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## Tiptoeing Through the Landmines: The Evolution of States' Legal Ethics Authority Regarding Representing Cannabis Clients

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## Tiptoeing Through the Landmines: The Evolution of States' Legal Ethics Authority Regarding Representing Cannabis Clients

*Karen E. Boxx\**

*"I feel . . . like I'm the one out in the trenches right now,  
tiptoeing through landmines."*<sup>1</sup>

Despite the continued federal classification of cannabis as an illegal drug,<sup>2</sup> states have legalized the possession, use, production, and sale of cannabis. In order to do so, the states have created complex regulatory schemes to control and monitor the cannabis industry and satisfy the federal government concerns, such as use by minors and organized crime involvement.<sup>3</sup> The complex regulatory schemes and unavailable business practice protections arising out of federal law<sup>4</sup> require cannabis businesses to seek legal advice, early and often in their business life cycle.

Consequently, lawyers face their own hurdles in assisting these businesses because state ethics rules prohibit a lawyer from advising and assisting clients to engage in illegal activity.<sup>5</sup> In addition, lawyers are also

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\* Professor of Law, University of Washington. Professor Boxx thanks Todd Maybrown and Professor Hugh Spitzer for their thoughtful suggestions, and Kyle Brown, Gallagher Law Library, for his research assistance.

1. Hugh McQuaid, *Medical Marijuana Poses Ethical Challenges for Lawyers*, CT NEWS JUNKIE (Oct. 25, 2013) (quoting attorney Diane W. Whitney), [https://www.ctnewsjunkie.com/archives/entry/medical\\_marijuana\\_poses\\_ethical\\_challenges\\_for\\_lawyers/](https://www.ctnewsjunkie.com/archives/entry/medical_marijuana_poses_ethical_challenges_for_lawyers/) [<https://perma.cc/X5Z4-DHFF>].

2. *See* Controlled Substances Act of 1970, 21 U.S.C. § 812 (2018); *see also* *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Mar. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/WCF5-4TPA>].

3. When the states began legalizing cannabis, the U.S. Department of Justice announced a list of eight enforcement priorities and indicated that states that protected against the federal concerns would have low expectations of federal interference. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-01, STATE MARIJUANA LEGALIZATION: DOJ SHOULD DOCUMENT ITS APPROACH TO MONITORING THE EFFECTS OF LEGALIZATION (2015), <https://www.gao.gov/assets/680/674464.pdf> [<https://perma.cc/64CW-7E4R>].

4. *See* 21 U.S.C. § 801 (2018). Because the cannabis business is considered illegal under federal law, bankruptcy, intellectual property protection, banking, and certain federal income tax deductions available to other businesses are not available.

5. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2019).

prohibited from committing crimes that reflect adversely on the lawyer's fitness and from engaging in conduct involving fraud, deceit, or conduct that is "prejudicial to the administration of justice."<sup>6</sup> Because cannabis remains illegal under federal law, representing cannabis businesses would be assisting in criminal behavior in a manner that may reflect adversely on the lawyer's fitness and be prejudicial to the administration of justice. States have responded with adjustments to their ethics rules. These responses have evolved into various forms from strictly construing cannabis representation as unethical to encouraging more safe harbors. Thanks to the changing political landscape, cannabis lawyers in a number of states now have some assurance that taking on a cannabis business as a client will not trigger disciplinary action; nonetheless, they must still proceed very carefully and continually evaluate the remaining risks. Although the practice of law always involves a certain level of risk management, the cannabis industry adds a unique and complex layer of risks to which a lawyer must be sensitive, even though the likelihood of state bar discipline or federal prosecution seems unlikely.

First, this Article presents the ethical dilemma of cannabis lawyering. Second, this Article describes the history, evolution, and current status of the various states' pronouncements on a lawyer's ethical duties with respect to the business and use of cannabis that may be legal under state law but illegal under federal law. Third, this Article briefly discusses the remaining dangers and concerns surrounding a cannabis law practice. Lastly, this Article concludes by emphasizing that states should clear the path for lawyers to represent cannabis clients by implementing a policy allowing cannabis representation, as such policies not only benefit the lawyers but also benefit the states that now have cannabis programs.

### I. THE ETHICAL DILEMMA OF CANNABIS LAWYERING

The Model Rules of Professional Conduct promulgated by the American Bar Association are the basis for all states' ethics rules.<sup>7</sup> The rule that is most troublesome for the cannabis lawyer is Rule 1.2(d):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of

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6. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2019).

7. California was the only state that did not use the American Bar Association (ABA) Model Rules, but in 2018, it completed a rewrite of its ethics rules which is essentially a state-specific version of the ABA Model Rules. See Lorelei Laird, *California Approves Major Revision to Attorney Ethics Rules, Hewing Closer to ABA Model Rules*, ABA J. (Oct. 2, 2018), [http://www.abajournal.com/news/article/california\\_approves\\_major\\_revision\\_to\\_attorney\\_ethics\\_rules\\_hewing\\_closer\\_t](http://www.abajournal.com/news/article/california_approves_major_revision_to_attorney_ethics_rules_hewing_closer_t) [https://perma.cc/8NL9-68F6].

conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.<sup>8</sup>

Because the possession, use, and marketing of cannabis is illegal under federal law, assisting a cannabis business in carrying out its activities would fall within the first phrase of this rule. Under the rule, the most the lawyer could do is explain to the client the extent to which the client's activities comply with or violate state and federal law. The lawyer is also permitted to discuss the potential legal consequences of the client's activities. Comment 9 to Rule 1.2 explains the extent of the lawyer's permissible counseling:

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.<sup>9</sup>

Arguably, the lawyer who merely assists the cannabis business client by advising on state law compliance, drafting entity formation documents, and reviewing leases is not helping the client to commit a crime "with impunity" because the client, under state regulation, will be operating in full view of the federal government.

In addition to concerns about Rule 1.2, lawyers must also be cognizant of potential violations of Rule 8.4. Model Rule 8.4 states in pertinent part:

It is professional misconduct for a lawyer to:

...

(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;

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8. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2019).

9. *Id.* cmt. 9.

(d) engage in conduct that is prejudicial to the administration of justice[.]<sup>10</sup>

Regardless of the likelihood of prosecution, assisting cannabis clients, actively participating in a cannabis business, and possessing or consuming cannabis are all federal crimes. The issue becomes whether such crimes would reflect adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer; would involve dishonesty, fraud, deceit, or misrepresentation; or would be prejudicial to the administration of justice. As noted below, some states have issued opinions, indicating that cannabis representation would not be a violation.<sup>11</sup> However, assisting in criminal activity could be considered prejudicial to the administration of justice or could be deemed to reflect adversely on the lawyer's trustworthiness or fitness as a lawyer, depending on how the disciplinary authority defines those broad terms.

## II. STATE LEGAL ETHICS RULES ADJUSTMENTS FOR CANNABIS

As of this Article, eleven U.S. states, the District of Columbia, and two territories allow adult recreational use of cannabis.<sup>12</sup> Twenty-three additional states, Puerto Rico, and the U.S. Virgin Islands have medical cannabis programs.<sup>13</sup> Twelve states allow use of low THC cannabidiol (CBD) products for limited purposes.<sup>14</sup> Of the thirty-four states that have a recreational or comprehensive medical cannabis program, twenty-six have issued some response to the ethical dilemma of lawyers engaging with the cannabis issue. The states with cannabis programs that have not addressed the issue are as follows: Arkansas, Delaware, Iowa, Louisiana, Montana, Oklahoma, Utah, and Vermont.<sup>15</sup>

Some of the states' bar associations have issued ethics opinions on the subject, and other states have added comments to the ethics rules or amended the ethics rules themselves. The responses generally divide into

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10. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2019).

11. *See, e.g.*, discussion of Colorado, *infra* notes 31–33 and accompanying text; discussion of Ohio, *infra* notes 40–51 and accompanying text.

12. *See infra* note 13 (those states and territories are Washington, Colorado, Oregon, California, Nevada, Alaska, Illinois, Michigan, Vermont, Massachusetts, Maine, District of Columbia, Guam, and Mariana Islands).

13. Leafly Staff, *Where Is Cannabis Legal?*, LEAFLY (Jan. 17, 2020), <https://www.leafly.com/news/cannabis-101/where-is-cannabis-legal> [<https://perma.cc/FS29-DCFQ>].

14. *Id.* Those states are Texas, Wyoming, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, Tennessee, Kentucky, Indiana, Wisconsin, and Iowa. *Id.*

15. Louisiana's state bar association at some point considered rule changes but, so far, has not recommended any rule changes or taken other action. *See, e.g.*, Dane S. Ciolino, *May a Louisiana Lawyer Assist a Client with Marijuana Distribution?*, LA. LEGAL ETHICS (Dec. 29, 2019), <https://la.legalethics.org/may-a-louisiana-lawyer-assist-a-client-with-marijuana-distribution/> [<https://perma.cc/DN28-4SDK>].

three types: (1) a strict interpretation of Rule 1.2 and a conclusion that representation of a cannabis client beyond just advice as to the legality of the business would be a violation of the ethics rule; (2) an administrative policy that the state bar will not discipline lawyers for cannabis business representation as long as the client is in compliance with state law; and (3) an amendment to the rule or a comment that acknowledges the unique circumstance of advising clients on conduct that is permitted under state law but not federal law and authorizes the representation as long as certain requirements are met.<sup>16</sup> As noted below, the states' responses have not been static. Remarkably, in the short history of cannabis legalization, the responses have been subject to revision and even reversal.

All of the state responses address the ethics of representing cannabis clients under Rule 1.2. Yet, only a handful have addressed whether a lawyer's more active and direct involvement in the cannabis industry or a lawyer's personal cannabis use violates ethical rules. Also, only a few of the states have addressed the applicability of Rule 8.4.

For several states that have issued ethics opinions or rule comments allowing cannabis representation as within the ethical rules, the change was based on the federal government's initial position that enforcement of federal law was not a priority if the conduct was in compliance with state law. This federal enforcement position was set forth in a 2013 memorandum known as the "Cole Memo" because it was drafted by Deputy Attorney General James M. Cole.<sup>17</sup> However, the Cole Memo was rescinded by Attorney General Jeff Sessions on January 4, 2018.<sup>18</sup> This change in enforcement policy required some states to revise and update their positions.

The following sections summarize each of the various state responses to cannabis representation.

#### *A. Strict Application of Rule 1.2*

Only one of the states with a cannabis program retains a strict position that representing cannabis businesses would violate Rule 1.2.

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16. See Leafly Staff, *supra* note 13.

17. Memorandum from James M. Cole, Deputy Attorney Gen., on Guidance Regarding Marijuana Enforcement to all U.S. Attorneys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/3XVY-E5FA>].

18. Memorandum from Jefferson B. Sessions III, Attorney Gen., on Marijuana Enforcement to all U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/EXW2-HMNE>].

### 1. Missouri

Missouri seems to take the strictest position (other than the states with cannabis programs that have not acted on the issue). The Missouri Supreme Court Advisory Committee, in *Informal Opinion 2019-09*, read Rule 1.2 strictly so that if a client's activities violated federal law, a lawyer's assistance of that client violated Rule 1.2 and possibly Rule 8.4.<sup>19</sup> In *Informal Opinion 2019-10*, however, the Committee concluded that a Missouri attorney who represented cannabis clients in another state that allowed such representation as ethical was not violating Rule 1.2 in Missouri.<sup>20</sup>

#### *B. Immunity from Discipline*

Three states have been perhaps more honest in their approach to the issue; they simply have given immunity from discipline to lawyers for representing cannabis clients who comply with state law. The statements have been mostly silent on the substantive question of whether cannabis representation violates Rule 1.2 or Rule 8.4.

### 1. Florida

The Florida Bar Board of Governors issued a policy in 2014 that it would not discipline lawyers for assisting clients on Florida medical marijuana activities as long as those lawyers also advised on federal law.<sup>21</sup>

### 2. Massachusetts

The Massachusetts Board of Bar Overseers and Office of Bar Counsel issued a statement equivalent to the Florida Bar in 2017:

The Massachusetts Board of Bar Overseers and Office of the Bar Counsel will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes and laws regarding medical or other legal forms of marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state or local provisions implementing

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19. *Ten New Informal Advisory Opinion Summaries Published*, MO. SUP. CT. ADVISORY COMMITTEE & LEGAL ETHICS COUNS., <http://molegaethics.org/ten-new-informal-advisory-opinion-summaries-published/> [https://perma.cc/NHQ2-BEN3].

20. *Id.*

21. Gary Blankenship, *Board Adopts Medical Marijuana Advice Policy*, FLA. B. NEWS (June 15, 2014), <https://www.floridabar.org/the-florida-bar-news/board-adopts-medical-marijuana-advice-policy/> [https://perma.cc/R8JR-LBBK].

them, as long as the lawyer also advises the client regarding related federal law and policy.<sup>22</sup>

### 3. Minnesota

Minnesota is unique in that its statutory scheme addresses the lawyer's role. Section 152.32(2)(i) of the Minnesota Statutes states that "[a]n attorney may not be subject to disciplinary action by the Minnesota Supreme Court or professional responsibility board for providing legal assistance to prospective or registered manufacturers or others related to activity that is no longer subject to criminal penalties under state law pursuant to sections 152.22 to 152.37."<sup>23</sup> The Minnesota Lawyers Professional Responsibility Board also issued a very brief ethics opinion in 2015 that allowed lawyers to represent cannabis clients compliant with state law as long as the lawyer advised about federal law.<sup>24</sup>

#### *C. Authorizing Representation if Lawyer Advises on Federal Law and Client Complies with State Law*

A number of states initially read Rule 1.2 strictly and opined that lawyers were severely restricted in what they could do in representing cannabis clients. These states then softened their stance after other states acknowledged the necessity of lawyers in this business and made qualified exceptions to Rule 1.2. Some of the states in this category initially issued opinions taking the strict approach and called for action from their state supreme courts for rule changes. A common pattern was a prohibitive ethics opinion, later withdrawn when the state supreme court revised the text of its state's Rule 1.2 or added a comment.

### 1. Maine

Maine was the first to address the issue of lawyers representing cannabis clients, although it has since revisited and reversed its position. In 2010, the Maine Professional Ethics Commission issued Opinion 199. At the time, Maine authorized lawyers to represent medical marijuana clients only. The opinion noted that Rule 1.2 does not make any exceptions for criminal laws that are not currently being enforced.<sup>25</sup> The opinion concluded that lawyers are forbidden from counseling a client to engage in the marijuana business or to assist a client in doing so, but lawyers can

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22. *Board of Bar Overseers/Office of Bar Counsel Policy on Legal Advice on Marijuana*, MASS. BOARD OF B. OVERSEERS (Mar. 29, 2017), <https://www.massbbo.org/Announcements?id=a0P36000009Yzb3EAC> [<https://perma.cc/73AW-4NVJ>].

23. MINN. STAT. ANN. § 152.32(2)(i) (West 2019).

24. Minn. Lawyers Prof'l Responsibility Bd., Formal Op. 23 (2015).

25. Me. Prof'l Ethics Comm'n, Informal Op. 199 (2010).



advise in “making good faith efforts to determine the validity, scope, meaning, or application of the law,” and lawyers need to evaluate where to draw the line “on a case by case basis.”<sup>26</sup> This opinion was reevaluated by the Commission in 2016. The Commission instead recommended revising Rule 1.2 to authorize a lawyer to “counsel or assist a client regarding conduct expressly permitted by Maine law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”<sup>27</sup>

However, the Maine Advisory Committee on Professional Conduct declined to make the change, so in 2017 the Commission issued a further opinion concluding that a lawyer may assist clients to engage in conduct that the lawyer “reasonably believes is permitted by Maine laws regarding medical and recreational marijuana.”<sup>28</sup> The Commission acknowledged that other states had taken a similar position and justified its position because “[d]efining 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.”<sup>29</sup> The Commission also noted that “[t]he 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.”<sup>30</sup> The cannabis lawyer is, however, subject to a duty to stay informed about federal law, state law, and enforcement policy, and to take reasonable steps to ensure that the client is compliant with state law.

## 2. Colorado

In 2012, the Colorado Bar issued an opinion addressing whether a lawyer’s use of medical marijuana violated Rule 8.4 and concluded it did not. The Colorado Bar reasoned that Rule 8.4(b) only prohibits criminal conduct that adversely reflects the lawyer’s “honesty, trustworthiness or fitness,” and the use of cannabis for medicinal purposes did not come within that description.<sup>31</sup> Subsequently addressed in an ethics opinion in 2013,<sup>32</sup> the Colorado Supreme Court decided not to revise Rule 1.2, and thus, Colorado lawyers risked violating that rule if they represented

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26. *Id.*

27. Me. Prof’l Ethics Comm’n, Op. 214 (2016).

28. Me. Prof’l Ethics Comm’n, Op. 215 (2017).

29. *Id.*

30. *Id.*

31. Colo. Bar Ass’n Ethics Comm’n, Formal Op. 124 (2012).

32. See Colo. Bar Ass’n Ethics Comm’n, Formal Op. 125 (withdrawn 2014); Philip Cherner & Dina Rollman, *Marijuana and Your License to Practice Law: A Trip Through the Ethical Rules, Halfway to Decriminalization*, 41 J. LEGAL PROF. 19, 27 (2016).

cannabis businesses. Shortly after, however, the court responded by adopting a comment to Rule 1.2 in 2014; that comment provides that a lawyer can represent a cannabis business that the lawyer reasonably believes is in compliance with state law (as long as the lawyer advises the client as to related federal law and policy).<sup>33</sup>

### 3. Pennsylvania

Before Pennsylvania legalized medical marijuana, the Pennsylvania Bar and the Philadelphia Bar issued a joint formal opinion that Rule 1.2 forbade a lawyer from representing cannabis clients by drafting or negotiating contracts for cannabis businesses.<sup>34</sup> The opinion urged the state supreme court to amend Rule 1.2 to authorize lawyers to conduct such representation. Pennsylvania authorized the use of medical marijuana in April of 2016.<sup>35</sup> The Pennsylvania Supreme Court responded by adding Rule 1.2(e) on October 26, 2016, which authorizes a lawyer to represent cannabis clients with activities allowed under Pennsylvania law (provided that the lawyer counsels the client about the consequences of “other applicable law”).<sup>36</sup>

### 4. New Mexico

New Mexico first established a Medical Cannabis Program in 2007.<sup>37</sup> Initially, the New Mexico Supreme Court did not see the need to address the issue of representing cannabis clients with a rule change because there was no expectation that the New Mexico Bar would discipline a lawyer for representing a medical cannabis client.<sup>38</sup> The bar did not comment on the ethics issue until 2016. When the bar issued the ethics opinion, it essentially drew the line at advising a medical cannabis business on the legality of its activities.<sup>39</sup> The opinion acknowledged that there was disagreement regarding where the line was drawn: negotiating contracts for buying cannabis would be unethical but forming a business entity that might include medical marijuana might be within permissible activities.<sup>40</sup>

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33. COLO. R.P.C. 1.2 (2018).

34. Pa. Bar Ass’n Prof’l Guidance Comm’n, Formal Op. 2015-100 (2015).

35. *Getting Medical Marijuana*, COMMONWEALTH OF PA., <https://www.pa.gov/guides/pennsylvania-medical-marijuana-program/> [<https://perma.cc/Q3UG-EUBY>].

36. PA. R.P.C. 1.2(e) (2019).

37. *Medical Cannabis General Information*, N.M. DEP’T OF HEALTH, <https://nmhealth.org/about/mcp/svcs/info/> [<https://perma.cc/YKL6-M242>] (general information on the New Mexico Medical Cannabis Program (MCP)).

38. See Cherner & Rollman, *supra* note 32, at 31; *infra* note 41 and accompanying text.

39. N.M. Bar Ass’n Ethics Advisory Comm., Op. 2016-01 (withdrawn); Francis J. Mootz III, *Ethical Cannabis Lawyering in California*, 9 ST. MARY’S J. ON L. MALPRACTICE & ETHICS 2, 38 (2018).

40. Mootz, *supra* note 39.

Due to the confusion in interpretation, that opinion was withdrawn in 2017.<sup>41</sup> Shortly after, the New Mexico Supreme Court revised Rule 1.2 to add comment eleven, which stated that a lawyer may counsel or assist a client with activities the lawyer “reasonably believes” are permitted by the medical cannabis laws (as long as the lawyer also advises on the legal consequences under federal or other law).<sup>42</sup> The comment states: “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.”<sup>43</sup>

### 5. Connecticut

Connecticut issued an ethics opinion in 2013 that limited cannabis representation to advising on the requirements of the state medical cannabis laws.<sup>44</sup> Assisting the client in conducting the cannabis business was not allowed.<sup>45</sup> As stated in the opinion, “[l]awyers may not assist clients in conduct that is in violation of federal criminal law. Lawyers should carefully assess where the line is . . . and not cross it.”<sup>46</sup> That opinion still remains but in 2014, the Connecticut Supreme Court amended the text of Rule 1.2 to add the following exception to Rule 1.2(d): “A lawyer may . . . (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.”<sup>47</sup> Note that the exception does not have the qualifier that the lawyer must “reasonably believe” the conduct complies with state law. This follows the pattern of providing information about the legal consequences in this course of conduct.

### 6. Ohio

An ethics opinion in Ohio was issued in 2016 that took a position similar to the Connecticut position: the lawyer could advise as to the scope of state and federal law, but “a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business.”<sup>48</sup> The opinion noted that

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41. State Bar of N.M. Ethics Advisory Comm’n, Informal Op. 2017-013 n.1 (2018).

42. N.M. R.P.C. 16-102 cmt. 11 (2018).

43. *Id.*

44. Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 2013-02 (2013) (discussing providing legal services to clients seeking licenses under the Connecticut Medical Marijuana Law).

45. *Id.* at 2.

46. *Id.* at 3–4.

47. CONN. R.P.C. 1.2(d), cmt. (2019).

48. Bd. of Prof’l Conduct, Supreme Court of Ohio, Formal Op. 2016-6 (2016) (discussing ethical implications for lawyers under Ohio’s Medical Marijuana Law).

other states have amended Rule 1.2 or added comments.<sup>49</sup> The Ohio Supreme Court responded by amending the rule to add the following exception to 1.2(d): “(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under [Ohio law] authorizing the use of marijuana for medical purposes. . . . In these circumstances, the lawyer shall advise the client regarding related federal law.”<sup>50</sup>

Unlike the states above, the 2016 opinion also addressed whether a lawyer’s personal use or direct participation in a cannabis enterprise violated the ethics rules. The opinion stated that a “nexus must be established between the commission of an illegal act and the lawyer’s lack of honesty or trustworthiness. . . . Similarly, multiple violations of federal law would likely constitute ‘a pattern of repeated offenses’ indicating an ‘indifference to legal obligations’ and constitute a violation of the rule.”<sup>51</sup> Also, the opinion questioned whether personal use would violate Rule 8.4(h) regarding a lawyer’s fitness to practice law. The opinion, therefore, did not prohibit personal use or participation per se but instead, it indicated that such activity, particularly with additional facts, “may” violate Rule 8.4.

## 7. New Hampshire

In 2016, the New Hampshire Bar Association Ethics Committee wrote to the New Hampshire Supreme Court, requesting that the court consider a change to Rule 1.2. In its comprehensive letter, which summarized the state of the law and the positions of other states, the committee concluded that without such a change, New Hampshire lawyers could not ethically represent cannabis businesses.<sup>52</sup> The New Hampshire Supreme Court responded by adopting an amendment to the text of the rule and adding a comment.<sup>53</sup> The rule now allows lawyers to represent clients in activities expressly permitted by state law as long as the lawyer also advises regarding federal law.<sup>54</sup> Again, similar to Connecticut, there is no “reasonable belief” that the conduct is lawful under the state law provisions. The comment notes that other states have made similar changes to Rule 1.2.<sup>55</sup>

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49. *Id.* at 6.

50. OHIO R.P.C. 1.2(d) (2020).

51. Supreme Court of Ohio, Bd. of Prof’l Conduct, Formal Op. 2016-6, 6 (2016) (citing OHIO R.P.C. 8.4(b) cmt. 3).

52. Letter from N.H. Bar Ass’n Ethics Comm. to Honorable Linda S. Dalianis, Chief Justice, N.H. Supreme Court (Aug. 30, 2016) <https://www.courts.state.nh.us/committees/adviscommrules/dockets/2016/2016-008/2016-008-Ethics-and-Medical-Marijuana-09-16-16-memo-from-Eileen-Fox-with-attachments.pdf> [<https://perma.cc/7BN2-97FY>].

53. N.H. R.P.C. 1.2(d) (2007); *id.* cmt. 4.

54. N.H. R.P.C. 1.2.

55. *Id.* cmt. 4.

## 8. Hawai`i

The Disciplinary Board of the Hawai`i Supreme Court issued an opinion in 2015 that without a rule change or a change in federal law, representation of cannabis businesses would violate Rule 1.2.<sup>56</sup> The Hawai`i Supreme Court responded with a revision to Rule 1.2(d) that allowed representation regarding conduct “expressly permitted by Hawai`i law,” provided the lawyer also counsels the client about “other applicable law.”<sup>57</sup>

### *D. Remaining States with Cannabis Programs*

The remaining states with cannabis programs that have addressed the ethics issue have either issued an ethics opinion, a revision to Rule 1.2, or a comment to Rule 1.2 that classifies representation of cannabis clients as within the ethical bounds of Rule 1.2 as long as the lawyer advises the client about federal law. Some extend the protection if the lawyer “reasonably believes” the client is in compliance with state law, whereas others require compliance without a reasonable belief component.

### 1. Arizona

Arizona was the second state to respond to this issue. In 2011, The Arizona state bar issued Ethics Opinion 11-01 that concluded an Arizona attorney could advise about the Medical Marijuana Act, assist in setting up business entities, and represent clients before governmental agencies in connection with the Act.<sup>58</sup> These actions were allowed as long as the lawyer also explained that the conduct could violate federal law.<sup>59</sup>

### 2. Washington

In 2014, the Washington Supreme Court added a comment to Rule 1.2, allowing Washington lawyers to represent cannabis clients as long as the clients were in compliance with state law, and that the lawyers also advised the clients on the federal law and policy, “at least until there is a change in federal enforcement policy[.]”<sup>60</sup> After the Cole Memorandum was revoked by Attorney General Jeff Sessions, the Washington Supreme Court revised the comment to delete the reference to federal enforcement policy.<sup>61</sup> After the initial comment was added, in 2015 the Washington

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56. Disciplinary Bd. of the Haw. Supreme Court, Formal Op. 49, at 3 (2015).

57. HAW. CT. R.P.C. 1.2 (2015).

58. Ariz. Supreme Court Attorney Ethics Advisory Comm., Formal Op. 11-01 (2011).

59. *See id.*

60. WASH. CT. R.P.C. 1.2, cmt. 18 (2014).

61. *Id.*; see Mark Fucile, *New Marijuana-Related Amendments to Rules of Professional Conduct*, NWSidebar (Jan. 10, 2019), <https://nwsidebar.wsba.org/2019/01/10/new-marijuana-related-amend>

Committee on Professional Ethics followed up with a comprehensive advisory opinion. The opinion stated that lawyers not only could represent cannabis clients but could also ethically engage in cannabis business themselves and personally possess and consume cannabis, as long as all activities conformed to state law.<sup>62</sup> The ethics opinion referred directly to the Cole Memorandum and the expressed federal forbearance from enforcement, so the effect of the revocation of the Cole Memorandum on the opinion's conclusion is unclear.

Before the pronouncements from the state bar and the state supreme court, the King County Bar Association (KCBA) addressed the issues in an advisory opinion in October of 2013.<sup>63</sup> KCBA took the position that cannabis client representation, as well as lawyers participating in cannabis business and personally possessing and consuming cannabis, did not violate Rule 1.2 or Rule 8.4. Similar to the Colorado opinion, the KCBA concluded that such activity did not reflect the lawyer's "honesty, trustworthiness or fitness."<sup>64</sup>

### 3. Alaska

Alaska added language to Rule 1.2 stating that a lawyer may assist a client in conduct that the lawyer "reasonably believes is authorized by" Alaska's marijuana laws, as long as the lawyer also advises the client about federal law.<sup>65</sup>

### 4. Nevada

Nevada is an outlier among states in this category because while the Nevada Supreme Court does not prohibit the representation of cannabis clients, it prohibits an attorney from personally engaging in the marijuana business. Back in 2014, when only medical marijuana was legalized in Nevada, its supreme court added a comment to Rule 1.2; the comment allowed an attorney to represent cannabis clients with conduct the lawyer "reasonably believe[d]" was permitted under state law regarding medical marijuana, as long as the lawyer also advised the client on federal law.<sup>66</sup>

Just two years later, in 2016, the state legalized recreational cannabis and the question then arose whether lawyers could participate directly in

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ments-to-rules-of-professional-conduct/ [<https://perma.cc/RW32-U4GX>]. The Washington Supreme Court also added a comment to RPC 8.4 that a lawyer who assists a cannabis client compliant with state law does not violate RPC 8.4. *Id.*

62. Wash. State Bar Ass'n Rules of Prof'l Conduct Comm., Advisory Op. 201501 (2015).

63. King Cty. Bar Ass'n Ethics Advisory Op. on I-502 & Rules of Prof'l Conduct (2013).

64. *Id.* at 5–6.

65. ALASKA R.P.C. 1.2(f) (2015).

66. NEV. R.P.C. 1.2 cmt. (2019).

the cannabis business.<sup>67</sup> The Nevada Supreme Court responded with a comment added to Rule 8.4: “Because use, possession, and distribution of marijuana in any form still violates federal law, attorneys are advised that engaging in such conduct may result in federal prosecution and trigger discipline proceedings . . . .”<sup>68</sup>

### 5. Illinois

In 2014, the Illinois State Bar Association issued an advisory opinion opining that legal representation of cannabis businesses, which comply with state law, is ethical. But the opinion further stated that “an Illinois lawyer who represents and counsels medical marijuana clients should tread carefully over the legal terrain.”<sup>69</sup> The opinion recommended that the state supreme court revise Rule 1.2, which the supreme court did in 2015, adding a section to Rule 1.2(d) allowing a lawyer to assist in conduct permitted by Illinois law that may conflict with federal or other law, as long as the lawyer also advises about federal law.<sup>70</sup>

### 6. Maryland

The Maryland Bar Committee on Ethics issued an opinion in 2016 stating that a judicial appointee “may not grow, process or dispense medical cannabis.”<sup>71</sup> Nevertheless, the Bar Committee also issued an opinion contemporaneous with the judicial appointee opinion that concluded that Maryland attorneys could represent cannabis clients in compliance with state law. In addition, the opinion stated Maryland lawyers could ethically own interests in cannabis enterprises.<sup>72</sup> However, the opinion based its conclusions in part on the federal enforcement position taken in the Cole Memorandum.

In December of 2016, the state supreme court added a comment to Rule 1.2, stating that “[i]n 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 the lawyer also counsel regarding “other applicable law.”<sup>73</sup>

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67. Michelle Rindels, *Law and Profit*, NEV. INDEP. (Nov. 11, 2019), <https://thenevada-independent.com/article/the-cannabis-files-law-and-profits> [<https://perma.cc/XZL3-QV9X>].

68. NEV. R.P.C. 8.4 cmt. (2019).

69. Ill. State Bar Ass’n, Formal Op. 14-07 (2014).

70. ILL. R.P.C. 1.2(d)(3) (2009).

71. Md. Judicial Ethics Comm., Formal Op. 2016–09 (2016).

72. Md. State Bar Ass’n Comm. on Ethics, Ethics Docket No. 2016-10 (2016).

73. MD. R.P.C. 19-301.2 cmt. 12 (2016).

### 7. New Jersey

New Jersey amended Rule 1.2 to add an exception to 1.2(d), allowing a lawyer to represent a cannabis client whom the lawyer “reasonably believes” is compliant with state law, as long as the lawyer advises on federal law.<sup>74</sup>

### 8. Oregon

Oregon revised Rule 1.2 to add a section allowing a lawyer to represent a client regarding the state’s cannabis laws, but if the Oregon law conflicts with federal or tribal law, the lawyer must also advise regarding that conflicting law.<sup>75</sup>

### 9. Rhode Island

Rhode Island Supreme Court Ethics Advisory Panel issued an opinion in 2017, concluding that a lawyer could represent a client with respect to the state’s medical marijuana laws, as long as the lawyer also advises about federal law.<sup>76</sup>

### 10. New York

New York’s State Bar Committee on Professional Ethics first issued an ethics opinion in 2014, concluding that the New York Rules of Professional Conduct allowed a lawyer to represent cannabis clients. It based this conclusion in part on the federal enforcement policy under the Cole Memorandum.<sup>77</sup> On November 18, 2019, the Committee issued Opinion 1177, reaffirming its conclusions in the 2014 opinion.<sup>78</sup> The issue was whether the withdrawal of the Cole Memo affected the conclusion. The Committee determined that the Rohrabacher Amendment, which prohibits the Department of justice from using congressionally appropriated funds to interfere with states’ medical marijuana programs, gave sufficient support to allowing lawyers to represent clients engaged in medical marijuana activity.

### 11. California

Until 2018, California was the one state that did not model its ethics rules on the ABA Model Rules.<sup>79</sup> In June 2015, the Bar Association of San

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74. N.J. R.P.C. 1.2(d) (2019).

75. OR. R.P.C. 1.2(d) (2015).

76. R.I. Supreme Court, Ethics Advisory Panel Op. 2017-01 (2017).

77. See N.Y. State Bar Ass’n Comm. on Prof. Ethics Op. 1024 (2014).

78. See N.Y. State Bar Ass’n Comm. on Prof. Ethics Op. 1177 (2019).

79. See generally Laird, *supra* note 7.



Francisco issued an opinion based on the California rules, concluding that a lawyer may ethically represent a cannabis client in compliance with local cannabis laws.<sup>80</sup> Similarly, the Los Angeles County Bar Association issued an ethics opinion reaching the same conclusion, and the opinion added that a lawyer could not assist a client to violate federal law in a manner that would allow the client to escape federal prosecution.<sup>81</sup>

When the California Supreme Court was considering adoption of a version of the ABA Model Rules in 2017 and 2018, Rule 1.2 and its comments underwent a series of revisions.<sup>82</sup> Ultimately, the California Rule 1.2.1 parallels the ABA Model Rule 1.2 but contains a comment that states:

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.<sup>83</sup>

There has been concern expressed that the comment is unclear as to what a lawyer may do when representing cannabis clients, but legislative history supports the lawyer's ability to provide a broad range of services, such as drafting and negotiating agreements and general corporate counseling.<sup>84</sup>

In summary, the trend is towards allowing cannabis representation. Although states' pronouncements are somewhat tepid, in states where there has been an announced policy allowing cannabis representation there appears to be little current risk of state disciplinary action when the clients are in full compliance with state law. The most helpful to attorneys are the state rule changes or added comments that specifically exempt cannabis representation from Rule 1.2 as long as the lawyer advises on federal law and the client is compliant with state law. States should go further, however, and clarify their position on the application of Rule 8.4 to cannabis representation. States should also take a position on lawyers' personal use or involvement in a cannabis business. Only a handful of states have given any indication about the application of the ethics rules to those two circumstances.

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80. Bar Ass'n of S.F., Ethics Op. 2015-1 (2015).

81. L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 527 (2015).

82. See Mootz, *supra* note 38, at 48–55.

83. CA. R.P.C. 1.2.1 cmt. 6 (2018).

84. See Mootz, *supra* note 39, at 55.

Even with existing indications that cannabis representation, without more, will not trigger discipline, the cannabis lawyer must be vigilant regarding any adjustments to the state ethics positions. The issue of whether representation of cannabis clients is a per se violation of Rule 1.2 is only the threshold question in managing the risk of a cannabis law practice.

### III. OTHER AREAS REQUIRING CAUTION FROM THE CANNABIS LAWYER

Once the state has confirmed that a cannabis law practice will not automatically constitute an ethical violation, the cannabis lawyer in that state must stay cognizant of the parameters and restrictions of such a practice. Initially, the lawyer must consider that, even though the practice is permissible in her state, there may be an issue if she needs admission in one of the few states that have not acknowledged the dilemma and allowed an exception to Rule 1.2.<sup>85</sup>

Another potential concern is the position of the in-house counsel. Cannabis businesses can be large enough, and the businesses' legal environment is certainly complex enough, to justify in-house counsel. But when does the in-house counsel cross over from simply legal representation to active participation and ownership in the cannabis business? As noted in the previous section, while a majority of states with cannabis programs have made some pronouncement that representation of cannabis clients is ethical, only a handful have commented on whether lawyers can enter into the cannabis business themselves. To the extent in-house counsel is acting as a legal advisor, the client is the company and the rules allowing cannabis representation should apply. In-house counsel should be mindful, however, that compensation packages that include ownership interests and activities that are more on the business side than the legal side may indicate the lawyer's participation has gone beyond representation.

Moreover, the cannabis lawyer must stay diligent in monitoring the client's business practices. The states' exceptions to the application of Rule 1.2 require that the client's activity be in full compliance with state regulations, and not all of the states allow the lawyer to have a reasonable belief of such compliance.<sup>86</sup> This diligence related to compliance is not unique to cannabis lawyers; all lawyers are subject to Rule 1.2. Tax

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85. See Hayley Hollis, *Cannabis Law, the Constitution, and the ABA Model Rules*, 23 LEWIS & CLARK L. REV. 1063, 1064–66, 1071–73 (2019); see also Eric Mitchell Schumann, Comment, *Clearing the Smoke: The Ethics of Multistate Legal Practice for Recreational Marijuana Dispensaries*, 6 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 332, 349–63 (2016).

86. Hollis, *supra* note 85, at 1072.

lawyers and corporate lawyers in particular are ethically required to keep client conduct within legal parameters.<sup>87</sup> The cannabis lawyer must also keep in mind the condition requiring advisement related to federal law and other contrary law, even though presumably the relatively sophisticated cannabis client is well aware of the Controlled Substances Act. Best practices for the cannabis lawyer could include the following:

- Prepared general explanations of federal law, including all legal consequences such as forfeiture and effect on attorney–client privilege, and limitation of certain federal protections such as bankruptcy and intellectual property protection.
- Inclusion of the general explanation in engagement letters and websites.
- Regular audits of client representation to determine if there are red flags raising federal or other (such as tribal) law concerns particular to the client’s activities.
- Use of a cannabis-specific engagement letter that includes warnings regarding attorney–client privilege and potential disclosure requirements for large cash payments of fees, and additional warnings regarding the lawyer’s potential need to withdraw if the client’s activities may subject the lawyer to discipline or criminal sanction.

Another serious concern is the cannabis lawyer’s exposure to federal prosecution. A lawyer that assists a client in the cannabis business can be prosecuted for aiding and abetting the client’s violations of the Controlled Substances Act.<sup>88</sup> While there have been no prosecutions of lawyers in that context, the current volatile political climate should alert lawyers to the need to monitor shifting enforcement priorities and to be prepared to react. The Rohrabacher Amendment should give comfort to lawyers whose clients are solely involved in medical marijuana,<sup>89</sup> but that amendment is continually up for renewal and is no help to recreational cannabis practices since it only extends to medical marijuana.<sup>90</sup> Therefore, lawyers should remain vigilant to the enforcement policies of the federal government, specifically related to recreational use.

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87. See generally John S. Dzienkowski & Robert J. Peroni, *The Decline in Tax Adviser Professionalism in American Society*, 84 *FORDHAM L. REV.* 2721 (2016); Mike Donaldson, *Lawyers and the Panama Papers: How Ethical Rules Contribute to the Problem and Might Provide a Solution*, 22 *L. & BUS. REV. AM.* 363 (2016).

88. 18 U.S.C. § 2(a) (2018); Controlled Substances Act of 1970, 21 U.S.C. §§ 801–889 (2018).

89. See Florence Shu-Acquaye, *Rohrabacher-Blumenauer Amendment, Case Law and the Department of Justice: Who Prevails in the Medical Marijuana Legalization Debate?*, 54 *GONZ. L. REV.* 127, 128–29, 136–38 (2019).

90. *Id.*

At its 2020 Midyear Meeting in Austin, Texas, the ABA adopted a resolution urging Congress to eliminate the risks that cannabis lawyers take on. The resolution reads as follows: the ABA “[u]rges Congress to enact legislation to clarify and ensure that it shall not constitute a federal crime for qualified lawyers to provide legal advice and services to clients regarding marijuana-related activities that are in compliance with state, territorial, and tribal law.”<sup>91</sup> Until Congress acts, or until cannabis is reclassified under the Controlled Substances Act, lawyers need to remain careful and cognizant of the risks.

Finally, lawyers must also be aware of a risk to the client rather than the lawyer—the risk to the attorney–client privilege. The attorney–client privilege allows communications between a lawyer and a client to remain confidential and is subject to some exceptions. Specifically relevant in the cannabis context, the privilege is subject to the crime–fraud exception: the privilege does not apply when a client seeks advice from a lawyer to further a crime or fraud.<sup>92</sup> And, under federal law, a cannabis client’s business is a crime.<sup>93</sup> In California state courts, the crime-fraud exception does not apply to cannabis representation but would apply in non-diversity federal court proceedings in California.<sup>94</sup>

#### CONCLUSION

Clearing the path for lawyers to represent cannabis clients not only benefits the lawyers and their bottom line but also the industry and the states that now have cannabis programs. As noted by a number of states in their authorization of such representation, these programs will only succeed if participants receive competent legal advice on state regulation and business structure and protection. Lawyers willing to participate, however, must accept the higher hurdles of due diligence and disclosure at the risk of violating their own ethical responsibilities, at least for as long as cannabis remains illegal under federal law. The state entities regulating lawyers could give lawyers better guidance, clarifying such issues as the application of Rule 8.4 and whether personal use or cannabis business investments are allowed. Until federal legalization, lawyers in the cannabis-representation trenches must continue tiptoeing through the various regulatory and ethical landmines.

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91. *Midyear Meeting 2020-House of Delegates Resolution 103B*, AM. B. ASS’N (2020), [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2020/house-of-delegates-resolutions/103b/](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2020/house-of-delegates-resolutions/103b/) [<https://perma.cc/ZUK7-JSQD>].

92. *Ergo Licensing, L.L.C. v. Carefusion 303, Inc.*, 263 F.R.D. 40, 44–46 (D. Me. 2009).

93. Controlled Substances Act of 1970, 21 U.S.C. §§ 801–889 (2018).

94. CAL. EVID. CODE § 956(b) (2018).

