to Get a Bank Account*, ABOVE L. (June 6, 2018, 4:20 PM) <https://abovethelaw.com/2018/06/cannabis-banking-blues-how-best-to-get-a-bank-account/> [<https://perma.cc/8BJA-7S8U>] (last visited Feb. 8, 2019).

89. See, e.g., 12 U.S.C. § 1818 (2018).

90. 31 C.F.R. § 1020.320 (2018).

91. *Id.*

92. For more information on this, see *IRS Form 8300 Reference Guide*, IRS <https://www.irs.gov/businesses/small-businesses-self-employed/irs-form-8300-reference-guide#introduction> [<https://perma.cc/PRL3-TM3V>] (last visited Feb. 8, 2019).

93. *Id.*

94. *Id.*

95. 31 C.F.R. § 1010.311.

96. *Id.* § 1010.100(xx).

97. 12 U.S.C. § 1956 (2018).

The United States Department of the Treasury, in its FinCEN⁹⁸ guidance, does not directly prohibit banks from dealing with entities licensed by state marijuana laws, but it cautions banks that wish to do so. The guidance—which seems to permit banks, in some limited instances, to deal with medical marijuana enterprises—expressly relies on the Cole Memorandum as authority.⁹⁹

98. FinCEN is the Financial Crimes Enforcement Network. *See* DEP'T TREASURY, FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/> [<https://perma.cc/C2ZN-N56H>] (last visited Feb. 8, 2019).

99. *BSA Expectations Regarding Marijuana-Related Businesses*, DEP'T TREASURY (Feb. 14, 2014), <https://www.fincen.gov/resources/statutes-regulation/s/guidance/bsa-expectations-regarding-marijuana-related-businesses> [<https://perma.cc/FZ9K-6SJM>]:

This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations. In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. Thorough customer due diligence is a critical aspect of making this assessment.

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. With respect to information regarding state licensure obtained in connection with such customer due diligence, a financial institution may reasonably rely on the accuracy of information provided by state licensing authorities, where states make such information available.

As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly

At the time this Article was written, FinCEN has neither altered nor withdrawn its guidance, and there is a flux in the banking market catering to legalized marijuana businesses.¹⁰⁰

V. AIDING AND ABETTING AND RICO

Under federal law, anyone who “commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”¹⁰¹ Courts have indicated that if there is evidence an attorney knew of the client’s wrongful conduct and

important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement’s priorities. *A financial institution that decides to provide financial services to a marijuana-related business would be required to file suspicious activity reports (“SARs”) as described below.*

(emphasis added) (last visited Feb. 8, 2019).

100. See Hilary Bricken, *Recent Developments in the Status of Marijuana Banking*, 37 BANKING & FIN. SERVS. POL. REP. 1 (2018); Candace Carlyon, *We Don’t Serve Your Kind Here: Federal Courts and Banks Don’t Dance with Mary Jane*, 28 NEV. LAW. 8 (2018); Robert McVay, *Marijuana Banking in the Wake of Jeff Sessions’s Policy Reversal*, CANNA L. BLOG (Jan. 29, 2018), <https://www.cannalawblog.com/marijuana-banking-in-the-wake-of-jeff-sessions-s-policy-reversal/> [<https://perma.cc/XMN7-HZV4>] (last visited Feb. 8, 2019); Tom Angell, *More Banks are Welcoming Marijuana Businesses, Federal Data Shows*, FORBES MAG. (Jan. 2, 2018, 7:41 AM), <https://www.forbes.com/sites/tomangell/2018/01/02/more-banks-welcome-marijuana-businesses-federal-data-shows/#1e35f5ee7a64> [<https://perma.cc/SPK7-JH3K>] (last visited Feb. 8, 2019). See also the materials cited in note 88, *supra*.

FinCEN has reported that, as of March 2018, 411 depository institutions in the U.S. are actively involved the dealing with marijuana businesses. *Marijuana Banking Update, Depository Institutions (by type) Providing Banking Services to Marijuana Related Businesses*, FINCEN, <https://www.fincen.gov/sites/default/files/shared/277157%20EA%202nd%20Q%20MJ%20StatsPublic.pdf> [<https://perma.cc/6LKJ-4RPQ>] (last visited Feb. 8, 2019).

To put this in perspective, while the FinCEN report stated that there are 411 depository institutions dealing with marijuana related businesses, the FDIC reports that there are 15,000 commercial banks and savings institutions. See *FDIC Statistics at a Glance*, FDIC, <https://www.fdic.gov/bank/statistical/stats/2018sep/fdic.pdf> [<https://perma.cc/K6P8-WTG6>] (last visited Feb. 8, 2019) (indicating historical trends as of Sept. 20, 2018). Thus, less than 3% of all U.S. depository institutions are reported to be currently dealing with marijuana related businesses.

101. 18 U.S.C. § 2.

rendered substantial assistance in committing it, the possibility exists that the attorney might be held liable as an aider and abettor.¹⁰²

Attorneys who are advising clients engaged in state-legalized marijuana businesses need to take into consideration not only the “aider and abettor” issue, but also the Racketeer Influenced and Corrupt Organizations Act (“RICO”),¹⁰³ which makes it illegal for anyone to participate, directly or indirectly, in the conduct of a criminal enterprise. The general test under RICO requires proof:

(1) that an enterprise existed; (2) that the enterprise affected interstate commerce; (3) that the defendant was associated with or employed by the enterprise; (4) that the defendant engaged in a pattern of racketeering activity; and (5) that the defendant conducted or participated in the conduct of the enterprise through that pattern of racketeering activity involving through the commission of at least two acts of racketeering activity as set forth in the indictment.¹⁰⁴

An enterprise may include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹⁰⁵ A RICO claim does not

102. *Cf.* *Anstine v. Alexander*, 128 P.3d 249, 256 (Colo. App. 2005), *rev. on other grounds sub. nom.* *Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007), (“[T]he law does not insulate aiders and abettors from liability simply because they acted in the course of fulfilling separate and distinct duties as lawyers.”).

Also cf. Ronald E. Mallen & Jeffrey M. Smith, LEGAL MALPRACTICE § 6.5, at 560 (5th ed. 2000); *Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991); *Hancock v. Homeq Servicing Corp.*, No. 05-0307 (PLF), 2007 WL 1238746 (D.D.C. Apr. 27, 2007), *aff’d*, 526 F.3d 785 (D.C. Cir. 2008):

“A defendant is made vicariously liable for a third party’s acts under an aiding and abetting theory when he “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself...” *Halberstam v. Welch*, 705 F.2d [472] at 477 [D.C. Cir. 1983] (citing RESTATEMENT (SECOND) OF TORTS § 876 (1979)). Like civil conspiracy, aiding and abetting requires an underlying tortious act. See *Fischer v. Estate of Flax*, 816 A.2d 1, 5 (D.C. 2003) (“Similarly, absent evidence that the attorney knew of wrongful conduct by the client and rendered substantial assistance in committing it, he cannot be held to be ... an aider and abettor ... of that conduct.”).

103. 18 U.S.C. §§ 1961–68.

104. See U.S. DEP’T OF JUST., U.S. ATTORNEY’S MANUAL § 109, <https://www.justice.gov/usam/criminal-resource-manual-109-rico-charges> [<https://perma.cc/29XK-WYYR>] (last visited Feb. 8, 2019).

105. *Id.*

require that an association-in-fact enterprise “have [a] formal hierarchy or means of decision making.”¹⁰⁶

Before a U.S. Attorney may bring criminal RICO charges, the DOJ’s Organized Crime and Gang Section must approve the charges;¹⁰⁷ however, RICO also permits private causes of action. For example, the Tenth Circuit has held that landowners have standing to bring a RICO claim against adjacent property owners who intend to use their property to cultivate marijuana made legal under state law.¹⁰⁸

Although at the time this Article was written, no case could be located in which a lawyer in a state with legalized marijuana has been alleged to be part of a RICO enterprise merely by being the attorney for one or more entities involved in state-authorized cannabis activity, it is possible that such allegations could be made in the future.

VI. IOLTA

Most states require lawyers to have an Interest on Lawyer’s Trust Account (“IOLTA account”) and, subject to a few exceptions, to deposit client funds in such an account.¹⁰⁹ The question lawyers face, however, is

106. *United States v. Hutchinson*, 573 F.3d 1011, 1021 (10th Cir. 2009).

107. U.S. DEP’T OF JUST., *CRIMINAL RICO: A MANUAL FOR FEDERAL PROSECUTORS* (6th ed. 2016), <https://www.justice.gov/usam/file/870856> [<https://perma.cc/9E4A-WZK3>] (last visited Feb. 8, 2019).

108. *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). The holding in *Safe Streets* was summarized in *Quillinan v. Ainsworth*:

In *Safe Streets*, the Reillys alleged that their injuries included noxious odors emanating from the Marijuana Growers’ criminal enterprise, which they could smell on their property. The plaintiffs also alleged that the ongoing enterprise diminished their property value to the foul smell, and that their property had declined in value due to the Marijuana Growers’ publicly disclosed operation.

No. 4:17-CV-00077-KAW, 2018 WL 4419225, at *4 (N.D. Cal. Oct. 5, 2017) (internal citations omitted).

109. ABA Model Rule 1.15(a) requires that a:

lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person.

ABA MODEL CODE OF PROF’L CONDUCT r. 1.15(a) (AM. BAR ASS’N 2018). The ABA’s Commission on Interest on Lawyers’ Trust Accounts (“IOLTA”) contains more information about the IOLTA process. *See Commission on Interest on Lawyers’ Trust Accounts*, ABA, <https://www.americanbar.org/groups/interest>

whether their banks will allow a deposit of funds into an IOLTA account if the bank knows that the funds are from a marijuana-related business. Media have reported that a court sentenced a California attorney to five years in prison because he used an IOLTA account to deposit currency from illegal activities.¹¹⁰ Although the case involved international money laundering, it raises concerns about deposits of marijuana-related cash into IOLTA accounts.¹¹¹

Many states permit a lawyer to place client funds in a separate interest-bearing account for the benefit of that particular client,¹¹² but doing so for a medical marijuana business may be difficult if a bank refuses to accept any funds that it knows or suspects came from such a business.

VII. CLIENT CONFIDENTIALITY

ABA Model Rule 1.6 deals with client confidentiality.¹¹³ It permits a lawyer to breach confidential communications and to make a disclosure if

_lawyers_trust_accounts.html [https://perma.cc/NH8C-45S4] (last visited Feb. 8, 2019).

110. See *Money Laundering Using Attorney's IOLTA Accounts Lands Him in Jail*, LSQUARED INS. AGENCY (Sept. 12, 2016), <https://www.l2insuranceagency.com/blog/money-laundering-using-attorneys-iolta-accounts-lands-him-in-jail.aspx> [https://perma.cc/9LBD-YT5M] (last visited Feb. 8, 2019).

111. See discussion *supra* Part IV.

112. By definition, an IOLTA account is “a pooled interest bearing client trust account.” LA. RULES OF PROF’L CONDUCT 1.15(g). Because it refers to pooled accounts, a single-client account is an exception to the general IOLTA rules. For example, in “West Virginia, as well as other states, IOLTA applies only to funds that are “nominal in amount or held for a short period of time” so larger amounts of money held for single clients are exempt from the West Virginia IOLTA program.” Anne Wernum Lambright, *Interest on Lawyer Trust Accounts*, W.V. LAW., July–Sept. 2014, at 30. See also *ABC’s of Opening Separate Trust Account for Single Client*, ABA, <https://www.americanbar.org/content/dam/aba/publications/solosez/ABCSofOpeningSeparateTrustAccountforSingleClient.pdf> [https://perma.cc/7VPU-FLW6] (last visited Jan. 13, 2019).

113. ABA Model Rule 1.6, entitled “Confidentiality of Information,” provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial

the lawyer reasonably believes it necessary “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.” In representing medical marijuana businesses, RPC 1.6 appears to require that a lawyer make a reasonable determination whether the client: (1) is committing a crime under federal law (2) that is likely to result in either (a) substantial bodily harm or (b) substantial injury to the financial interest or property of another.

If the lawyer makes this determination, RPC 1.6(c) appears to permit the attorney to reveal this information to the person likely to be harmed. Over 40 states, however, have not adopted Rule 1.6 verbatim.¹¹⁴ Some states, like New Jersey, do not give the lawyer the option to reveal confidential communications; rather they mandate some disclosures.¹¹⁵

interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA MODEL CODE OF PROF’L CONDUCT r. 1.6.

114. See *Variations of the ABA Model Rules of Professional Conduct*, ABA CTR. FOR PROF. RESP. (Apr. 20, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.authcheckdam.pdf [<https://perma.cc/WA2D-4S3Z>] (last visited Jan. 13, 2019) (maintaining a chart of state variations).

115. Rule 1.6 of the New Jersey Rules of Professional Conduct, entitled “Confidentiality of Information,” states:

RPC 1.16 permits an attorney to withdraw from representing a client under certain circumstances, including if the continued representation will result in a violation of the Rules of Professional Conduct “or other law,” or if the client is using the lawyer’s services to perpetrate a crime.¹¹⁶ RPC

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) *A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:*

(1) *from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;*

(2) *from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.*

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client’s criminal, illegal or fraudulent act in the furtherance of which the lawyer’s services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to comply with other law.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

(emphasis added).

116. ABA Model Rule 1.16, entitled “Declining Or Termination Representation,” provides, in pertinent part:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law; . . .

1.16(d) requires a lawyer to withdraw in a way that minimizes harm to the client. Yet, some courts have indicated that a lawyer may need to engage in a “noisy withdrawal” to “blow the whistle” on a client’s illegal conduct.¹¹⁷

Lawyers who advise marijuana-related business in states that have legalized such activity may therefore face issues about whether to: (1) continue that representation; (2) reveal confidences if the clients’ actions may be seen as causing substantial bodily harm or substantial injury to the

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; . . .

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA MODEL CODE OF PROF’L CONDUCT r. 1.16.

117. For more discussion on this, see Dennis J. Ventry, Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS. L. REV. 1455 (2017). See also Comment 10 to ABA Model Rule 1.2 (emphasis added):

[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.

financial interest or property of another; or (3) withdraw from the client's representation.

IX. HYPOTHETICALS RELATING TO ADVISING CLIENTS IN STATES WITH LEGALIZED MARIJUANA

This Article raises issues; it does not resolve them. It may be helpful, however, to illustrate the dilemmas lawyers may face by using a law professor's favorite tool: the hypothetical. Each of the following hypotheticals focuses on aspects of some of the issues discussed above, and each is situated in a state with a legalized marijuana program.

Two hypothetical lawyers will respond to every hypothetical: Noah Holdsbard, who never sees an ethical issue in the situation, and Ova Leigh Cawshus, who sees so many ethical issues that she may never take on a client in this arena.¹¹⁸

A. Millie Ennielle¹¹⁹—Part I

Millie is a young lawyer who likes to smoke marijuana. Although the state in which Millie lives allows the medical use of marijuana, Millie is not using it for medicinal purposes and does not have a prescription. She offers a joint to another associate in her firm.

Is smoking and sharing the marijuana a problem for Millie? Is it a problem for the other associate?

- (i) Noah Holdsbard: NO PROBLEM!
 - (1) This is no different than having a drink or two at lunch.
 - (2) A toke can actually relax you. There is already enough stress at a law office. Relaxing is a good thing.
- (ii) Ova Leigh Cawshus: THERE IS A BIG PROBLEM HERE.

118. As the reader may note, the author is a paronomasiac—one addicted to puns.

119. The concept of this hypothetical comes from John M. Tanner and Kieran A. Lasater's article, *The Ethics of a Lawyer's Use of Marijuana*, INSIDE COUNSEL MAG. (Oct. 1, 2015).

- (1) If Millie is using marijuana, how can the law firm be sure she is acting competently? *See* RPC 1.1.
- (2) If marijuana materially impairs a person's mental condition, should Millie be required to withdraw from representing the client? *See* RPC 1.1 and 1.16.
- (3) How can we have Millie here in the firm? We know she is violating federal law and engaging in a federal crime. *See* RPC 8.4.
- (4) The other associate may have a duty to turn her in, and if not, the other associate may be violating the rules. *See* RPC 8.3.¹²⁰

*B. Millie Ennielle*¹²¹—Part II

Would it make any difference if a licensed state medical marijuana dispensary prescribed the marijuana Millie was smoking?

(iii) Noah Holdsbard: NO PROBLEM!

- (1) Of course there is no problem if she is using it legally!
- (2) Besides, she will be a better lawyer if she knows the effects of medical marijuana. She will be a rising star in the firm *because* of her intimate knowledge of the area.

120. ABA Model Rule 8.3(a) states: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." ABA MODEL CODE OF PROF'L CONDUCT r. 8.3(a).

121. As in the previous hypothetical, this situation comes from the Tanner and Lasater article. *See supra* note 119.

- (iv) Ova Leigh Cawshus: THERE IS A BIG PROBLEM HERE.
- (1) The fact that it is legal under state law doesn't cure the federal criminal problem.
 - (2) Even if the dispensary is licensed under the federal law and regulations, Millie still has the impairment problem.
 - (3) Finally, if she is impaired, does the other associate, or the firm as a whole, have a duty to taker her off cases until she is no longer using marijuana?

C. State University

The state university is getting into the medical marijuana business. It has a special state license for these activities. The University plans to propagate plants, extract chemicals, and maintain a medical marijuana dispensary in conjunction with its medical school. It wants a local firm to advise it on all aspects of this venture.

Can the firm handle this project?

- (v) Noah Holdsbard: NO PROBLEM!
- (1) Of course we can advise the state university. We are doing our legal as well as civic duty, and this will probably get us great seats for the next football season.
 - (2) The University probably wants to get registered nationally as well, and it certainly needs to know about the state rules and regulations in detail.
 - (3) This is fantastic business for the firm. I am going to charge the

University a hefty fee on this one.

- (vi) Ova Leigh Cawshus: THERE IS A BIG PROBLEM HERE.
- (1) Unless our firm is registering the University under the federal rules and regulations, we are directly running afoul of federal law.
 - (2) While our state's version of RPC 1.2 may allow our firm to advise a client about state law as well as the effects of federal law, if we know that the client is not going to register under federal law, are we assisting in the commission of a crime or fraud?
 - (3) Then there is Rule 1.6; a lawyer is permitted to reveal confidential information if it is likely to cause "substantial bodily harm." The CSA is based on the assumption that Schedule I substances do substantial bodily harm, is it not?

D. Aun Treprenneur—Part I

Aun Treprenneur, who has made a bundle in other businesses, is getting in on the ground floor of the medical marijuana business in the state. She wants the local firm to help incorporate her business, help her get a state license, negotiate for the purchase of property where she will run the business, and advise her on all matters.

Can the firm advise Aun?

- (vii) Noah Holdsbard: NO PROBLEM!
- (1) This is perfect. Aun will become the firm's biggest client. It is always a good idea to get in on the ground floor of a growing business.
 - (2) Besides, state law authorizes this action. Aun needs the best legal

advice possible, and of course I give the best advice.

(viii) Ova Leigh Cawshus: THERE IS A BIG PROBLEM HERE.

- (1) If I am advising Aun, I have to tell her that she is potentially violating federal law and that there are no 'safe harbors' under federal law.
- (2) Even if our state has expressly amended RPC 1.2 to permit us to do all these activities, we are potentially running afoul of RPC 8.4, because what Aun wants to do is criminal under federal law.
- (3) Moreover, as in the case of State University, the firm is putting itself at risk because the feds might charge the firm with aiding and abetting a criminal activity.

E. Aun Trepeneur—Part II

The firms tells Aun Trepeneur that doing this work will be expensive and that it needs a retainer. Aun brings the firm \$50,000 in cash as an advance deposit on fees.

Can the local firm take the money? Must the firm put this deposit into its IOLTA account, and will there be any problem in doing so?

(ix) Noah Holdsbard: NO PROBLEM!

- (1) I told you that Aun would be a great client. She did not even blink when I mentioned the amount of the initial advance. Maybe I should have asked for more.
- (2) Aun's marijuana businesses will be floating in cash. We can help her figure out ways to keep it safe. More business and more billable hours.

- (3) Besides, the IOLTA account is the perfect place for this, and I am ecstatic that Aun can pay up front. So many clients balk when I discuss our fees, but Aun walked right in with the cash in hand.
- (x) Ova Leigh Cawshus: THERE IS A BIG PROBLEM HERE.
- (1) There is no end to the problems this causes. Once the firm receives more than \$10,000 from a client, we have to file an IRS Form 8300.¹²²
 - (2) Then, once we take the cash to our bank, the banker is going to ask all kinds of questions so that she can file a Currency Transaction Report.
 - (3) Moreover, when the banker finds out the source of the cash, she may refuse to take it.
 - (4) If we do not put the cash in our IOLTA account, we are now violating other provisions that can impact each of our licenses to practice law here.
 - (5) And we cannot forget that if all of this is related to illegal activities, our fee may be subject to asset forfeiture.¹²³

122. For more information on this, see *IRA Form 8300 Reference Guide*, *supra* note 92.

123. See Reinhart, *Up in Smoke or Down in Flames?*, *supra* note 22:

[The] funds derived from a marijuana business are subject to forfeiture, so long as the recipient of the funds is aware that they come from an illegal source. The fact that the lawyer provided fair value services in return for the money does not defeat the forfeiture. Moreover, by accepting a payment of more than \$10,000 that the lawyer knows came from a legal marijuana business, the lawyer is committing a federal money laundering crime, which makes the funds separately subject to

F. Aun Trepeneur and Les Sohr

Aun Trepeneur has found some old warehouses owned by Les Sohr. These warehouses would provide a perfect location to grow thousands of marijuana plants. Aun wants the firm to negotiate the lease, but she says, “Do not tell Les what I am growing. Just make sure I can grow plants in there, and tell him I am going to be in the farm-to-table movement with locally sourced materials.”

Do any problems exist in helping Aun and keeping the purpose of the warehouse a secret from Les?

(xi) Noah Holdsbard: NO PROBLEM!

- (1) I told you Aun will become the firm’s biggest client!
- (2) Client confidences are sacrosanct. Everybody knows that. If Aun tells me to keep a secret, I am obliged to do so.
- (3) And besides, this is a pure real estate deal, which is my specialty. That is what I am known for: a plain vanilla lease. This is going to be great.

(xii) Ova Leigh Cawshus: THERE IS A BIG PROBLEM HERE.

- (1) Now, in addition to all the other problems I have described in representing Aun, we have another one. Aun knows that this is for a business that, while it may be legal under state law, is illegal under federal law.
- (2) Because it is illegal under federal law, I do not feel

forfeiture. (18 U.S.C. §§ 981(a)(1)(A), 1957.) Section 1957 does contain a safe harbor for “any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment to the Constitution.” (*Id.* § 1957(f)(1).) Because of the reference to the Sixth Amendment, however, this safe harbor only applies to attorney fees in criminal cases.

comfortable in not disclosing to Les what Aun is growing.

- (3) That is because, if the feds come in, they may attempt to seize the warehouse under the asset forfeiture statutes. This will cause substantial injury to the financial interests or property of another and in furtherance of which Aun is using our services. That is what RPC 1.6 is all about.
- (4) Maybe we should try to persuade Aun to let us disclose to Les what she is doing, but if Aun won't let us tell Les what is going on, our firm may have to resign under 1.16, and if we do that, we may have to do so in a way that tries to protect client confidences or minimize harm to Aun, but I am not sure how we can do all that.
- (5) See how complicated this can be? It is better not to get involved in this in the first place.

G. Terri Trucker

Terri has a small trucking business. When she hears from her brother-in-law, Les Sohr, about the new business operating out of Les's warehouses, she approaches Aun Treprenneur and offers to provide trucking services.

Aun wants the firm to represent her in negotiating with Terri.

Can the firm help Aun?

(xiii) Noah Holdsbard: NO PROBLEM!

- (1) Of course I can assist. There is no conflict here.
- (2) Aun is a great client! I think I am going to ask for an additional \$50k advance deposit!
- (3) And, if I play my cards right, Terri may hire me in the future

to represent her business with others.

(xiv) Ova Leigh Cawshus: THERE IS A BIG PROBLEM HERE.

(1) The problems keep piling up. Now, we have yet another personal problem. If our firm is working with Aun on growing, storing, and now distributing a substance that federal law criminalizes, that means we may be aiding and abetting a criminal enterprise, which may make the firm (and me) liable to charges of being part of a RICO enterprise.

(2) This is too much of a headache. Maybe I ought to retire!

CONCLUSION

Researchers have estimated that U.S. retail sales of legalized marijuana products amounted to over \$6 billion in 2017 and will increase to over \$13 billion by 2021.¹²⁴ Media has reported that big tobacco companies are investing in marijuana- and cannabis-related enterprises¹²⁵ and that “Silicon Valley has been funneling capital into the cannabis industry.”¹²⁶ Additional states may legalize either medical or recreational marijuana, or both—some because they see it as increasing state economic

124. See Paul Ausick, *The 10 Largest Marijuana Companies*, 24/7 WALL ST. (Jan. 1, 2018), <https://247wallst.com/consumer-products/2018/01/01/the-10-largest-marijuana-companies/> [<https://perma.cc/R92S-RHLH>] (last visited Feb. 8, 2019).

125. See Bill Peters, *Could Big Tobacco Become Big Cannabis as Marijuana Business Soars?*, INVESTOR’S BUS. DAILY (Apr. 23, 2018), <https://www.investors.com/news/marijuana-business-soars-big-tobacco-opportunities-vaping-cannabis-inhaler/> [<https://perma.cc/YRC2-SS5D>] (last visited Feb. 8, 2019).

126. See Duncan Rolph, *Marijuana is the Next Big Investment, But Here’s Why Most Investors Will have to Wait*, FORBES (Dec. 12, 2017, 10:07 AM), <https://www.forbes.com/sites/duncanrolph/2017/12/12/marijuana-is-the-next-big-investment-but-heres-why-most-investors-will-have-to-wait/#776295882329> [<https://perma.cc/X3HR-ZAHC>] (last visited Feb. 8, 2019).

vitality, and others because they see it as a source of additional tax dollars.¹²⁷

In light of all these activities, the demand for legal services for those individuals and businesses in the legalized cannabis arena will surge. Attorneys, bar associations, legislatures, and Congress may need to consider whether to amend statutes and each state's Rules of Professional Conduct so that clients may obtain appropriate legal representation and lawyers may provide such representation without risking the loss of their licenses.

For states that may be considering changes to their versions of Rule 1.2 and 8.4 to address these issues, the following language is presented for consideration. The suggested changes from the ABA Model Rules have deletions shown as strike-throughs and additions underlined and with bold italics.

SUGGESTED CHANGES TO MODEL RULES 1.2 AND 8.4

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

127. See Megan Woods, *More States Could Join Legal Marijuana Wave This Year*, FOX NEWS (Apr. 20, 2018), <http://www.foxnews.com/politics/2018/04/20/more-states-could-join-legal-marijuana-wave-this-year.html> [<https://perma.cc/Z9CD-H23L>] (last visited Feb. 8, 2019).

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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 **(i)** discuss the legal consequences of any proposed course of conduct with a client, **(ii)** ~~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 (iii) advise and assist a client in complying with and taking actions consistent with state laws while at the same time advising the client of the existence and consequences of federal law that may impose criminal penalties for actions or matters permitted by state law.***

Comment on Rule 1.2

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer - Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult

with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client

may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[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. ~~Not does the~~ **The** fact that a client uses advice in a course of action that is criminal or fraudulent of itself **does not** 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. **There are times when state laws and federal laws may diverge. In such instances, lawyers may advise and assist a client in complying with state laws, even if these laws may conflict with federal criminal laws. That advice and counsel includes negotiating contracts and writing documents that depend upon state law for their validity, but a lawyer in all instances must advise the client both of the conflict between state and federal law and of the potential criminal penalties for violation of federal law as well as the potential impact that violation of federal laws may have on any contracts or documents the client signs.**

[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. ***If state law and federal law conflict, however, Rule 1.2(d) permits the lawyer to advise and assist the client in complying with state law. See Comment (9), above.***

[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 ***not only*** 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, ***but also that when state law and federal law conflict, a lawyer may give advice so that the client complies with state law as long as the lawyer also advises the client about federal law that may provide for criminal penalties for actions or matters permitted by state law, as well as the potential impact that that violation of federal law may have on contracts or documents the client signs.***

[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).

* * *

Maintaining the Integrity of the Profession

Rule 8.4 Misconduct

¶ ***Except as provided in Rule 1.2(d), it is professional misconduct for a lawyer to:***

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct - Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire

criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category, ***but actions taken in compliance with Rule 1.2(d) do not constitute professional misconduct***. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law *as well as to advising and assisting clients when state law is in conflict with federal criminal law.*

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

EXHIBITS

A. Exhibit A

Rubin, Exhibit A	Last updated Dec. 25, 2018	
Color Codes	Recreational Marijuana	Medical Marijuana
Codes	0 = Identical to Model Rule	X = Differs from Model Rule

STATE	1.2(a)	1.2(b)	1.2(c)	1.2(d)	Ethics Opinion?	Note	Comment or Opinion
							CAPS = negative opinion
Alabama						1	
Alaska	X	0	X	X		2	Yes
	Comment: Numerous changes from Model Rules, Rule 1.2(f) specifically deals with marijuana. Adopts all the ABA comments and adds one more, but that additional comment does not deal with marijuana issues.						
Arizona	0	0	0	0	Yes	3	
	Comment: Arizona's Rule 1.2 is identical to the Model Rule; it has an additional Comment 14, but it does not specifically refer to marijuana.						
Arkansas	0	0	X	0		4	
	Comment: Arkansas's Rule 1.2(d) is identical to the Model Rule.						
California	X	X	X	X	No*	5	Yes
	Comment: Effective November 1, 2018, California added a comment to the text of its Rule 1.2.1 to permit an attorney to assist a client in instances in which California laws might conflict with federal or tribal law.						
Colorado	0	0	X	0	Yes	6	Yes
	Comment: Colorado 1.2(d) identical to the Model Rule, but adds an additional Comment 14 dealing with marijuana issues. Colorado has issued two ethics opinions on marijuana, one about a lawyer's use of marijuana and one about advising a client; the latter opinion has been withdrawn.						
Connecticut	X	0	X	X	Yes	7	Yes
	Comment: Conn. Rule 1.2(d) allows both counseling and assistance about conduct permitted by Conn. Law, and there is an additional comment under the Rule dealing with marijuana. Its Ethics Opinion concludes that lawyers "may not assist clients in conduct that is in violation of federal criminal law."						
Delaware	0	0	0	0		8	
	Comment: Delaware's Rule 1.2(d) is identical to the Model Rule.						
Florida	X	0	X	X	*	9	
	Comment: While Florida Rule 1.2(d) does not mention marijuana, and while Florida has not issued an ethics opinion, apparently the bar's Disciplinary Procedures Committee has issued a policy not to prosecute attorneys for "advising or assisting" clients in marijuana matters made legal under Florida state law.						

STATE	1.2(a)	1.2(b)	1.2(c)	1.2(d)	Ethics Opinion?	Note	Comment or Opinion
							CAPS = negative opinion
Georgia	0	0	0	0		10	
	Comment: Georgia's Rule 1.2(d) is identical to the Model Rule.						
Hawaii	X	0	X	X	Yes*	11	Yes
	Comment: Hawaii's Rule 1.2(d) permits lawyers to counsel and assist clients on matters made lawful under state law. Hawaii's ethics opinion on this was issued Aug. 27, 2015 and rescinded Oct. 2015.						
Idaho						12	
Illinois	0	0	0	X	Yes	13	Yes
	Comment: Illinois Rule 1.2(d) allows counseling and assisting a client on matters permitted by Illinois law even though they "violate or conflict with federal or other law." Also, Illinois has a comment to this Rule pointing out that the change to the Rule is not limited to medical marijuana issues.						
Indiana						14	
Iowa	0	0	X	0	0	15	
	Comment: Iowa's Rule 1.2(d) is identical to the ABA Model Rule.						
Kansas						16	
Kentucky						17	
Louisiana	0	0	0	0		18	
	Comment: Did not adopt any of the Comments; Louisiana Rules have no comments.						
Maine	X	0	X	0*	Yes	19	
	Comment: * Maine's Rule 1.2(e) is the same as ABA Rule 1.2(d), and no comment addresses marijuana, but there is a Reporter's Note about both "passive and active assistance."						
Maryland	X	0*	X	0*		20	Yes
	Comment: Maryland's Rule 1.2(d) is the same as the Model Rule, except that it substitutes the word "attorney" for lawyer. Comment 12 to the Maryland Rule expressly addresses advising clients about marijuana issues, but that comment appears to rely on the Cole memo.						
Massachusetts	X	0	0	0		21	
	Comment: Massachusetts Rule 1.2(d) is identical to the ABA Rule and there is no change in the ABA comments to deal with marijuana.						
Michigan	X	X	X	X		22	
	Comment: Michigan's Rule 1.2(c) is identical to ABA Rule 1.2(d), except it uses the word "illegal" rather than "criminal."						
Minnesota	0	0	0	0	Yes	23	Yes
	Comment: Minnesota's Rule 1.2 is identical to the Model Rule. Minn. Op. 23 deals with advising clients about Minn. marijuana law.						
Mississippi						24	
Missouri						25	
Montana	0	0	X	0		26	
	Comment: Montana Rule 1.2(d) is identical to the ABA Model Rule. Montana has no comments to its rules.						
Nebraska						27	

STATE	1.2(a)	1.2(b)	1.2(c)	1.2(d)	Ethics Opinion?	Note	Comment or Opinion
							CAPS = negative opinion
Nevada	0	0	0	0		28	Yes
	Comment: No change in Rule 1.2(d). Did not adopt ABA Comments, but has its own comment directed to marijuana.						
New Hampshire	X	0	X	X		29	
	NH Rule 1.2(d) and 1.2(e) permit a lawyer to "assist a client regarding conduct expressly permitted by state or local law that conflicts with federal law"						
New Jersey	X	0	0	X		30	Yes
	Comment: New Jersey has amended Rule 1.2d to deal with medical marijuana; New Jersey does not have any comments to Rule 1.2.						
New Mexico	X	0	0	X		31	
	Comment: Although N.M. Rule 1.2(d) is not identical to the Model Rule, the changes do not refer to marijuana issues. Comments to the rules indirectly deal with conflicts between federal and state law.						
New York	X	0	e	X	Yes	32	Yes
	Comment: New York has two sets of RPCs, once by the Unified Court System and one by the NY State Bar Association. The Unified Court Rules omit language in Model Rule 1.2d about counseling or assisting a client to determine the validity or scope of the law, and it adds a Rule 1.2(f) to allow a lawyer to refuse to participate conduct that may be unlawful even though there is an argument that it is legal. The New York State Bar Rules are identical to the Unified Court Rules, but the NYSBA adds comments. <i>The NY Bar Ethics Opinion was issued in 2014 and appears to rely on the Cole Memorandum.</i>						
North Carolina						33	
North Dakota	0	0	X	0	Yes	34	YES
	Comment: North Dakota Rule 1.2(d) is identical to the Model Rule. N.D. Op. 14-02 states that an attorney's use or medical marijuana, prescribed under the laws of another state permitting it, is a violation of Rule 8.4.						
Ohio	X	X	X	X		35	Yes
	Comment: Ohio Rule 1.2(d) (numbered 1.2.4) permits a lawyer to "counsel or assist" a client concerning Ohio medical marijuana laws.						
Oklahoma	X	X	0	0		36	
	Comment: In late 2018, Oklahoma legalized medical marijuana. Oklahoma's Rule 1.2(b) differs from the Model Rule.						
Oregon	0	X	0	0		37	Yes
	Comment: Did not adopt Rule 1.2(b), Oregon's Rule 1.2(b) corresponds to ABA Rule 1.2(c); Oregon's Rule 1.2(c) is the same as ABA Rule 1.2(d); but Oregon added a separate, new 1.2d dealing specifically with marijuana law.						

STATE	1.2(a)	1.2(b)	1.2(c)	1.2(d)	Ethics Opinion?	Note	Comment or Opinion	
							CAPS = negative opinion	
Pennsylvania	0	0	0	0*	Yes	38	Yes	
	Comment: Penn. Rule 1.2(d) is identical to the Model Rule, but Pennsylvania added a 1.2(e) to allow lawyers to “counsel or assist” clients on matters “expressly permitted by Pennsylvania law.”							
Rhode Island	0	0	X	0*	Yes	39	Yes	
	Comment: Rhode Island Rule 1.2(c) is identical to Model Rule 1.2(d). Rhode Island Op. 2017-01 oks advising clients about medical marijuana matters, but it appears to be based on the Cole Memo.							
South Carolina	0	0	0	0		40		
	Comment: In late 2018, South Carolina legalized medical marijuana. South Carolina’s Rule 1.2 is identical to the Model Rule.							
South Dakota						41		
Tennessee						42		
Texas	X	X	X	X		43		
	Comment: Texas Rule 1.2(c) is not the same as Model Rule 1.2(d), but it does not expressly refer to marijuana. It allows a lawyer to “counsel and represent” a client rather than “counsel and assist.”							
Utah	0	0	0	0		44		
	Comment: In late 2018, Utah legalized medical marijuana. Utah’s Rule 1.2 is identical to the Model Rule.							
Vermont	0	0	0	0		45	Yes	
	Comment: Vermont’s Rule 1.2 is identical to the Model Rule, but Vermont Comment 14 allows a lawyer to “counsel” and “advise” a client about medical marijuana issues; however, the Comment appears based on the Cole memo.							
Virginia						46		
Washington	0	0	0	0		47	Yes	
	Comment: No change in Rule 1.2(d), but new Comment 18.							
West Virginia	0	0	0	X		48		
	Comment: West Virginia’s Rule 1.2(d) is identical to the Model Rule, but the state’s Rule 1.2(e) allows lawyers to assist clients in complying with West Virginia law. West Virginia’s comments concerning Rule 1.2(d), however, appear to be identical to the Model Rule formulation.							
Wisconsin						49		
Wyoming						50		

B. *Exhibit B*

NOTES ON STATE VARIATIONS OF ABA MODEL RULE 1.2 DEALING WITH
MARIJUANA LAWS

NOTE 2, ALASKA

<http://www.courtrecords.alaska.gov/webdocs/rules/docs/prof.pdf>
[<https://perma.cc/K69J-8J5C>].

Rule 1.2:

(a) Subject to paragraphs *(c)*, *(d)*, and *(e)*, a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to *offer or accept a settlement*. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, whether the client will testify, and whether to take an appeal.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation.

(1) If a written fee agreement is required by Rule 1.5, the agreement shall describe the limitation on the representation.

(2) The lawyer shall discuss with the client whether a written notice of representation should be provided to other interested parties.

(3) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with this rule is considered to be unrepresented

for purposes of Rules 4.2 and 4.3 unless the opposing lawyer knows of or has been provided with:

(A) a written notice stating that the lawyer is to communicate only with the limited representation lawyer as to the subject matter of the limited representation; or

(B) a written notice of the time period during which the lawyer is to communicate only with the limited representation lawyer concerning the subject matter of the limited representation.

(d) Except as provided in paragraph (f), a lawyer shall not counsel or assist a client to engage 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.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(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.

NOTE 3, ARIZONA

<https://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=4> [<https://perma.cc/T3PB-NUQQ>].

Arizona's Rule 1.2 is identical to the Model Rule.

Arizona Comment (14) (not in the ABA Model Rules):

[14] 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 ER 1.4(a)(5).

Arizona Ethics Opinion 11-01:

<http://www.azbar.org/Ethics/EthicsOpinions/RelatedOpinions?id=4> [<https://perma.cc/2424-F8S3>].

A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act ("Act"), despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time the advice or assistance is provided, 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 requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

NOTE 4, ARKANSAS

<https://courts.arkansas.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct> [<https://perma.cc/CFA2-W9BW>].

Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(1) The client's informed consent must be confirmed in writing unless:

(A) the representation of the client consists solely of a telephone consultation;

(B) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a program authorized by Rule 6.5 and the lawyer's representation consists solely of providing information and advice or the preparation of legal documents;

or

(C) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent as required by this rule, there shall be a presumption that:

(A) the representation is limited to the attorney and the services as agreed upon;

and

(B) the attorney does not represent the client generally or in matters other than those as agreed upon.

(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.

NOTE 5, CALIFORNIA (NO EQUIVALENT OF RULE 1.2)

<https://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-1.pdf> [https://perma.cc/473G-3GD3].

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

[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 section 6068, subdivision (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 section 6068, subdivision (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. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict. (See rules 1.1 and 1.4.).

Ethics Opinions:

While the California Bar apparently has not issued a formal ethics opinion, it has a page on its website with the following statement, followed by links to ethics opinions by the San Francisco and Los Angeles Bar Associations as well as to the ethics opinions of other state bars.

<http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Publications/Ethics-News>
[<https://perma.cc/S243-AXCF>].

As the law pertaining to the legalization of the cultivation, sales, and use of marijuana continues to change, questions arise as to whether a lawyer advising a client on this type of business under state law runs afoul of professional conduct rules given that such activities are illegal under federal law. Attorney should consider their ethical obligations before representing these types of businesses.

San Francisco Bar opinion on marijuana:

https://www.sfbbar.org/ethics/opinion_2015-1.aspx
[<https://perma.cc/3V58-LBTR>].

Digest:

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 Bar opinion on marijuana:

<http://www.lacba.org/docs/default-source/ethics-opinions/archived-ethics-opinions/ethics-opinion-527-rev.pdf> [<https://perma.cc/MDX9-2VUL>].

Summary:

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.

NOTE 6, COLORADO

<http://www.cobar.org/rulesofprofessionalconduct>
[<https://perma.cc/DVM9-XMV3>].

Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(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.

COMMENT 14:

[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.

Colorado Ethics Opinion 124 (Apr. 23, 2012, addendum Dec. 10, 2012):

http://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_124_2014.pdf [https://perma.cc/4LTB-WF8Y].

Syllabus:

Federal law treats the cultivation, possession, and use of marijuana for any purpose, even a medical one, as a crime. Although Colorado law also treats the cultivation, possession, and use of marijuana as a crime, it nevertheless permits individuals to cultivate, possess, and use small amounts of marijuana for the treatment of certain debilitating medical conditions. Cultivation, possession, and use of marijuana solely for medical purposes under Colorado law, however, does not guarantee an individual's protection from prosecution under federal law. Consequently, an individual permitted to use marijuana for medical purposes under Colorado law may be subject to arrest and prosecution for violating federal law.

This opinion concludes that a lawyer's medical use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b).1 Rather, to violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's

honesty, trustworthiness, or fitness as a lawyer in other respects.

A lawyer's use of medical marijuana in compliance with Colorado law may implicate additional Rules, including Colo. RPC 1.1, 1.16(a)(2), and 8.3(a). Colo. RPC 1.1 is violated where a lawyer's use of medical marijuana impairs the lawyer's ability to provide competent representation. If a lawyer's use of medical marijuana materially impairs the lawyer's ability to represent the client, Rule 1.16(a)(2) requires the lawyer to withdraw from the representation. If another lawyer knows that a lawyer's use of medical marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.

Our conclusion is limited to the narrow issue of whether personal use of marijuana by a lawyer/patient violates Colo. RPC 8.4(b). This opinion does not address whether a lawyer violates Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation, possession, or use by third parties of medical marijuana under Colorado law.

Colorado Ethics Opinion 125 (Oct. 21, 2013, withdrawn May 17, 2014):

[Link no longer available on the Colorado Bar's site; information located by Peter Geraghty].

A lawyer may advise a client on marijuana-related activities and transactions that are now lawful under Colorado law though marijuana is still illegal under federal laws for all purposes. The opinion urges the state supreme court to adopt the bar's proposal to change Colorado's ethics rules so that lawyers will not be subject to discipline for providing legal services and advice on marijuana-related conduct. Opinion 124; 21 U.S.C. §885(d); Colo. Rev. Stat. §§12-43.3-101 to 12-43.3-1001; Rules 1.2(d), 2.1, 3.9, 6.4.

NOTE 7, CONNECTICUT

<https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>
[<https://perma.cc/5S3Q-NSJ5>].

Rule 1.2:

(a) Subject to ~~paragraphs~~ subsections (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. Subject to revocation by the client and to the terms of the contract, a client's decision to settle a matter shall be implied where the lawyer is retained to represent the client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss, and the third party elects to settle a matter without contribution by the client.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Such informed consent shall not be required when a client cannot be located despite reasonable efforts where the lawyer is retained to represent a client by a third party that is obligated by contract to provide the client with a defense.

(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 ~~and may;~~ (2) counsel or assist a

client to make a good faith effort to determine the validity, scope, meaning or application of the law; or (3) counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Connecticut Comment (unnumbered):

Subsection (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. Subsection (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. Subsection (d) (2) 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. Subsection (d) (3) is intended to permit counsel to provide legal services to clients without being subject to discipline under these Rules notwithstanding that the services concern conduct prohibited under federal or other law but expressly permitted under Connecticut law, e.g., conduct under An Act Concerning the Palliative Use of Marijuana, Public Act 12-55, effective Oct. 1, 2012. Subsection (d) (3) shall not provide a defense to a presentment filed pursuant to Practice Book Section 2-41 against an attorney found guilty of a serious crime in another jurisdiction.

Conn. Informal Op. 2014-08, Lawyer's Possession and use of Medical Marijuana

https://c.ymcdn.com/sites/ctbar.site-ym.com/resource/collection/B95C5820-BCC4-4002-AD3F-1A4491A73A45/Pages_from_Dec_14_Jan_15_-_Ethics_Opinion.pdf [<https://perma.cc/HSD7-594Z>].

Excerpt:

An attorney suffering from a debilitating medical condition has been certified to use medical marijuana by

a licensed physician in accordance with The Palliative Use of Marijuana Act, C.G.S. §§ 21a-408 — 21a-408q (hereafter "the State Act"). The attorney inquires as to whether the possession and use of medical marijuana under the State Act constitute a violation of Rule 8.4 of the Rules of Professional Conduct. The short answer is that a lawyer who is a "qualified patient" under the terms of the State Act who possesses and uses medical marijuana in accordance with the State Act does not violate the Rule 8.4.

Conn. Informal Op. 2013-02, Providing Legal Services to Clients Seeking Licenses Under the Connecticut Medical Marijuana Law
http://c.ybcdn.com/sites/www.ctbar.org/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf
[<https://perma.cc/S4GK-EKK3>].

Excerpt:

It is not our role to predict the path that the law may take in resolving the conflict between the federal Controlled Substances Act and state laws regulating the medical use of marijuana. The Rules of Professional Conduct permit lawyers to make novel, good faith, and non-frivolous arguments that challenge the law. Conn Bar Assoc. Informal Op. 09-92. Though, perhaps, subject to legal and political challenges, the Controlled Substances Act stands. Whether or not the CSA is enforced, violation of it is still criminal in nature. See Memorandum For United States Attorneys "Guidance Regarding The Ogden Memo In Jurisdictions Seeking to Authorize Marijuana For Medical Use" by James M. Cole, U.S. Deputy Attorney General (June 29, 2011). See, also, *Gonzalez v. Raich*, 545 U.S. 1 (2005). While Connecticut law may allow certain behavior, that same behavior currently constitutes a federal crime. We decline to categorize particular factual circumstances that may raise issues of culpability because the circumstances may be so various as to make the effort valueless. C.f. Maine Professional Commission Opinion 199 (2010). Nonetheless, "the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not....[A]n

attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law". *Id.* At a minimum, a lawyer advising a client on Public Act 12-55 must inform the client of the conflict between the state and federal statutes, and that the conflict exists regardless of whether federal authorities in Connecticut are or are not actively enforcing the federal statutes.

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.

NOTE 8, DELAWARE

<https://courts.delaware.gov/rules/pdf/DLRPC-LN.pdf>
[<https://perma.cc/DBP3-FBRT>].

Delaware's Rule 1.2 is identical to the Model Rule.

NOTE 9, FLORIDA

<https://www.floridabar.org/wp-content/uploads/2018/09/Ch-4-9-17-18.pdf> [<https://perma.cc/3ZFD-UZ2W>].

Rule 4-1.2:

(a) Subject to ~~paragraphs~~ subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by ~~Rule 4-1.4~~, shall *reasonably* consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) 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.

(c) If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows *or reasonably should know* is criminal or fraudulent, ~~but~~. *However*, 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.

Florida Bar Disciplinary Procedure Policy, as indicated at:

<https://www.floridabar.org/news/tfb-news/?durl=%2FDIVCOM%2FJN%2Fjnnews01.nsf%2FArticles%2F575B2BA3C91F53DD85257CF200481980>
[<https://perma.cc/8E5A-94W5>].

“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.”

NOTE 10, GEORGIA

Georgia's Rule 1.2 is identical to the Model Rule.

NOTE 11, HAWAII

http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm
#Rule 1.2 [<https://perma.cc/5SFU-Q8PR>].

Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which ~~they~~ the objectives are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives ~~informed~~ consent after consultation.

(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.

(e) When a lawyer knows or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct. See Rule 1.4(a)(5) of these Rules.

Hawaii Opinion 49 (issued Aug. 27, 2015, rescinded Oct. 2015 as being "superseded" by the change to Hawaii Rule 1.2(d))

http://www.odchawaii.com/uploads/Formal_Opinion_49.pdf
[<https://perma.cc/L3GU-M4SV>].

Consequently, until such time as the Hawai'i Supreme Court amends HRPC Rule 1.2(d) or adds an appropriate comment, or the Congress acts to excepts from federal criminal law state authorized production and distribution of marijuana, a lawyer may advise a client with regard to legality under state and federal law on the subject of marijuana production and distribution and may advocate for changes in court rules or state or federal laws on the subject, but a lawyer may not "provide legal services to facilitate the establishment and operation of a medical marijuana business" in accordance with Act 241 or otherwise.

NOTE 13, ILLINOIS

http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/Art_VIII_NEW.htm#1.2 [<https://perma.cc/M2SC-F4KU>].

Rule 1.2 (amendment effective Jan. 1, 2016):

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.~~

(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.

(e) After accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the lawyer's firm the responsibility for performing or completing that employment, without the client's informed consent.

Illinois Comment 10:

[10] 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.

Illinois Professional Conduct Advisory Opinion 14-07, issued *before* Illinois amended Rule 1.2(d)
<https://www.isba.org/sites/default/files/ethicsopinions/14-07%20%28Board%20Revised%20Medical%20Marijuana%29.pdf> [<https://perma.cc/37BH-FRYU>].

Excerpts:

The second issue raised by the inquiry is whether an Illinois lawyer may provide services that go beyond the provision of legal advice to medical marijuana clients. The negotiation of contracts and the drafting of legal documents for such a client are means of assisting the client in establishing a medical marijuana business. Therefore, an attorney who performs such work would be assisting the client in conduct that violates federal criminal law, even though such conduct is permissible under the new state law. But as quoted above, a lawyer may provide such assistance if the lawyer is assisting the “client to make a good-faith effort to determine the validity, scope, meaning or application of the law.

* * *

The Committee is aware that the view expressed in the foregoing advisory opinion is not held universally, as can be seen by comparing the approach taken in Arizona Ethics Opinion 11-01 with that of Informal Opinion 2013-02 (January 16, 2013) of the Connecticut Bar Association. For that reason, the Committee stresses that this opinion is for the guidance only of Illinois-

licensed lawyers. The Committee also points out that its ethics opinions are not intended as legal advice, and they do not immunize any lawyer from disciplinary action.

Given the text of Rule 1.2(d), there is some degree of uncertainty surrounding the duties of an Illinois lawyer when representing a client involved in the medical marijuana business. That uncertainty would be removed if Rule 1.2(d) were to be amended, as is occurring in Connecticut, to account for the unique situation in which the laws of another jurisdiction run counter to those of Illinois. * * *

Substantive changes in the Illinois Rules of Professional Conduct should not be made without good reason and thorough consideration. In the judgment of the ISBA, the ethical conundrum faced by Illinois lawyers who represent medical marijuana businesses is sufficiently grave to merit a change in Rule 1.2(d) along the lines of the Connecticut amendment. Contemporaneously with the publication of this opinion, the ISBA is recommending to the Illinois Supreme Court Rules Committee that just such an amendment be promulgated.

NOTE 15, IOWA

<https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf> [<https://perma.cc/Y7QQ-TU44>].

Iowa Rule 32:1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 32:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer,

as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(1) The client's informed consent must be confirmed in writing unless:

(i) the representation of the client consists solely of telephone consultation;

(ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit or court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or

(iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in a writing signed by the client, there shall be a presumption that:

(i) the representation is limited to the attorney and the services described in the writing; and

(ii) the attorney does not represent the client generally or in any matters other than those identified in the writing.

(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.

NOTE 19, MAINE

http://mebaroverseers.org/regulation/bar_rules.html?id=87817
[<https://perma.cc/LSU8-53SS>].

a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. Subject to the Rules with respect to Declining or Terminating Representation (Rule 1.16), a lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client provides informed consent after consultation. If, after consultation, the client consents, an attorney may enter a limited appearance on behalf of an otherwise unrepresented party involved in a court proceeding. A lawyer who signs a complaint, counterclaim, cross-claim or any amendment thereto that is filed with the court, may not thereafter limit representation as provided in this rule, without leave of court.

(d) A lawyer, who under the auspices of a non-profit organization or a court-annexed program provides limited representation to a client without expectation of either the lawyer or the client that the lawyer will provide continuing representation in the matter, is subject to the requirements of Rules 1.7, 1.9, 1.10 and 1.11 only if the lawyer is aware that the representation of the client involves a conflict-of-interest.

(e) 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.

“Reporter’s Note: Rule 1.2 (e) prohibits a lawyer from assisting or advising a client to engage in criminal or fraudulent conduct. Both passive and active assistance is prohibited by this rule. This rule, however, permits lawyer to assist clients in making good-faith determinations of the validity, scope and meaning of the application of a rule or law.”

Maine Professional Ethics Commission Op. #12, Attorneys’ Assistance to clients under Rule 1.2 regarding the use and sale of Medical and Recreational Marijuana.

http://www.mebaroverseers.org/attorney_services/opinion.html?id=734620 [<https://perma.cc/FB5E-WK59>].

Excerpts:

The Professional Ethics Commission (Commission) provides this opinion to clarify that, notwithstanding current federal marijuana laws, Maine Rule of Professional Conduct 1.2 permits an attorney to counsel or assist clients who are engaged in conduct related to the sale or use of marijuana consistent with Maine’s laws and regulations governing medical and recreational marijuana.

Opinion 199 was issued on July 7, 2010. That opinion responded to a request from Bar Counsel to the Commission to render an opinion concerning the general parameters within which an attorney may, consistent with the Maine Rules of Professional Conduct, represent or advise clients under Maine’s Medical Marijuana Act because of the interplay of that law with the Federal prohibition against the distribution and possession of marijuana.

Opinion 199 cited a guidance, dated October 19, 2009, from the United States Deputy Attorney General which directed United States Attorneys not to focus federal resources on individuals whose actions are in “clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” That guidance, however, made it clear that the Federal law against the distribution of marijuana was still in effect, recognized that “no State can authorize violations of federal law” and that the guidance did “not ‘legalize’ marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil or criminal matter.” The Department of Justice (DOJ) has issued two subsequent guidance memoranda, both of which essentially reaffirm the 2009 guidance.

The issue presented which led to Opinion 199 was whether and how an attorney might act in regard to a client whose intention is to engage in conduct which is permitted by state law and which is a federal crime, even though it might not currently be prosecuted under federal law.

* * *

The Commission feels it is appropriate to revisit this opinion and to offer additional guidance to individuals and entities seeking legal advice to assist them in navigating the statutory and regulatory structure posed by Maine legislation with specific regard to marijuana (either medical or recreational). In doing so, the Commission notes that there are two different issues to be addressed: 1) whether Maine lawyers can advise clients on how to conform their conduct to the law; and 2) whether a Maine lawyer may provide services that go beyond the provision of legal

advice to clients involved in the sale or use of marijuana as permitted under Maine law, such as negotiation of contracts and drafting of legal documents for such a client to assist the client in establishing a marijuana business.

With regard to the first question, the Commission notes that since Opinion 199 was issued, several other states have had occasion to address state legalization of medical or recreational marijuana and its impact on Rule 1.2. In that regard, a consensus has developed that lawyers should be permitted to advise clients on how to conform their conduct to the law and that the provision of legal advice to clients involved in the marijuana trade falls squarely within that exception.

* * *

The Rules of Professional Conduct are recognized to be rules of reason, intended to be interpreted in light of “the purposes of legal representation and of the law itself.” M. R. Prof. Conduct, Preamble ¶ [14B]. In that light, Rule 1.2 must reasonably be read considering the context of its interaction with Rule 8.4. Specifically, Rule 8.4 does not make every violation of law a violation of Rule 1.2 and instead contemplates only those violations that reflect adversely on a lawyer’s honesty, trustworthiness or fitness to practice law.

Likewise, Rule 1.2 does permit a lawyer to “counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” Rule 1.2(e). This is necessary in order to balance a lawyer’s obligations under the Rules with the public’s general interest in obtaining legal assistance to understand the law and to conform its conduct. Defining Rule 1.2 too strictly on matters involving marijuana would inhibit lawyers from

assisting clients in testing the boundaries and validity of existing law, which is recognized to be an integral part of the development of the law. Thus, the Commission recognizes that such strict interpretation of Rule 1.2 would more likely have a detrimental effect, particularly where, as here, it appears the regulation of use and trade in marijuana is in a developmental phase. To subject lawyers to discipline for counseling or assisting clients to engage in Maine's testing of this area would be, in practical effect, to shut down this particular approach to development of the law. The public's need for legal assistance and right to receive it are substantial, and concerns about upholding respect for the law and legal institutions are not significant enough to outweigh those considerations in this circumstance.

Therefore, in clarifying and hereby replacing Opinion 214, the Commission opines that, notwithstanding current federal laws regarding use and sale of marijuana, Rule 1.2 is not a bar to assisting clients to engage in conduct that the attorney reasonably believes is permitted by Maine laws regarding medical and recreational marijuana, including the statutes, regulations, Orders and other state or local provisions implementing them. The Commission cautions that, because the DOJ guidance on prosecutorial discretion is subject to change, lawyers providing advice in this field should be up to date on federal enforcement policy, as well as any modifications of federal and state law and regulations, and advise their clients of the same.

NOTE 20, MARYLAND

[https://govt.westlaw.com/mdc/Document/N383901803C0211E6ACAF9E5216076AB4?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)&bhcp=1](https://govt.westlaw.com/mdc/Document/N383901803C0211E6ACAF9E5216076AB4?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1) [<https://perma.cc/2YR4-JLCJ>].

Maryland Rule 19-301.2:

(a) Subject to ~~paragraphs~~ sections (c) and (d) *of this Rule, an attorney* shall abide by a client's decisions concerning the objectives of *the* representation and, ~~as required by Rule 1.4 when appropriate,~~ shall consult with the client as to the means by which they are to be pursued. ~~A lawyer~~ *An attorney* may take such action on behalf of the client as is impliedly authorized to carry out the representation. ~~A lawyer~~ *An attorney* shall abide by a client's decision whether to settle a matter. In a criminal case, the ~~lawyer~~ *attorney* shall abide by the client's decision, after consultation with the ~~lawyer~~ *attorney* as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) ~~A lawyer~~ *An attorney* 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.

(c) ~~A lawyer~~ *An attorney* may limit the scope of the representation ~~if in accordance with applicable Maryland Rules if (1) the limitation is reasonable under the circumstances and (2) the client gives informed consent, and (3) the scope and limitations of any representation, beyond an initial consultation or brief advice provided without a fee, are clearly set forth in a writing, including any duty on the part of the attorney under Rule 1-324 to forward notices to the client.~~

(d) ~~A lawyer~~ *An attorney* shall not counsel a client to engage, or assist a client, in conduct that the ~~lawyer~~ *attorney* knows is criminal or fraudulent, but a ~~lawyer~~ *an attorney* 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.

Maryland Comments to its version of Rule 1.2:

12] Maryland enacted a medical marijuana law in 2013. See Code, Health General Article, § 13-3301 et seq. As a matter of State law, some medical marijuana activities are permissible, and are subject to regulation. Notwithstanding Maryland law, the Federal Controlled Substances Act, 21

U.S.C. §§ 801--904, continues to criminalize the production, use, and distribution of marijuana, even in the context of medical use. As of 2014, the federal government has taken the position, however, that it generally does not wish to interfere with retail sales of medical marijuana permitted under State law.

In this narrow context, an attorney may counsel a client about compliance with the State's medical marijuana law without violating Rule 19-301.2 (d) and provide legal services in connection with business activities permitted by the State statute, provided that the attorney also advises the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

NOTE 21, MASSACHUSETTS

<https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-12-scope-of-representation-and> [<https://perma.cc/8VDJ-NQLQ>].

(a) ~~Subject to paragraphs (c) and (d), a~~ A lawyer shall ~~abide by a client's decisions concerning~~ *seek* the *lawful* objectives of representation and, as required by Rule 1.4, shall consult with the *his or her* client as to the *through reasonably available* means by which they are to be pursued *permitted by law and these Rules*. ~~A lawyer may take such action on behalf~~ *does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her* client as is impliedly authorized to carry out the representation, *by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process*. A lawyer shall abide by a client's decision whether to *accept an offer of settlement of* a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.

NOTE 22, MICHIGAN

<http://courts.mi.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf>
[<https://perma.cc/63KJ-FARZ>].

Rule: 1.2 Scope of Representation:

(a) ~~Subject to paragraphs (c) and (d), a~~ A lawyer shall ~~abide by a client's decisions concerning~~ seek the lawful objectives of representation and, ~~as required,~~ a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule ~~Rule 1.4, shall consult with~~ by acceding to reasonable requests of opposing counsel that do not prejudice the client as to the means by which they are to be pursued. A lawyer may take such action on behalf rights of the client as is impliedly authorized to carry out the representation, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to ~~settle~~ accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, ~~as~~ with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(b) ~~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.~~

(b) A lawyer licensed to practice in the State of Michigan may limit the scope of a representation, file a limited appearance in a

civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

(1) A lawyer licensed to practice in the State of Michigan may draft or partially draft pleadings, briefs, and other papers to be filed with the court. Such assistance does not require the signature or identification of the lawyer, but does require the following statement on the document: "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to Michigan Rule of Professional Conduct 1.2(b)."

(2) The filing of such documents is not and shall not be deemed an appearance by the lawyer in the case. Any filing prepared pursuant to this rule shall be signed by the party designated as "self-represented" and shall not be signed by the lawyer who provided drafting preparation assistance. Further, the lawyer providing document preparation assistance without entering a general appearance may rely on the client's representation of the facts, unless the lawyer has reason to believe that such representation is false, seeks objectives that are inconsistent with the lawyer's obligation under the Rules of Professional Conduct, or asserts claims or defenses pursuant to pleadings or papers that would, if signed by the lawyer, violate MCR 2.114, or which are materially insufficient.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is ~~criminal~~ illegal 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.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

NOTE 23, MINNESOTA

<http://lprb.mncourts.gov/rules/Documents/MN%20Rules%20of%20Professional%20Conduct.pdf> [https://perma.cc/FU5S-BC2B].

Minnesota's Rule 1.2 is identical to the ABA Model Rule.

Minn.'s Lawyers Professional Responsibility Board Op. 23 states, in its entirety:

<http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2023.pdf> [https://perma.cc/Y6ZN-K3RH].

A lawyer may advise a client about the Minnesota Medical Marijuana Law and may represent, advise and assist clients in all activities relating to and in compliance with the Law, including the manufacture, sale, distribution and use of medical marijuana, without violating the Minnesota Rules of Professional Conduct, so long as the lawyer also advises his or her client that such activities may violate federal law, including the federal Controlled Substance Act, 21 U.S.C. § 841(a)(1).

NOTE 26, MONTANA

https://c.ymcdn.com/sites/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_professional_conduct.pdf [https://perma.cc/AVX6-C877].

Montana Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent: in writing.

(1) The client's informed consent must be confirmed in writing unless:

(i) the representation of the client consists solely of telephone consultation;

(ii) the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or

(iii) the court appoints the attorney for a limited purpose that is set forth in the appointment order.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

(i) the representation is limited to the attorney and the services described in writing; and

(ii) the attorney does not represent the client generally or in matters other than those identified in the writing.

(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.

NOTE 28, NEVADA

<https://www.leg.state.nv.us/courtrules/RPC.html>
[<https://perma.cc/EKB7-BBHH>].

Rule 1.2 is identical to the Model Rule, but Nevada did not adopt the ABA Comments and has its own comment to 1.2.

[1] 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.

[Added; effective May 1, 2006; as amended; effective May 7, 2014.]

NOTE 29, NEW HAMPSHIRE

https://www.courts.state.nh.us/rules/pcon/pcon-1_2.htm

[<https://perma.cc/3CED-NQK5>].

New Hampshire Rule 1.2:

(a) Subject to paragraphs (c) ~~and~~ (d), *and (e)*, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. ~~A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.~~

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. *In providing limited representation, the lawyer's responsibilities to the client, the court and third parties remain as defined by these Rules as viewed in the context of the*

limited scope of the representation itself; and court rules when applicable.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, except as stated in paragraph (e), 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.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by state or local law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

(f) It is not inconsistent with the lawyer's duty to seek the lawful objectives of a client through reasonably available means, for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, avoid the use of offensive or dilatory tactics, or treat opposing counsel or an opposing party with civility.

(g) In addition to requirements set forth in Rule 1.2(c),

(1) a lawyer may provide limited representation to a client who is or may become involved in a proceeding before a tribunal (hereafter referred to as litigation), provided that the limitations are fully disclosed and explained, and the client gives informed consent to the limited representation. The form set forth in section (g) of this Rule has been created to facilitate disclosure and explanation of the limited nature of representation in litigation. Although not prohibited, the provision of limited representation to a client who is involved in litigation and who is entitled as a matter of law to the appointment of counsel is discouraged.

(2) a lawyer who has not entered an applicable limited appearance, and who provides assistance in drafting pleadings, shall advise the client to comply with any rules

of the tribunal regarding participation of the lawyer in support of a pro se litigant.

NOTE 30, NEW JERSEY

<https://www.judiciary.state.nj.us/attorneys/assets/rules/rpc.pdf>
[<https://perma.cc/MK33-8JJA>].

New Jersey Rule 1.2:

(a) ~~Subject to paragraphs (c) and (d), a~~ lawyer shall abide by a client's decisions concerning the scope and objectives of representation ~~and, subject to paragraphs (c) and (d), and~~ as required by ~~Rule~~ RPC 1.4 shall consult with the client ~~as to about~~ the means ~~by which they are to be pursued to pursue them.~~ A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision, ~~after consultation with the lawyer, as to a~~ on the plea to be entered, ~~whether to waive~~ jury trial, and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel ~~a client to engage~~ or assist a client in conduct that the lawyer knows is *illegal*, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may ~~discuss the legal consequences of any proposed course of conduct with a client and may counsel~~ counsel or assist a client ~~to make~~ in a good faith effort to determine the validity, scope, meaning or application of the law. A lawyer may counsel a client regarding New Jersey's medical 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.

NOTE 31, NEW MEXICO

http://www.nmcompcomm.us/nmrules/NMRules/16-102_6-30-2017.pdf [<https://perma.cc/XDG4-KR55>].

A. Subject to Paragraphs C and D *of this rule*, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule *16-104 NMRA of the Rules of Professional Conduct*, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

B. 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.

C. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

D. 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.

New Mexico Comments:

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. As an illustration, a lawyer may counsel or assist a client regarding conduct expressly permitted by the Lynn and Erin Compassionate Use Act, NMSA 1978, §§ 26-2B-1 to -7, and may assist a client in conduct that the lawyer reasonably believes is permitted by the Act. When that advice or assistance is given, the lawyer shall counsel the client about the potential legal consequences, under federal and other applicable law, of the client's proposed course of conduct. 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.

[14] 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.

[15] 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 16-104(A)(5) NMRA.

NOTE 32, NEW YORK

** New York has two sets of RPC, one by the Unified Court System and one by the NY State Bar. The RPCs are the same, but only the NYSBA version has comments.

New York State Unified Court System Rule 1.2 (Jan. 1, 2017):

<http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf> [<https://perma.cc/R34F-8J4C>].

There is a note to the rules:

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

(a) Subject to ~~paragraphs (c) and (d)~~ the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. ~~A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.~~ A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances ~~and~~ the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is ~~criminal~~ illegal or fraudulent, ~~but a~~ except that the 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.~~

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable

requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

The New York State Bar Rules are identical to the Unified Court Rules, but the NYSBA adds comments.

<https://www.nysba.org/DownloadAsset.aspx?id=50671>

[<https://perma.cc/BG3T-TSH3>].

Comment 15 (emphasis in the original):

[15] In some situations such as those described in paragraph (d), a lawyer is prohibited from aiding or participating in a client's improper or potentially improper conduct; but in other situations, a lawyer has discretion. Paragraph (f) permits a lawyer to refuse to aid or participate in conduct the lawyer *believes* to be unlawful, even if the conduct is arguably legal. In addition, under Rule 1.16(c)(2), the lawyer *may* withdraw from representing a client when the client persists in a course of action involving the lawyer's services that the lawyer reasonably *believes* is criminal or fraudulent, even if the course of action is arguably legal. In contrast, when the lawyer *knows* (or reasonably should know) that the representation will result in a violation of law or the Rules of Professional Conduct, the lawyer *must* withdraw from the representation under Rule 1.16(b)(1). If the client "insists" that the lawyer pursue a course of conduct that is illegal or prohibited under the Rules, the lawyer must not carry out those instructions and, in addition, may withdraw from the representation under Rule 1.16(c)(13). If the lawyer is representing the client before a tribunal, additional rules may come into play. For example, the lawyer may be required to obtain the tribunal's

permission to withdraw under Rule 1.16(d), and the lawyer may be required to take reasonable remedial measures under Rule 3.3 with respect to false evidence or other criminal or fraudulent conduct relating to a proceeding.

NYSBA Ethics Opinion 1024 (Sept. 29, 2014), issued *before* the NY change in Rule 1.2

<http://www.nysba.org/CustomTemplates/Content.aspx?id=52179>
[<https://perma.cc/TW6Q-3GTP>].

Excerpts:

4. Lawyers may advise clients about the lawfulness of their proposed conduct and assist them in complying with the law, but lawyers may not knowingly assist clients in illegal conduct. Rule 1.2(d) provides: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.” Disciplinary Rule 7-102(A)(7), contained in the pre-2009 Code of Professional Responsibility, was to the same effect. As this Committee has observed, if a client proposes to engage in conduct that is illegal, “then it would be unethical for an attorney to recommend the action or assist the client in carrying it out.” N.Y. State 769 (2003); *accord* N.Y. State 666 (1994).

5. This ethical restriction reflects lawyers’ fundamental role in the administration of justice, which is to promote compliance with the law by providing legal advice and assistance in structuring clients’ conduct in accordance with the law. *See also* Rule 8.4(b) (forbidding “illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer”). Ideally, lawyers will not only attempt to prevent clients from engaging in knowing illegalities but also discourage clients from conduct of doubtful legality: * * *

6. It is counter-intuitive to suppose that the lawyer’s fundamental role might ever be served by assisting clients

in violating a law that the lawyer knows to be valid and enforceable. But the question presented by the state's medical marijuana law is highly unusual if not unique: Although participating in the production, delivery or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana. Both the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to promote their compliance with state law and current federal policy. Under these unusual circumstances, for the reasons discussed below, the Committee concludes that Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.

12. Lawyers might provide a range of assistance to clients seeking to comply with the CCA and to act consistently with federal law enforcement policy. Among the potential clients are public officials and agencies including the Health Department that have responsibility for implementing the law, health care providers and other entities that may apply to be selected or eventually be selected as Registered Organizations authorized to manufacture and dispense medical marijuana, physicians seeking to prescribe medical marijuana, and patients with severely debilitating or life-threatening conditions seeking to obtain medical marijuana. Any or all of these potential clients may seek legal assistance not only so that they may be advised how to comply with the state law and avoid running afoul of federal enforcement policy but also for affirmative legal assistance. The Health Department may seek lawyers' help in establishing internal procedures to conduct the registrations and other activities contemplated by the law. Entities may seek

assistance in applying to become Registered Organizations as well as in understanding and complying with employment, tax and other requirements of the law. Physicians may seek help in understanding the severe restrictions on the issuance of prescriptions for medical marijuana and in navigating the procedural requirements for effectively issuing such prescriptions.

13. Leaving aside the federal law, the above-described legal assistance would be entirely consistent with lawyers' conventional role in helping clients comply with the law. Indeed, it seems fair to say that state law would not only permit but affirmatively expect lawyers to provide such assistance. In general, it is assumed that lawyers, by virtue of their expertise and ethical expectations, have a necessary role in ensuring the public's compliance with the law. "As our society becomes one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance." Rule 6.1, Cmt. [1]. This is especially true with regard to complex, technical regulatory schemes such as the one established by the CCA, and where, as in the case of the CCA, noncompliance can result in criminal prosecution.

14. However, the federal law cannot easily be left aside. The question of whether lawyers may serve their traditional role is complicated by the federal law. Assuming, as we do for purposes of this opinion, that the federal marijuana prohibition remains valid and enforceable notwithstanding state medical marijuana law, then individuals and entities seeking to dispense, prescribe or use medical marijuana, or to assist others in doing so, pursuant to the CCA would potentially be violating federal narcotics law as principals or accessories; in that event, the legal assistance sought from lawyers might involve assistance in conduct that the lawyer knows to be illegal.

NOTE 34, NORTH DAKOTA

<https://www.ndcourts.gov/rules/Conduct/frameset.htm>
[<https://perma.cc/R6T2-KAHS>].

North Dakota Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the ~~limitation is reasonable under the circumstances and the client gives informed consent~~ client consents in writing after consultation.

(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.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by North Dakota law. To the extent required by Rule 1.1, a lawyer shall counsel such a client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

North Dakota Opinion 14-02 (Aug. 12, 2014) Conflict of laws; Jurisdiction; Out-of-state lawyers; Multijurisdictional practice; Misconduct.

https://www.lcc.leg.mn/mctrtrf/meetings/11062014/North_Dakota_Bar_Opinion.pdf [<https://perma.cc/J4NE-47M6>].

A North Dakota lawyer who moves to Minnesota to participate in a medical previous marijuana treatment program that complies with Minnesota law violates Rule 8.4(b). Both federal and North Dakota law criminalize any use of previous marijuana. 21 U.S.C. §§812(b)(1), 841(a)(1); N.D. Cent. Code §19-03.1; Rule 8.4.

Note that North Dakota considered amending Rule 1.2(d) in 2017 but did not do so.

https://www.ndcourts.gov/Court/Committees/Jt_ASC/AgendaMar2017.htm [<https://perma.cc/MP8W-7B6G>].

NOTE 35, OHIO

<http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf> [<https://perma.cc/PUZ3-GEW9>].

Ohio Rule 1.2 (amended Sept. 20, 2016, and entire rules amended again effective May 2, 2017):

(a) Subject to ~~paragraphs~~ *divisions (e) and (d) (c), (d), and (e) of this rule*, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take ~~such~~ action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer ~~shall abide~~ *does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by* a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, ~~after consultation with the lawyer,~~ as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

~~(b) [RESERVED] 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.~~

(c) A lawyer may limit the scope of ~~the~~ a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client ~~gives informed consent,~~ preferably in writing.

(d)

(1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is *illegal* or fraudulent, but a. 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 in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(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, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

Note: Ohio's Board of Professional Conduct has issued an opinion about medical marijuana; both were issued in 2016, but it seems to be superseded by the later change in Rule 1.2.

Ohio Opinion 2016-6 (Aug. 5, 2016)

<https://www.ohioadvop.org/wp-content/uploads/2017/03/Adv-Op-2016-6-Not-Current-docx.pdf> [<https://perma.cc/BN3F-QXB5>].

SYLLABUS: A lawyer may not advise a client to engage in conduct that violates federal law, or assist in such conduct, even if the conduct is authorized by state law. A lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to

transact business with a person or entity engaged in a medical marijuana enterprise.

A lawyer may provide advice as to the legality and consequences of a client's proposed conduct under state and federal law and explain the validity, scope, meaning, and application of the law. A lawyer's personal use of medical marijuana pursuant to a state regulated prescription, ownership in, or employment by a medical marijuana enterprise, subjects the lawyer to possible federal prosecution, and may adversely reflect on a lawyer's honesty, trustworthiness, and overall fitness to practice law.

NOTE 36, OKLAHOMA

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?Cit eID=448831> [<https://perma.cc/DWJ5-KW4Q>]

Oklahoma Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

~~b) 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. The substance of (b) is in modified Comment at [5].~~

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.

NOTE 37, OREGON

https://www.osbar.org/_docs/rulesregs/orpc.pdf
[<https://perma.cc/7EPP-KBME>].

Oregon Rule 1.2:

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

~~b) 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.~~

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is ~~criminal~~ *illegal* 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.

(d) Notwithstanding paragraph (c), 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.

NOTE 38, PENNSYLVANIA

<http://www.padisciplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct>
[<https://perma.cc/T297-Z6S6>].

Pennsylvania Rule 1.2:

1. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

2.~~(b)~~ 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.

3.~~(e)~~ A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

4.~~(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.

5. *A lawyer 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.*

Note: in adopting this Rule in 2017, the Penn. Disciplinary Board issued a release explaining its rationale.¹²⁸

128. *See Amendment to Rules of Professional Conduct: PA Supreme Court Clarifies Rule that Pertains to the Issue of Lawyers Advising Clients Engaged in the Medical Marijuana Industry*, DISCIPLINARY BD. OF SUP. CT. OF PA., (Oct. 26, 2017), <http://www.padisciplinaryboard.org/news-media/news-article/7/amendment-to-rules-of-professional-conduct> [<https://perma.cc/7DR5-STXQ>]:

The Pennsylvania Supreme Court has adopted a change to its Rules of Professional Conduct governing attorneys to address questions of whether it is ethically permissible to provide legal advice and assistance to clients engaged in the medical marijuana industry.

The change adds a new paragraph (e) to Rule of Professional Conduct 1.2 specifically permitting a lawyer to counsel or assist a client regarding conduct expressly permitted by Pennsylvania law. At the same time, however, the rule also states that the lawyer has an obligation to counsel the client about the legal consequences of the client's proposed course of conduct under other applicable laws.

The rule change arose out of numerous inquiries received by the Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee and the Philadelphia Bar Association's Professional Guidance Committee. With the changing marijuana laws in the United States precipitating a growing need for legal assistance in this area, Pennsylvania lawyers were asking whether it was ethically permissible to provide legal advice and assistance to clients engaged in the marijuana industry. To date, more than 20 states, including Ohio, New York, New Jersey, Maryland and Delaware, and the District of Columbia have enacted laws relating to medical marijuana. Pennsylvania enacted the Medical Marijuana Act on April 17, 2016.

Notwithstanding the trend of many states toward some form of legalization of marijuana, marijuana remains illegal under federal law. The Controlled Substances Act provides that marijuana is a 'Schedule 1' drug, thereby making it unlawful to 'manufacture, distribute, dispense, or possess a controlled substance.'

The conflict between federal and state laws created an ethical dilemma for Pennsylvania lawyers because Pennsylvania RPC 1.2(d) states that 'A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .'

Under the former rule, arguably, a Pennsylvania lawyer was prohibited from assisting a client in various activities such as drafting or negotiating contracts that may have related, directly or indirectly, to the purchase, distribution or sale of medical marijuana, even though such activities are now legal under state law.

The new rule will permit counsel to provide legal services to clients without being subject to discipline under court rules.

“Joint Formal Opinion” by the Penn. Bar Ass’n and the Philadelphia Bar Ass’n, Op. 2015-100, recommending changes to Rule 1.2 (a change later adopted):

<http://www.philadelphiabar.org/WebObjects/PBARReadOnly.woa/Contents/WebServerResources/CMSResources/JointFormalOpinion2015-100.pdf>
[<https://perma.cc/R4RD-CJS4>].

Summary:

Current federal law enforcement policy limits the likelihood of prosecution for violation of the Controlled Substances Act for those involved in marijuana-related activities that are specifically authorized and regulated under state law. However, the manufacture, distribution, dispensation and possession of marijuana are still crimes under federal law. Therefore, Rule 1.2(d) of the Pennsylvania Rules of Professional Conduct prohibits a lawyer from counseling or assisting a client in such conduct, even though the conduct may be specifically authorized under applicable state law. A lawyer may, however, explain to the client the potential consequences of a proposed course of conduct, including whether or not such conduct would be in conformance with applicable state and federal law.

To address the existing and growing need for legal assistance with respect to marijuana-related activities that are authorized, or will, in the future, become authorized under various states’ laws, it is recommended that Rule 1.2(d) be amended to authorize lawyers to provide legal assistance with respect to conduct that is expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.

Pennsylvania Bar Association Opinion 2016-017 (June 27, 2016)
business activities; misconduct. (not available online)

Holds that a lawyer may participate as a principal or a backer in a medical marijuana organization authorized under the Pennsylvania Medical Marijuana Act. Even if this violates the federal Controlled Substances Act, it does not reflect adversely on the lawyer's fitness within the meaning of Rule 8.4(b). Formal Opinion 2015-100; Rule 8.4(b).

The "proposed activity would all be in compliance with, and specifically authorized under, existing state law. There is nothing inherently 'dishonest' or 'untrustworthy' about carrying on such state-sanctioned activities, and they cannot otherwise be considered to 'indicate [a] a lack of those characteristics relevant to law practice' as discussed in Comment 5 [2].

NOTE 39, RHODE ISLAND

<https://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf> [<https://perma.cc/8WGU-NR95>].

Rule 1.2 (Rules revised June 2017):

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

~~(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.~~

~~(d)~~ (c) 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.

(d) Limited Scope Representation. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. The client must provide knowing and informed consent as part of the written limited scope representation engagement or retainer agreement. Upon entering into a written limited scope representation engagement or retainer agreement, an attorney/client relationship arises between the client and lawyer.

(1) For limited scope representation matters involving only the provision of drafting services, such as drafting a pleading, motion, or other written submission. The lawyer shall sign the document(s) and disclose thereon his or her identity and the nature and extent of the assistance that he or she is providing to the tribunal and to all parties to the litigation. The lawyer shall also indicate on the written document that his or her signature does not constitute an entry of appearance or otherwise mean that the lawyer represents the client in the matter beyond assisting in the preparation of the document(s). The attorney/client relationship between the client and the lawyer engaged to provide limited scope drafting services shall terminate in accordance with Rule 1.16(d) upon the filing of all document(s) the lawyer was engaged to draft.

(2) For limited scope representation matters involving court proceedings in connection with, in addition to, or independent of the provision of drafting services. The lawyer shall make a limited appearance on behalf of the otherwise unrepresented client by filing an Entry of Limited Appearance. This Entry of Limited Appearance cannot be filed until the otherwise unrepresented client also files a pro se appearance in the case. The Entry of Limited Appearance shall state precisely the court event to which the limited appearance pertains. A lawyer may

not file an Entry of Limited Appearance for more than one court event in a civil case without leave of the court and the written consent of the client. A lawyer may not enter a limited appearance for the sole purpose of making evidentiary objections. A limited appearance also shall not allow both a lawyer and a litigant to argue at the same court event during the period of the limited appearance.

(3) Termination of Limited Scope Representation. Upon completion of a limited scope representation conducted pursuant to Rule 1.2(d)(2), a lawyer shall withdraw by filing a Notice of Withdrawal of Limited Appearance in the court in which the appearance was made, with written notice to the client. No formal motion to withdraw is required and the Notice of Withdrawal of Limited Appearance when filed will be treated as a withdrawal as a matter of course when the lawyer certifies that the purpose for which the appearance was entered has been accomplished and that written notice of the withdrawal has been given to the client. The Notice of Withdrawal of Limited Appearance shall include the client's name, address, and telephone number, unless otherwise provided by law. The lawyer must file a Notice of Withdrawal of Limited Appearance for each court event for which the lawyer has filed an Entry of Limited Appearance. Such withdrawal shall be done as soon as practicable. A lawyer who seeks to withdraw before the purpose of the limited appearance has been accomplished may do so only on motion and with notice. Upon the submission of the Notice of Withdrawal of Limited Appearance in accordance with this subsection, the representation of the client is terminated in accordance with Rule 1.16(d).

(4) A pleading, motion, Entry of Limited Appearance, Notice of Withdrawal of Limited Appearance, or any other document filed by a lawyer making a limited appearance under subsections 1 through 3 shall comply with the requirements of Rule 1.2(d).

Rhode Island Supreme Court Ethics Advisory Opinion. 2017-01
(Feb. 3, 2017)

<https://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/17-01.pdf> [<https://perma.cc/NBJ9-R8UX>].

Excerpts:

ISSUE PRESENTED: May the inquiring attorneys provide legal services relating to Rhode Island’s medical marijuana law when conduct that is permitted under the law is unlawful under federal law?

OPINION: The inquiring attorneys may ethically advise clients about Rhode Island’s medical marijuana law, and may ethically represent, advise, and assist clients in all activities relating to and in compliance with the law, provided that the lawyers also advise clients regarding federal law, including the federal Controlled Substances Act.

“The Rules of Professional Conduct are rules of reason.” R.I. Rules of Professional Conduct, Preamble & Scope, ¶ 14. In the context of this inquiry, clients are seeking to participate in a lawful medical marijuana program. They are not pursuing a course of criminal conduct. It follows then, that when lawyers assist clients in a lawful medical marijuana program, the lawyers are not assisting those clients in conduct that is criminal. Rather, they are providing assistance in implementing and promoting state law, and in this instance, a state law that is sufficiently complex so as to warrant the assistance of lawyers. The Panel believes that when our Supreme Court adopted Rule 1.2(d), the Court never intended to prohibit lawyers from advising clients on Rhode Island law, or from assisting clients in conduct permitted under Rhode Island law.

Next, marijuana enforcement by the United States Department of Justice has been relaxed. In 2013, the Department of Justice issued a memorandum advising United States attorneys and law enforcement that, in states

that have legalized marijuana in some form, and have strong regulatory and enforcement systems in place, the Department of Justice will defer to enforcement of state law by state and local law enforcement and their regulatory agencies. See Memorandum from James M. Cole, Deputy Attorney General, to U.S. Attorneys, "Guidance Regarding Marijuana Enforcement" (Aug. 29, 2013).

Finally, the Panel considered the legislative finding in Rhode Island's medical marijuana law which states:

4) States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with this chapter does not put the state of Rhode Island in violation of federal law. G.L. 1956 § 21-28.6-2(4).

Accordingly, the Panel concludes that the inquiring attorneys may ethically advise clients about Rhode Island's medical marijuana law, and may ethically represent, advise, and assist clients in all activities relating to and in compliance with the law, provided that the lawyers also advise clients regarding federal law, including the federal Controlled Substances Act.

NOTE 43, TEXAS

<https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm>
[<https://perma.cc/VL2U-4HSN>].

Texas Rule 1.02:

(a) Subject to paragraphs ~~(b) and (c)~~ (b), (c), (d), (e), (f), and (g), a lawyer shall abide by a client's decisions:

(1) concerning the objectives *and general methods* of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the

~~client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision;~~

~~(2) whether to settle a accept an offer of settlement of a matter, except as otherwise authorized by law;~~

~~(3) In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.~~

~~(b) 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.~~

~~(b) A lawyer may limit the scope, objectives and general methods of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. client consents after consultation.~~

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

~~(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.~~

~~(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.~~

~~(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the~~

lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct. (g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

NOTE 45, VERMONT

<https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf>
[<https://perma.cc/85SE-GS96>].

Vermont's Rule 1.2 is identical to the Model Rule.

Vermont added Comment 14 to its Rule 1.2 effective Oct. 31, 2016, although the Comment is not yet on the official Vermont Judiciary website. The link to the Supreme Court's order is:

https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDComment%20to%20V.R.Pr_.C.%201.2.pdf [<https://perma.cc/D77A-R67C>].

Vermont Comment 14:

[14] With respect to paragraph (d), a lawyer may counsel a client regarding the validity, scope, and meaning of Title 18, chapters 84, 84A, and 86 of the Vermont Statutes Annotated, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state and local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

Board's Notes-2016 Amendment:

Comment [14] is added to clarify that Rule 1.2(d) does not prohibit Vermont lawyers from providing legal advice and legal assistance to

clients on matters related to Vermont's laws regulating marijuana and allowing some permissible uses. Rule 1.2(d) does not draw a distinction between state and federal law. Therefore, while the Department of Justice's current enforcement policy is to focus prosecutorial resources on activities other than those that are legal under state-approved regulatory schemes, marijuana remains an illegal controlled substance under the federal Controlled Substances Act. See 21 U.S.C. §§ 801-904. Arguably, a lawyer violates Rule 1.2(d) by providing a client with legal advice and legal assistance necessary to set up a dispensary of therapeutic cannabis that is legal under Vermont law. This amendment clarifies that such legal advice and assistance is not a violation of the rule.

Given the conflict between state and federal law, and DOJ's current enforcement policy, this is an area in which advice from an attorney is critical and into which clients should not be forced to enter without counsel. Similarly, lawyers should not face professional discipline for providing legal advice and legal assistance on such an important issue, especially when the alternative is to leave clients to proceed at their own peril.

NOTE 47, WASHINGTON STATE

https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc1.02 [https://perma.cc/Y9R6-YQ9A].

Washington State Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client as to the

means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.

(e) [Reserved.]

(f) A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.

Washington Comment 18:

[18] At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) 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.

[Comment [18] adopted effective December 9, 2014.]

NOTE 48, WEST VIRGINIA

<http://www.courts.wv.gov/legal-community/court-rules/professional-conduct/rule1.html#rule1.2>
[<https://perma.cc/DPU7-RJ5G>].

West Virginia Rule 1.2:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation ~~with the lawyer~~, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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.

(e) A lawyer may counsel a client regarding West Virginia law and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If West Virginia law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and its potential consequences.