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Trapped Between Sovereigns: What's an Ethical Lawyer to do when Federal, State, or Local Criminal Laws Conflict?

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TRAPPED BETWEEN SOVEREIGNS: WHAT'S AN ETHICAL LAWYER TO DO WHEN FEDERAL, STATE, OR LOCAL CRIMINAL LAWS CONFLICT?

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Under the Rules of Professional Conduct, lawyers cannot ethically assist their clients with engaging in criminal conduct. As marijuana sale and use has been legalized at the state level but has remained illegal under federal law, states have used different approaches to the Rules to enable lawyers to assist clients with setting up marijuana businesses. As the political climate has become more polarized, the potential for conflict between state and federal, state and local, and local and federal criminal law has increased. Because chief executives at the state and national levels are increasingly willing to act through executive orders, these conflicts often arise more quickly than with legislation. In some circumstances, two or more sovereigns' criminal laws conflict so that a person or business cannot comply with one without violating another. The Rules of Professional Conduct must be analyzed and applied in a way that permits lawyers to help their clients navigate these conflicts without facing discipline. How South Dakota's Ethics Committee and other states have approached the conflict between state and federal marijuana law provides a useful framework.

In November 2020, two South Dakota state ballot measures, Initiated Measure 26, legalizing marijuana for medical use, and Constitutional Amendment A, legalizing the cultivation, processing, possession, use, and distribution of recreational marijuana, passed by a majority vote of the electorate.[1] As a result, South Dakota moved into the ranks of more than thirty other states that have legalized the sale of at least some kinds of marijuana.[2] Marijuana cultivation, sale,

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1. S.D. Ethics Comm., Formal Op. 07 (2020), https://www.statebarofsouthdakota.com/assets/pdf/1380_6249_2020-07/.

2. The South Dakota Supreme Court has since ruled that Constitutional Amendment A legalizing recreational marijuana is unconstitutional because it violates the "single subject" rule for proposed amendments submitted to the voters for approval. Thom v. Barnett, 2021 SD 65, ¶¶ 46-60, 967 N.W.2d 261, 276-81.

distribution, and use, however, remain illegal under federal law.[3] Rule 1.2(d) of South Dakota's Rules of Professional Conduct ("Rules") forbids lawyers from assisting their clients with violating criminal laws. Rule 1.2 does not differentiate between state and federal law:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but 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.[4]

Given the obvious difficulty Rule 1.2 created for South Dakota lawyers confronted with contradictory state and federal marijuana laws, it is not surprising that, in late 2020, the South Dakota State Bar's Ethics Committee ("the Committee") was asked to address whether lawyers could assist clients with setting up marijuana-related businesses and providing other direct assistance.[5] The Committee issued two opinions clarifying that lawyers could *advise* clients about South Dakota marijuana laws but could not *assist* clients with setting up marijuana businesses because of the continued illegality of marijuana under federal law.[6] The blanket prohibition left both clients and lawyers seeking additional guidance to better understand how Rule 1.2 applies in various contexts. The South Dakota State Bar and South Dakota Supreme Court provided prompt guidance. In the summer of 2021, the State Bar proposed amending Rule 1.2 to permit lawyers to both advise and assist clients in the marijuana business, notwithstanding the continued illegality of marijuana under federal law. The South Dakota Supreme Court adopted the amendment on September 1, 2021.[7]

This article identifies the general approaches states have taken in addressing the ethical dilemma marijuana presents, including a so-called "Rules of Reason" approach based on the principle that the drafters of the Rules did not contemplate conflicting state and federal criminal statutes. The article then discusses South Dakota's approach to the problem, including modifying Rule 1.2(d). Next, the article discusses how marijuana is only one way that state and federal law, state and local law, and federal and local law conflict and create issues under Rule 1.2(d). In apparent anticipation of this issue, some states have amended their versions of Rule 1.2 to clarify that lawyers may provide advice and assistance to clients regarding conduct that is illegal under federal law, as long as the conduct

3. *See* 21 U.S.C. § 812(b)-(c) (2013) (defining marijuana as a Schedule I controlled substance); 21 U.S.C. § 841(a)-(b) (2013) (proscribing certain conduct related to controlled substances and prescribing certain criminal penalties for violations).

4. SDCL Chapter 16-18 Appx. A, Rule 1.2(d) (2015 & Supp. 2021).

5. S.D. Ethics Comm., Formal Op. 07, *supra* note 1.

6. *Id.*; S.D. Ethics Comm., Formal Op. 01 (2021), https://www.statebarofsouthdakota.com/assets/pdf/1381_6268_2021-01/.

7. *See* S.D. SUP. CT., *In the Matter of the Amendment Appendix to SDCL Chapter 16-18, The Rules Of Professional Conduct, Rule 1.2, Scope of Representation and Allocation of Authority between Client and Lawyer*, *Rule 21-09*, at 2 (Sept. 1, 2022) [hereinafter *Appendix to SDCL Chapter 16-18*], https://ujs.sd.gov/uploads/sc/rules/SCRULE_RSRC_20210901104114.pdf.

is legal under state law. Although that approach is facially appealing, it could lead to unintended consequences and uncertain and shifting obligations. Instead, if read strictly, but in light of its comments, Rule 1.2(d) as written provides the most useful guidance. It permits lawyers to advise clients with analyzing and, in some cases, to assist in challenging the validity of less-certain laws. In fact, Rule 1.2 appears to permit lawyers to assist clients in determining how to disobey a criminal law to establish the standing needed to mount a good-faith legal challenge to the law's validity.

Finally, the article discusses when a "Rules of Reason" approach to Rule 1.2(d) is essential—when there are conflicting criminal statutes, each enacted by a different sovereign, with no clear answer regarding which, if any, of those statutes are valid and enforceable. In this situation, lawyers should not face discipline for helping their clients navigate a situation where any act necessarily violates at least one criminal law.

I. A SURVEY OF STATE APPROACHES TO RULE 1.2(D) AND LEGALIZED MARIJUANA

When a state legalizes the cultivation and sale of marijuana, it often jump-starts lucrative new businesses.[8] Legalization often results in a "gold rush" of investors and other business interests seeking to establish themselves at the forefront of opportunity.[9] Clients seeking help with the legal sale of marijuana under state law are still confronted with a violation of federal law.[10] A lawyer representing marijuana clients must comply with Rule 1.2(d), which is not limited to criminal activities under state law. Because the regulation of lawyers is inherently state-based, states have tailored their responses to this dilemma.[11] By 2020, most states had adopted one of three approaches, which provided the South Dakota Ethics Committee and the South Dakota Bar with a range of choices.[12] A discussion of those approaches and South Dakota's eventual choice follows.

8. Michael H. Rubin, *Smokin' Hot: Ethical Issues for Lawyers Involving State Laws Legalizing Marijuana*, 79 LA. L. REV. 629, 676-77 (2019), https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6731&context=lalrev.

9. *Id.*

10. *See* 21 U.S.C. § 812(b)-(c) (defining marijuana as a Schedule I controlled substance); *see also* 21 U.S.C. § 841(a)-(b) (proscribing certain conduct related to controlled substances and prescribing certain criminal penalties for violations).

11. Justin H. Pace, *The "Free Market" For Marijuana: A Sober, Clear-Eyed Analysis of Marijuana Policy*, 24 LEWIS & CLARK L. REV. 1219, 1247-49 (2020), https://law.lclark.edu/live/files/31358-4-pace-article-244pdf.

12. The exceptions would be Georgia, which has so far declined to amend its rules, *see* GA. SUP. CT. ORDER, *In re Motion to Amend 2021-3* (June 21, 2021), https://www.gasupreme.us/wp-content/uploads/2021/06/Order_2021-3.pdf; Louisiana, *see* La. Bar Ass'n Rules of Pro. Conduct Comm., Nov. 2016 minutes, https://lalegalethics.org/louisiana-rules-of-professional-conduct/article-8-maintaining-the-integrity-of-the-profession/rule-8-4-misconduct/; North Dakota, which found that a Minnesota resident with a North Dakota law license could not use medical marijuana, *see* N.D. Ethics Op. 02 (2014), https://www.lcc.mn.gov/mctrtf/meetings/11062014/North_Dakota_Bar_Opinion.pdf; and Oklahoma, *see* OKLA. RULES OF PRO. CONDUCT r. 1.2(d) (2002); Joe Balkenbush, *Ethics of Legal Marijuana in Oklahoma*, 90 OKLA. BAR J. 60, 61 (2019).

A. THE PLAIN TEXT AND AMENDMENT APPROACH

The majority approach is the most conservative one. The approach distinguishes between advising clients about marijuana laws, which is permissible, and directly *assisting* clients with marijuana-related matters, which the plain text of Rule 1.2(d) prohibits.[13] For example, Colorado's Ethics Committee took the position that lawyers could ethically (1) represent a client in proceedings relating to the client's past activities; (2) advise governmental clients regarding the creation of rules and regulations implementing marijuana laws; (3) argue or lobby for specific regulations, rules, or standards; or (4) advise clients regarding the consequences of marijuana use or commerce under Colorado or federal law.[14] However, a lawyer could not assist a client in structuring or implementing marijuana-related transactions that violate federal law.[15] Impermissible assistance would include drafting or negotiating: "(1) contracts to facilitate the purchase and sale of marijuana; or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana even though such transactions comply with Colorado law."[16] Similarly, Connecticut's Ethics Committee noted that Rule 1.2 "does not make a distinction between crimes which are enforced and those which are not" and advised lawyers to avoid assisting clients with conduct that violates federal law, while acknowledging that providing advice, as opposed to active assistance, would be permissible.[17] Ethics committees in Ohio and Pennsylvania joined this approach.[18] Most of these states have since amended their rules of professional conduct or comments to permit lawyers to provide direct assistance, not just advice, regarding marijuana-related businesses.[19] Others, including Alaska,[20]

13. Rubin, *supra* note 8, at 636-37.

14. *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 125 (2013) (discussing the extent to which lawyers may represent clients regarding marijuana-related activities).

15. *Id.*

16. *Id.*

17. *See* Conn. Bar Ass'n Pro. Ethics Comm., Informal Op. 02 (2013) (quoting Me. Pro. Ethics Comm'n, Op. 1999 (2010)).

18. *See* Ohio Bd. of Pro. Conduct, Op. 6 (2016), https://www.ohioadvop.org/wp-content/uploads/2017/03/Adv-Op-2016-6-Not-Current-docx.pdf; Pa. Bar Ass'n Legal Ethics & Pro. Resp. Comm. & Phila. Bar Ass'n Pro. Guidance Comm. Joint Formal Op. 100 (2015), https://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/JointFormalOpinion2015-100.pdf.

19. *See* OHIO RULES OF PRO. CONDUCT r. 1.2(d)(2) (2007); CONN. RULES OF PRO. CONDUCT r. 1.2(d)(3) (2015).

20. *See* ALASKA RULES OF PRO. CONDUCT r. 1.2(f) (2015).

Montana,[21] New Hampshire,[22] Oregon,[23] Rhode Island,[24] Virginia,[25] and West Virginia,[26] do not have ethics opinions on the issue but have amended their Rules of Professional Conduct.[27]

B. THE IMMUNITY APPROACH

A few states have issued declarations or statements through disciplinary authorities or legislation that lawyers are not subject to discipline for advising and assisting clients in conformity with state law, notwithstanding federal law. These states include Florida,[28] Massachusetts,[29] Minnesota,[30] and Missouri.[31] The rationale for this approach is twofold. First, government lawyers would be asked to draft regulations to implement state marijuana laws, and private lawyers would be asked to set up businesses to distribute marijuana under state law.[32] Second, the federal government has essentially stopped prosecuting most marijuana-related crimes.[33]

C. THE "RULES OF REASON" APPROACH

The most permissive approach is one summarized in an ABA comment from July 2019:

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21. *See* MONT. RULES OF PRO. CONDUCT Preamble (2020) (amending paragraph six which became effective January 1, 2020).

22. *See* N.H. RULES OF PRO. CONDUCT r. 1.2(e) (2018).

23. *See* Or. Bd. of Governors Resol. #5 (Feb. 19, 2015) (recommending direct amendment to rules and amendment to Rule 1.2).

24. *See* R.I. RULES OF PRO. CONDUCT r. 1.2 (2017) (adding new Comment [14] in a 2016 amendment).

25. *See* VA. STATE BAR PRO. GUIDELINES, *Amendments to Rule 1.2 of the Rules of Professional Conduct. Adopted by the Supreme Court of Virginia January 11, 2022. Effective March 12, 2022*, https://www.vsb.org/pro-guidelines/index.php/rule_changes/item/prop_RPC_1.2 (last visited June 23,2022) (noting that proposed Comment [13] is awaiting Virginia Supreme Court approval on October 29, 2021).

26. *See* W. VA. SUP. CT. APP., *Adoption of Proposed Amendment to Rule 1.2 of the Rules of Professional Conduct 18-Rules-01* (Apr. 4, 2018), http://www.courtswv.gov/legal-community/court-rules/Orders/2018/Rule1.2MedicalCannabisRuleadopted.pdf (adding section e to Rule 1.2, which became effective April 4, 2018).

27. Wash. Advisory Op. No. 20150, https://ao.wsba.org/print.aspx?ID=1682 (noting the Washington Supreme Court resolved the issue with a new Comment [18] to Washington's Rules of Professional Conduct Rule 1.2 permitting lawyer assistance to state-approved marijuana businesses).

28. Gary Blankenship, *Board Adopts Medical Marijuana Advice Policy*, FLA. BAR (June 15, 2014), https://www.floridabar.org/the-florida-bar-news/board-adopts-medical-marijuana-advice-policy/.

29. *See* Mass. Bd. of Bar Overseers & Off. of the Bar Counsel Pol'y on Legal Advice on Marijuana (Mar. 29, 2017), https://www.massbbo.org/Announcements?id=a0P36000009Yzb3EAC.

30. *See* MINN. STAT. § 152.32(2)(i) (2014), https://www.revisor.mn.gov/statutes/cite/152.32.

31. MO. CONST. Art. XVI, § 1(5.8).

32. Blankenship, *supra* note 28.

33. Siama Y. Chaudhary, *Ethics: Opinion No. 23 and Medicinal Marijuana*, MINN. LAW. 1, 3 (May 4, 2015), http://lprb.mncourts.gov/articles/Articles/Ethics%20Opinion%20No.%2023%20and%20Medicinal%20Marijuana.pdf.

> [B]ecause the ABA Model Rules of Professional Conduct are rules of reason, it is unreasonable to prohibit a lawyer from providing advice and counsel to clients and to assist clients regarding activities permitted by relevant state or local law, including laws that allow the production, distribution, sale, and use of marijuana for medical or recreational purposes so long as the lawyer also advises the client that some such activities may violate existing federal law.[34]

In other words, advocates of this "Rules of Reason" approach maintains that Rule 1.2(d) as written permits and continues to permit lawyers to advise and assist clients regarding marijuana issues, notwithstanding the continued illegality of marijuana use and distribution under federal law.[35] The rationale for this conclusion has usually been based on some or all of four points: (1) the issuance of the "Cole Memorandum" by the Department of Justice under the Obama Administration, which announced the DOJ would not prioritize enforcement of federal marijuana laws in states that had legalized marijuana;[36] (2) the Preamble and Scope to the Model Rules, paragraph [14] stating that the "Rules of Professional Conduct are *rules of reason*. They should be interpreted with reference to the purposes of legal representation and the law itself[;]"[37] (3) the clear intent of Rule 1.2(d) is to proscribe assisting clients with direct illegality, rather than the gradually eroding illegality of marijuana nationwide;[38] and (4) the importance of access to competent legal advice for residents and businesses in states that have legalized marijuana.[39]

Indeed, the fourth point is a crucial animating factor in most opinions. For example, Arizona's ethics committee stated:

> [W]e decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits.[40]

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34. *Id.*

35. *Id.*

36. *See* Memorandum from James M. Cole, Deputy Attorney General, on Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

37. MODEL RULES OF PRO. CONDUCT Preamble & Scope cmt. [14] (AM. BAR ASS'N 1983) (emphasis added).

38. *See* N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 1024 (2014), https://nysba.org/ethics-opinion-1024/ ("Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy.").

39. Ariz. Att'y Ethics Advisory Comm. Op. 11-01 (2011), https://tools.azbar.org/RulesofProfessionalConduct/ViewEthicsOpinion.aspx?id=710.

40. *Id.*

The Illinois State Bar Association's Ethics Committee used similar reasoning:

> As Preamble [14] notes, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses. One of the purposes of legal representation is to enable clients to engage in legally regulated businesses efficiently, and that purpose is advanced by their retention of counsel to handle matters that require legal expertise. A lawyer who concludes that a client's conduct complies with state law in a manner consistent with the application of federal criminal law may provide ancillary services to assure that the client continues to do so.[41]

Likewise, the New York State Bar noted that "a state medical-marijuana law[42] establishing a complex regulatory scheme depends on lawyers for its success."[43]

D. ILLINOIS AND CALIFORNIA CRAFT A BLANKET FEDERALISM RULE

As a final wrinkle, at least two states revised their versions of Rule 1.2(d) or its comments to expressly permit lawyers to assist clients in complying with state laws that conflict with federal law. Illinois now allows a lawyer to "counsel or assist a client in conduct expressly permitted by Illinois law that may violate federal law."[44] Similarly, Comment [6] to California's version of Rule 1.2 provides that a lawyer may advise clients regarding the validity, scope, and meaning of California laws that conflict with federal law and may assist a client in drafting or administering, interpreting, or complying with California laws, even if the client's actions might violate the conflicting federal law.[45] This includes permitting California lawyers to advise or assist clients with conducting business under California's cannabis laws.[46]

E. SOUTH DAKOTA'S CHOICE

As noted above, the Committee issued a pair of opinions that the plain text of Rule 1.2(d) proscribed South Dakota lawyers from assisting clients with

41. Ill. State Bar Ass'n ISBA Pro. Conduct Advisory Op. No. 07 (2014).

42. The New York State Bar recently clarified that this rationale also applies to recreational marijuana laws. *See* N.Y. State Bar Ethics Op. 1225 (2021), https://nysba.org/ethics-opinion-1225/.

43. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 1024, *supra* note 38.

44. *See* ILL. RULE OF PRO. CONDUCT r. 1.2(d)(3) (2016).

45. *See* CAL. RULE OF PRO. CONDUCT r. 1.2.1 cmt. [6] (2018).

46. Cal. Standing Comm. on Pro. Resp. & Conduct Op. 202 (2020).

creating and conducting marijuana business, such as by forming entities, drafting contracts and leases, and other activities.[47] Like several other ethics committees, it distinguished between "advice" and "assistance."[48] This, in turn, led to the adoption of a revision to Rule 1.2(d), clarifying that South Dakota lawyers could "counsel *or* assist a client regarding conduct expressly permitted by South Dakota cannabis laws."[49]

A "Rules of Reason" approach would have avoided the need for this amendment. But there were specific issues, some unique to South Dakota, that favored a more conservative approach. First, the "Rules of Reason" approach was based in part on Comment [14] of the Preamble to the Rules.[50] However, South Dakota did not formally adopt the Preamble as binding authority until September 1, 2021, after the Committee's opinions.[51] Second, the Committee is an advisory body comprised of lawyer volunteers; it is not a rulemaking body.[52] The Committee's opinion had no force of law.[53] Third, the South Dakota Supreme Court has repeatedly emphasized that in interpreting statutes (and South Dakota's Rules, which are in the Appendix to South Dakota Codified Law Chapter 16-18), when the words of statutes are unambiguous, a strict "plain meaning" analysis must be employed.[54] Although the Court has also stressed that a statute must be read in context with the overall statutory scheme,[55] as noted above, the "Rules of Reason" from the Preamble and Scope of the Rules was not yet part of the South Dakota Rules of Professional Conduct.[56] So a strict construction of Rule 1.2(d), such as that previously employed by ethics bodies in Colorado, Connecticut, Ohio, and Pennsylvania, was appropriate.[57]

Beyond these issues unique to South Dakota, opinions adopting the "Rules of Reason" approach typically invoked the Cole Memorandum, under which the Obama Administration's Department of Justice had announced a policy of non-enforcement regarding marijuana sales and distribution legally occurring under

47. *See* S.D. Ethics Comm., Formal Op. 07, *supra* note 1; S.D. Ethics Comm., Formal Op. 01, *supra* note 6.

48. *See* S.D. Ethics Comm., Formal Op. 07, *supra* note 1; S.D. Ethics Comm., Formal Op. 01, *supra* note 6.

49. *Appendix to SDCL Chapter 16-18*, *supra* note 7, at 2 (emphasis added).

50. *See* SDCL Ch. 16-18, Appx. A, Preamble & Scope cmt. [14] (2021).

51. S.D. SUP. CT., *In the Matter of the Adoption of the Preamble and Scope to the Rules of Professional Conduct, of the Appendix to SDCL Chapter 16-18*, at 1 (Sept. 1, 2022) [hereinafter *Adoption of Preamble and Scope*], https://ujs.sd.gov/uploads/sc/rules/SCRULE_RSRC_20210901103832.pdf.

52. *See* S.D. Ethics Comm., Formal Op. 01, *supra* note 6.

53. *Id.*

54. *See, e.g.*, Reck v. S.D. Bd. of Pardons & Paroles, 2019 SD 42, ¶ 11, 932 N.W.2d 135, 139 (applying the "plain meaning" approach in a strict fashion).

55. *See, e.g.*, Expungement of Oliver, 2012 SD 9, ¶ 9, 810 N.W.2d 350, 352 (utilizing the "plain meaning" approach).

56. *Adoption of Preamble and Scope*, *supra* note 51, at 1, 4.

57. Ohio Bd. of Pro. Conduct, Op. 6, *supra* note 18. *See also* Pa. Bar Ass'n Legal Ethics & Pro. Resp. Comm. & Phila. Bar Ass'n Pro. Guidance Comm. Joint Formal Op. 100, *supra* note 18 (dictating strict construction with Rule 1.2(d), but ultimately amending the rule).

state law.[58] However, by 2020, a policy change had superseded the Cole Memorandum at the DOJ under the Trump Administration, which took a different approach to enforcement.[59] This variable enforcement affected what was ethically permissible. For example, the Washington State Bar's Ethics Committee specifically noted that its permissive approach to lawyers advising clients and assisting them in conduct that would technically violate federal marijuana laws would last only "for as long as present federal enforcement policies last," thereby casting Washington's (and other states') permissive approach into doubt.[60]

Finally, even in jurisdictions where some version of a "Rules of Reason" approach was initially followed, those opinions were frequently withdrawn or superseded by a subsequent rule amendment.[61] That the state bars of those states deemed it necessary to amend the rules, notwithstanding their permissive opinions, suggested that most practitioners in those states were still concerned the answer was less than clear.

In short, although there are certainly justifications for the more permissive interpretations of Rule 1.2(d), in South Dakota, because the Committee is an advisory body and the plain text of statutes is paramount, two of the four common justifications for the "Rules of Reason" interpretation were not available. As noted below, moreover, a "Rules of Reason" approach has limited utility outside the ambit of the conflict between state and federal law regarding marijuana. Regarding a blanket rule applying to all state-federal conflicts, South Dakota's jurisprudential tradition is one of caution and circumspection. Modifying Rule 1.2(d) to address all state-federal conflicts would be a modification beyond the specific issue presented, i.e., advising and assisting clients about how to comply with marijuana laws. Such a modification would at the very least encourage lawyers in every instance of state-federal conflict to default to state law. As noted in more detail below, such a modification could likely lead to unexpected and unintended consequences depending upon the particular conflict.

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58. U.S. DEP'T JUST., *Justice Department Issues Memo on Marijuana Enforcement* (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement.

59. Julie Rheinstrom, *Current Developments: One Hundred Days of President Trump's Executive Orders*, 31 GEO. IMMIGR. L.J. 433, 444 (2017).

60. *See* Wash. State Bar Ass'n Comm. on Pro. Ethics, Advisory Op. 201501 (2015), https://ao.wsba.org/searchresult.aspx?year=&num=201501&arch=False&rpc=&keywords=.

> If, for example, the federal government were to disavow its present positions and announce that it would thereafter prosecute any and all violators including but not limited to those purporting to act pursuant to [Washington's recreational marijuana law] or [Washington's medical marijuana law] it could well be that any protections offered by Comment 18 would be at an end.

Id.

61. *See* Colo. Bar Ass'n Ethics Comm. Formal Op. 124 add. (2012); Colo. Bar Ass'n Ethics Comm. Formal Op. 125 (withdrawn 2014); Conn. Bar Ass'n Prof. Ethics Comm. Informal Op. 2013-02 (2013), *superseded by* CONN. RULE OF PRO. CONDUCT r. 1.2(d) (2015) (amended 2014); Disciplinary Bd. of the Haw. Sup. Ct., Formal Op. 49, *superseded by* HAW. RULE OF PRO. CONDUCT r. 1.2(d) (2015) (amended 2015).

II. EMERGING CONFLICTS

Marijuana legislation is not the only area where state and federal law conflict. In particular, the increasing use of presidential executive orders has likewise increased the opportunity for state-federal conflicts.[62] These conflicts occur more frequently because presidential executive powers are being used for increasingly controversial purposes.[63] Less frequently discussed, but no less notable, are conflicts between state and county or local authorities (and sometimes federal and local authorities) regarding similar matters, oftentimes arising from rapidly-enacted gubernatorial orders that other state or local authorities perceive as exceeding the governor's authority.[64]

Some examples of these conflicts follow. Importantly, not all inter-sovereign conflicts are within the ambit of Rule 1.2(d) because that Rule only implicates conduct known to be criminal or fraudulent. So unless one of the sovereigns involved in the conflict has imposed some sort of criminal penalty for non-compliance with a given policy or for engaging in certain conduct, the fundamental issues addressed here are not in play.

A. IMMIGRATION

The federal government has broad power over immigration and the status of aliens.[65] Nonetheless, states near the southern border have tried to regulate immigration, particularly the status and employment of undocumented immigrants and state enforcement of federal immigration law.[66] Many of these laws were enacted after an effort at federal immigration reform failed late in George W. Bush's presidency and are based on the belief that the federal government is not adequately enforcing federal immigration laws.[67]

Although the concept of federal preemption under the Supremacy Clause seems simple on its face, its application has led to seemingly inconsistent results. For example, in *Chamber of Commerce v. Whiting*,[68] a divided United States

62. *See* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 1-2 (2002), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1163&context=jleg.

63. Admittedly, there were much earlier controversial orders such as President Franklin D. Roosevelt's 1942 order during the Second World War to create Japanese internment camps, President Abraham Lincoln's suspension of habeas corpus, and President Harry S. Truman's executive order in 1948 abolishing racial discrimination in the armed forces. *See* Jessica M. Stricklin, *The Most Dangerous Directive: The Rise of Presidential Memoranda in the Twenty-First Century as a Legislative Shortcut*, 88 TUL. L. REV. 397, 405 n.58 (2013), https://www.tulanelawreview.org/pub/volume88/issue2/the-most-dangerous-directive-cshbm.

64. Ron Beal, *Power of the Governor: Did the Court Unconstitutionally Tell the Governor to Shut Up?*, 62 BAYLOR L. REV. 72, 106 (2010), https://heinonline.org/HOL/LandingPage?handle=hein.journals/baylr62&div=5&id=&page=.

65. Arizona v. United States, 567 U.S. 387, 394 (2012).

66. Lauren Gilbert, *Immigrant Laws, Obstacle Preemption, and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 155 (2012), https://lawcat.berkeley.edu/record/1125004?ln=en.

67. *Id.*

68. 563 U.S. 582 (2011).

Supreme Court upheld various provisions of the Legal Arizona Workers Act of 2007, which targeted employers who hired so-called "unauthorized aliens," finding that these provisions were not preempted by the 1986 Immigration Reform and Control Act or the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.[69] Specifically, the Court upheld state laws permitting the revocation of licenses to do business in the State of Arizona for companies that improperly employed unauthorized immigrants.[70] The Court expressly rejected the argument that federal power over immigration is exclusive.[71] Conversely, in *Arizona v. United States*,[72] the Court struck down an Arizona law that made it a crime for an "unauthorized alien" to apply for work or perform work, whether as an employee or independent contractor.[73] The rationale was that the federal government had occupied the field regarding the criminalization of legal status and had declined to impose criminal consequences (versus civil penalties) for the same conduct.[74] If the rationale for the difference in outcomes between these two cases seems like a fine distinction, the late Justice Scalia agreed.[75]

The constitutionality of immigration laws is also subject to splits of authority, even among the federal circuit courts of appeals. For example, several cities have declared themselves sanctuary jurisdictions that will not cooperate with federal enforcement of immigration law, even though federal law, i.e., the Byrne statute, forbids states and localities from restricting their officials from sharing "information regarding the citizenship or immigration status, lawful or unlawful, of any individual" with the Department of Homeland Security.[76] The Second Circuit has held that Congress properly enacted the Byrne statute under its Spending Clause power.[77] The First, Third, Seventh, and Ninth Circuits have held to the contrary.[78] So for the moment, the legality of sanctuary jurisdictions appears at least reasonably debatable. Further complicating the situation is that some states have, in turn, forbidden cities from engaging in sanctuary policies.[79] Texas, Alabama, Indiana, Iowa, Mississippi, North Carolina, and Tennessee have

69. *Id.* at 611.
70. *Id.*
71. *Id.* at 600-01.
72. 567 U.S. 387 (2012).
73. *Id.* at 394.
74. *Id.*
75. *Id.* at 416-37 (Scalia, J., dissenting).
76. 8 U.S.C. § 1373(a) (2013).
77. New York v. Dep't of Just., 951 F.3d 84, 101-04, 116-22 (2d Cir. 2020).
78. City of L.A. v. Barr, 941 F.3d 931, 945 (9th Cir. 2019); City of Chi. v. Barr, 957 F.3d 772, 798-99 (7th Cir. 2020); City of Chi. v. Sessions, 888 F.3d 272, 283-87 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); City of Phila. v. Att'y Gen., 916 F.3d 276, 284-88 (3d Cir. 2019); City of Providence v. Barr, 954 F.3d 23, 45 (1st Cir. 2020).
79. City of El Cenizo v. Texas, 890 F.3d 164, 173 (5th Cir. 2018).

all followed this path.[80] Notably, Texas's statutes on this point impose criminal penalties on officials who fail to comply.[81]

Meanwhile, either by legislation or executive order, other states have declared their entire states to be sanctuaries.[82] And the Trump Administration, by executive order, threatened to withhold funding from jurisdictions that followed this approach. This executive order was also questioned.[83]

In short, in sharp contrast to the apparent illegality of marijuana under federal law, the validity and interpretation of the immigration laws and orders above, some of which contemplate criminal penalties for non-compliance, are unclear.

B. GUN REGULATION

The term "sanctuary" has also become associated with gun regulation.[84] Some 1,200 local governments have adopted Second Amendment sanctuary resolutions in states around the United States, including Virginia, Colorado, New Mexico, Kansas, Illinois, and Florida.[85] Local governments have declared they will not enforce certain state laws restricting or regulating firearms in these jurisdictions. The disputes flow in both directions. For example, in 2021, a state court in Florida ruled on the constitutionality of a 2011 Florida law imposing criminal penalties on local government officials who enact or enforce local firearms laws in conflict with state law.[86] A similar lawsuit was joined in 2020 by Philadelphia and other parties challenging a Pennsylvania law.[87] Kentucky imposes criminal liability on local officials in this arena as well.[88]

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80. Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 839-40 (2019), https://columbialawreview.org/content/anti-sanctuary-and-immigration-localism/.

81. Bradley Pough, *Understanding the Rise of Super Preemption in State Legislatures*, 34 J.L. & POL. 67, 94-95 (2018), http://www.lawandpolitics.org/hifi/files/issues/vol-xxxiv-no-1-fall-2018/Pough_article_final_10.08.18.pdf.

82. Rose Cuison Villazor & Alma Godinez-Navarro, *"Sanctuary States"*, 48 SW. L. REV. 503, 510-18 (2019), https://www.immigrationresearch.org/system/files/Sanctuary%20States.pdf.

83. City & Cnty. of S.F. v. Trump, 897 F.3d 1225, 1232-33 (9th Cir. 2018). *See* Daniel S. Cohen, *A Gun to Whose Head? Federalism, Localism, and the Spending Clause*, 123 DICK. L. REV. 421, 428-35 (2019), https://ideas.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=1062&context=dlr.

84. Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 445-48 (2020), https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss2/2/.

85. Lindsay Whitehurst & Andrew Selsky, *Second Amendment sanctuaries facings 1st court test in Oregon*, ASSOCIATED PRESS NEWS (May 16, 2021), https://apnews.com/article/us-news-oregon-gun-politics-government-and-politics-1dec173dc5d6d7d5f343b933bb883368.

86. *NRA*, *GOP win as court upholds law preventing local gun control*, TAMPA BAY TIMES (Apr. 9, 2021), https://www.tampabay.com/news/florida-politics/2021/04/09/nra-gop-win-as-court-upholds-law-preventing-local-gun-control/.

87. Chris Palmer, *Philadelphia sues Pennsylvania over inability to enact city-specific gun laws*, PHILA. INQUIRER (Oct. 7, 2020), https://www.inquirer.com/news/philadelphia-violence-gun-control-lawsuit-preemption-pennsylvania-20201007.html.

88. Nester M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 970 (2019), https://www.yalelawjournal.org/essay/the-dilemma-of-localism-in-an-era-of-polarization.

Further clouding the issue, most states (including South Dakota) have "home rule" laws, which extend greater autonomy to cities and counties.[89] For example, Ohio state courts have previously overturned state laws purporting to preempt local regulations regarding a variety of subjects, including municipal regulation of foods containing trans fats, local regulation of towing companies, and local hiring requirements on specific local construction contracts, as well as laws burdening local use of cameras to enforce traffic laws.[90] However, it remains unclear whether and to what extent home-rule arguments will succeed for localities that attempt to approach firearms in a manner contrary to state law.

Although "Second Amendment Sanctuary" often refers to local or county officials stating that law enforcement in their jurisdiction will not enforce certain types of state firearms restrictions or regulations,[91] it is not difficult to envision showdowns between federal and local or federal and state authorities regarding conflicting firearms regulations, some of which might feature criminal penalties.

C. LAW ENFORCEMENT FUNDING

In the wake of George Floyd's murder, state and local governments have fought a pitched battle over funding for local law enforcement. For example, the Florida legislature recently passed what it termed an "anti-riot" bill that created an appeal process to challenge local law enforcement budget cuts or modifications.[92] Any such appeal is heard by an administration commission comprised of the governor and the Florida governor's cabinet, and any decision of that body is final.[93] This resulted in two federal lawsuits.[94] Similar laws were passed in Texas and Georgia.[95] While these laws do not include criminal penalties for reducing police budgets or similar conduct, a state may yet criminalize the conduct, as is possible with immigration enforcement and firearms regulation.

89. SDLRC Issue Memo 96-1; Fields, *supra* note 84, at 476-80.

90. Richard Briffault, *The Challenge of New Preemption*, 70 STAN. L. REV. 1995, 2013-14 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/70-Stan.-L.-Rev.-1995.pdf.

91. *Id.*

92. Matt Dixon, *Florida panel paves way for law enforcement to appeal local police budget cuts*, POLITICO (June 17, 2021), https://www.politico.com/news/2021/06/17/florida-police-budget-cuts-495053.

93. *Id.*

94. Karl Etters, *City of Tallahassee mounting legal challenge to Florida's 'anti-riot' law, HB 1*, TALLAHASSEE DEMOCRAT (Oct. 13, 2021), https://www.tallahassee.com/story/news/2021/10/13/tallahassee-lawsuit-florida-anti-riot-law-ron-desantis-protests-city-commission/8442781002/.

95. H.B. 1900, 87th Leg., Reg. Sess. (Tex. 2021), https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB1900; Nicholas Reimann, *Georgia Enacts Law That Bans Cutting Police Budgets*, FORBES (May 7, 2021), https://www.forbes.com/sites/nicholasreimann/2021/05/07/georgia-enacts-law-that-bans-cutting-police-budgets/?sh=1eea5cc6855dl; H.B. 286, 2021-2022 Leg., Reg. Sess. (Ga. 2021).

D. COVID-19

Since mid-2020, most of these other emerging conflicts have been obscured by those related to the COVID-19 pandemic. On July 1, 2021, to little fanfare, the State of Montana became the first state to prohibit employers (with exceptions for certain medical and long-term-care providers) from mandating vaccines or proof of vaccine status as a condition of employment.[96] The penalty for violating the act was a potential determination that a violator had violated the Montana Human Rights Act, which exacts civil, not criminal, penalties.[97]

But then, on October 11, 2021, Texas Governor Greg Abbott issued an executive order (and created a much greater stir) regarding vaccine mandates.[98] He noted that he had previously issued executive orders prohibiting Texas state agencies from imposing vaccine mandates before stating, "in yet another instance of federal overreach, the Biden Administration is now bullying many private entities into imposing COVID-19 vaccine mandates . . . ."[99]

Governor Abbott's executive order provided:

> No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19. I hereby suspend all relevant statutes to the extent necessary to enforce this prohibition.[100]

The asserted "federal overreach" was the Biden Administration's announcement on September 9, 2021, that it would be instructing the Occupational Safety and Health Administration ("OSHA") to issue new rules requiring all private employers with at least one hundred employees to mandate that their employees get vaccinated for COVID-19 or undergo weekly testing.[101]

Governor Abbott's order specified a penalty for non-compliance.[102] It invoked Texas Government Code section 418.173, which provides that a state emergency management plan "may provide that failure to comply with the plan or with a rule, order, or ordinance adopted under the plan is an *offense*."[103] It also provides that the punishment for the offense can include a fine and confinement

96. H.B. 702, 67th Leg., Reg. Sess. (Mont. 2021), https://leg.mt.gov/bills/2021/billpdf/HB0702.pdf.

97. MONT. DEPT. LAB. & INDUS., *House Bill 702: Frequently Asked Questions* (July 2021), https://erd.dli.mt.gov/human-rights/human-rights-laws/employment-discrimination/hb-702.

98. Tex. Exec. Order No. EO-GA-40 (Oct. 11, 2021), https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11-2021.pdf.

99. *Id.*

100. *Id.*

101. Morris Hawk, *President Biden Orders OSHA to Issue Rule Requiring Large Employers to Mandate that Employees get Vaccinated for COVID-19 or Undergo Weekly Testing*, NAT'L L. REV. (Sept. 10, 2021), https://www.natlawreview.com/article/president-biden-orders-osha-to-issue-rule-requiring-large-employers-to-mandate. The executive order imposed similar requirements for all federal employees and contractors. *Id.*

102. *Id.*

103. TEX. GOV'T CODE § 418.173(a) (West 1987) (emphasis added).

in jail for up to 180 days.[104] This provision has generally been regarded as a *criminal* offense and penalty.[105]

After OSHA issued the mandate, larger employers in Montana and Texas (and the lawyers who advise them) faced an undeniable conflict between state and federal law. Texas employers faced a criminal penalty for complying with federal law.[106] Although the constitutionality of the Biden Administration's vaccine mandates for federal workers, certain medical facilities, and large employers has not been finally adjudicated by the Supreme Court, it appears that the OSHA mandate (which the Biden Administration has withdrawn) is unconstitutional.[107] The Medicare/Medicaid recipient mandates and federal employee mandates appear to be on firmer ground.[108] However, these particular mandates are just a few examples of a myriad of state and federal executive orders and rulemaking regarding COVID-19 mitigation providing for potential criminal fines and incarceration.[109] And, importantly, COVID-19 may not be the last time a public health crisis results in conflicting laws.

III. THE "PLAIN MEANING" APPROACH PROVIDES MORE, NOT LESS, GUIDANCE FOR LAWYERS

In any situation involving a conflict between state and federal law, state and local law, or federal and local law, particularly when one of the conflicting laws carries a criminal penalty, the "plain meaning" approach to Rule 1.2(d) requires a lawyer to determine when "advice" becomes "assistance." In "emerging"

104. *Id.*

105. *See* Planned Parenthood Ctr. for Choice v. Abbott, 450 F. Supp. 3d 753, 756 (W.D. Tex. 2020), *vacated on other grounds in part by* Sw. Women's Surgery Ctr. v. Abbott, 802 F. App'x. 150 (5th Cir. 2020), *certiorari granted and judgment vacated on other grounds by* Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021); *see also In re* Abbott, 601 S.W.3d 802, 811-13 (Tex. 2020) (having a similar discussion in relation to Texas governor's previous order suspending statutes permitting trial judges to release jail inmates with violent histories following declaration of state of disaster).

106. Hannah Mitchell, *12 states banning COVID-19 vaccine mandates & how they affect healthcare workers*, BECKER'S HOSP. REV. (Oct. 12, 2021), https://www.beckershospitalreview.com/workforce/11-states-banning-covid-19-vaccine-mandates-how-it-affects-healthcare-workers.html.

107. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664-65 (2022).

108. Although the Supreme Court stayed enforcement of the OSHA rule for large employers, it did so pending a final ruling by the Sixth Circuit Court of Appeals on that rule. *Id.* The issue is likely moot given OSHA's withdrawal of the rule effective January 26, 2022. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 Fed. Reg. 3928 (Jan. 26, 2022). Likewise, although the Supreme Court in *Biden v. Missouri* and *Becerra v. Louisiana* permitted the Biden Administration's rule requiring vaccination for health care workers at facilities that receive Medicare and Medicaid funding, the U.S. Courts of Appeals for the Fifth and Eighth Circuit still have to rule on the merits of those claims. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 647.

109. *See, e.g.*, Alsob v. Desantis, 8:20-cv-1052-T-23SPF, 2020 WL 4927592, at *1 (M.D. Fla. Aug. 21, 2020) (discussing Florida ban on vacation rentals and potential criminal penalties for violation of same); *see also* Northland Baptist Church of St. Paul v. Walz, 530 F. Supp. 3d 790, 817 (D. Minn. 2021) (holding the same regarding Minnesota restrictions on number of occupants in certain businesses); First Baptist Church v. Kelly, 457 F. Supp. 3d 1072, 1083 (D. Kan. 2020) (illustrating the same rule regarding Kansas orders); Ctrs. for Disease Control & Prevention, Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292-01 (Sept. 4, 2020) (specifying criminal penalties).

conflicts or conflicts in flux, would not the "Rules of Reason" approach seem apt? Alternatively, would not the "blanket federalism" approach taken by Illinois and California, permitting lawyers to advise and assist clients with complying with state law in any inter-sovereign conflict, provide a clear solution?[110] Not necessarily.

Arizona's formulation of the "Rules of Reason" approach to marijuana shows why this approach has its weaknesses. A key factor for the Arizona ethics committee was that the legal advice at issue related to conduct that was clearly legal under state law and, while technically illegal under federal law, violated a federal statute that the federal government had publicly stated it was not enforcing.[111] So for purposes of addressing the emerging conflicts discussed above, the primary problem with the "Rules of Reason" approach is that it is unhelpful concerning a law that is likely to be enforced, but of questionable, or at least arguable, validity, particularly if that law conflicts with another law of equally debatable validity.

The primary issue with the "blanket federalism" approach is that it potentially would encourage a lawyer to consistently err on the side of advising a client to comply with state law, even if that might not be in the client's best interest. Moreover, the approach does not address other potential conflicts between local and state governments or local and federal enactments.

A. RULE 1.2 CONTEMPLATES ADVISING AND ASSISTING CLIENTS WITH CIVIL DISOBEDIENCE

In contrast, the continued use of a "plain meaning" approach to Rule 1.2(d) addresses these difficult situations when the proper definition of "knows" is combined with a close reading of Rule 1.2(d) and Comments [9] and [12]. The word "knows" in Rule 1.2(d) requires "actual knowledge of the fact in question."[112] Although actual knowledge "may be inferred from circumstances" or through "circumstantial evidence, a mere showing that the lawyer reasonably should have known her conduct was in violation of the rules, without more, is insufficient."[113] In other words, negligence regarding the state of the law is insufficient to trigger the Rule.[114]

That said, courts have long observed that "willful blindness" to the law is equally culpable as "actual knowledge" because "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts."[115] As explained in ABA Formal Opinion #491:

110. *See* ILL. RULE OF PRO. CONDUCT r. 1.2(d)(3); CAL. RULE OF PRO. CONDUCT r. 1.2.1, cmt. [6].
111. Ariz. Att'y Ethics Advisory Comm. Op. 11-01, *supra* note 39.
112. *See* SDCL Ch. 16-18, Appx. A, Preamble; *In re* Tocco, 984 P.2d 539, 542-43 (Ariz. 1999).
113. SDCL Ch. 16-18, Appx. A, Preamble.
114. *Id.*
115. Global-Tech Appliances, Inc. v. SEB S.A., 564 U.S. 754, 766 (2011).

> A lawyer who has knowledge of facts that create a *high probability* that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a *duty to inquire further* to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule.[116]

So the "knowledge" question here is whether the lawyer knows (or would not know only through willful blindness) that the client's potential course of conduct violates criminal law.

Here, a phrase from Rule 1.2(d), revisited, and two comments to Rule 1.2 become crucial. 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 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.*[117]

Comment [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.*[118]

Equally important, Comment [12] provides in part:

> 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*.[119]

116. ABA Formal Op. 491 at 2 (Apr. 29, 2020) (emphasis added).
117. SDCL Ch. 16-18, Appx. A, Rule 1.2(d) (2015 & Supp. 2021) (emphasis added).
118. *Id.* at cmt. [9] (emphasis added).
119. *Id.* at cmt. [12] (emphasis added).

B. A Proposed Formulation of the Correct Analysis

A plain-meaning approach to Rule 1.2(d), informed by the correct definition of "knows" and the emphasized text of Comments [9] and [12], provides the framework for a proposed analysis under Rule 1.2(d) that is superior in addressing state-federal conflicts to the other approaches already discussed. The standard "plain meaning" analysis, the "blanket federalism" approach, and the "Rules of Reason" analysis all share a common drawback, i.e., they are attempts to create a rule that will fit every conflict between state and federal law. The standard "plain meaning" approach leads to the "one may advise but not assist" outcome (along with the uncertainty about where the "line" is between advice and assistance) in virtually every case. The "blanket federalism" approach is likely to lead in most cases to "one may only advise and assist with complying with the state law, not the federal law," and does not address conflicts between state and local law. Finally, the "Rules of Reason" approach, taken to its most extreme conclusion, would potentially permit a lawyer to advise or assist with either law in all circumstances.

By contrast, a superior "plain meaning" approach, and an approach superior to all of these rules, can be applied on a case-by-case basis using the following analysis:

(1) A lawyer must engage in reasonable inquiry and research to determine whether a client's course of conduct is potentially a violation of criminal law;

(2) A lawyer cannot advise a client to engage or assist a client in engaging in conduct the lawyer knows is criminal or fraudulent; but

(3) A lawyer can lay out the possible ramifications of a client deciding to violate a law or regulation;

(4) A lawyer can provide an honest opinion about the actual consequences that are likely to result if the client violates the law;

(5) A lawyer can advise *or assist* a client in making a good faith effort to determine the validity, scope, meaning, or application of the law; and

(6) Determining the validity or interpretation of the law may require the client to disobey the law or the government's understanding of the law.

C. The Contrast Between Well-Established Laws Such as the Controlled Substances Act and Newer Conflicting Laws Demonstrates the Utility of the Analysis

The tension between state and federal marijuana law provides a practical test case for this analysis. Under the ABA's formulation of "knows," any lawyer would know or have to be consciously blind not to know that the sale or use of marijuana remains illegal under federal law. The statute criminalizing the conduct has been upheld as constitutional. The United States Supreme Court previously stated that Congress had the power under Article I, Section VIII to criminalize

purely intrastate use, cultivation, sale, or distribution of marijuana.[120] In *Standing Akimbo, LLC v. United States*,[121] the Supreme Court recently denied certiorari regarding, among other things, the conflict between state and federal law regarding marijuana.[122] So it would be impossible for any lawyer conducting even a modicum of due diligence to claim uncertainty about whether the sale, distribution, cultivation, or use of marijuana remains a federal crime or whether Congress had and continues to have the authority to criminalize that conduct. Indeed, as noted by the Committee, because of the apparent illegality of the conduct at issue, the plain text of Rule 1.2(d) did not permit active "assistance" to clients, such as drafting marijuana contracts and forming marijuana businesses.[123]

But the opinions also emphasized that lawyers could advise clients about the likely ramifications of a given range of conduct. For example, even if a lawyer could not advise a client to violate the law, the comments to Rule 1.2 strongly suggest a lawyer could advise that the "actual consequences that [were] likely to result" from the client violating federal law were likely to be minimal, given the limited enforcement efforts of the federal government. Lawyers could also advise clients about what South Dakota's marijuana laws mean, how they apply, whether they are valid, and what a client would have to do to comply with the laws, understanding that the conduct would likely violate federal law.

That said, in the case of marijuana laws, it would be difficult for a lawyer to discuss or recommend a "civil disobedience" course of conduct as justification for ignoring federal marijuana law in "good faith," as contemplated by Comment [12]. As noted above, the sale and use of marijuana have long been illegal under federal law, and the Supreme Court has unquestionably affirmed the constitutionality of that law.[124] Instead, any assistance with purported "civil disobedience" would, under the circumstances, risk a finding the lawyer was "recommending the means by which a crime or fraud might be committed with impunity," rather than a good faith challenge to a law of questionable validity.[125]

The relatively straightforward outcome obtained under the proposed analysis regarding marijuana informs the proper outcome in the more difficult cases, i.e., those that involve statutes, orders, or regulations that clearly define certain conduct as criminal, when there is a genuine question whether those enactments are valid, or multiple enactments create conflicting obligations.

A practical example here is the public debate regarding COVID-19 vaccine mandates, although admittedly, the courts have begun to settle that dispute, and OSHA's mandate has been withdrawn.[126] The governor of Texas declared that no entity or state agency could impose a COVID vaccine mandate on

120. Gonzales v. Raich, 545 U.S. 1, 15-22 (2005).

121. 141 S. Ct. 2236 (2021).

122. *Id.*

123. *See* S.D. Ethics Comm., Formal Op. 07, *supra* note 1.

124. *See supra* note 120 and accompanying text (illustrating the Supreme Court's rule on the constitutionality of prohibiting sale and use of marijuana).

125. SDCL 16-18, Appx. A, Rule 1.2, cmt. [9].

126. *See supra* note 108 (noting OSHA's withdrawal of its vaccine mandate).

employees.[127] This prohibition was similar to his previous executive order forbidding mask mandates.[128] A Texas state court granted a temporary injunction against enforcement of the mask order, stating the petitioners had shown a likelihood of success on the merits of their claim that Governor Abbott exceeded his authority in unilaterally issuing the anti-mandate order.[129]

Consider a lawyer's client that was a private employer of more than one hundred employees that was faced with complying with the federal OSHA mandate before it was withdrawn[130] by imposing a vaccine mandate or facing onerous financial (but likely not criminal) penalties.[131] Assume the client also believed that requiring vaccinations was the right step as a matter of company policy, public policy, and public relations. But, as noted above, if the company mandated vaccinations, there was potential criminal liability under Texas law.[132] Given the proscriptions of Rule 1.2(d), what could the lawyer have done?

Under the approach Illinois and California have followed (lawyers may advise or assist clients with compliance with state law if it conflicts with federal law), the only certainty is that the lawyer could have advised the client to comply with the Texas state statute without violating Rule 1.2(d). In fact, the inclusion of a specific provision in Rule 1.2 enabling lawyers to advise and assist clients with compliance with state law that conflicts with federal law might make it difficult to argue the Rule or its comments permit any other conduct in the face of a state-federal conflict. But under the analysis proposed above, the list of what a lawyer could not do in the event of such a conflict is much shorter than the list of what could be done.

As a starting point, it is unlikely a lawyer would not have known about the OSHA mandate and Governor Abbot's executive order. Still, in such a contentious situation, the lawyer would have needed to be informed about the emerging COVID laws if the lawyer was going to wade into that area.

Next, a lawyer could advise the client not to comply with the OSHA regulation to avoid criminal penalties at the state level, as long as the OSHA regulation contained no automatic criminal provisions (which appeared to be the case). Although the client may have incurred significant financial penalties, there was a chance a court would determine OSHA could not mandate a vaccine, or, as ultimately occurred, temporarily enjoin the enforcement of the regulation, pending a determination whether the Supreme Court's decision in *Jacobson v.*

127. Tex. Exec. Order No. EO-GA-40, *supra* note 98.

128. Tex. Exec. Order No. EO-GA-38 (July 29. 2021).

129. Abbot v. La Joya Indep. Sch. Dist., No. 03-21-00428, 2022 WL 802751, at *3 (Tex. Ct. App. Mar. 17, 2022).

130. *See supra* note 108 (illustrating OSHA's regulations regarding COVID).

131. *See* J.D. Sheahan, *Employer's Criminal Liability Under OSHA (Occupational Safety And Health Act)*, 15 CRIM. L. BULL. 322, abstract (1979), https://www.ojp.gov/ncjrs/virtual-library/abstracts/employers-criminal-liability-under-osha-occupational-safety-and (noting that criminal penalties under OSHA regulations typically require a willful violation that caused an employee death).

132. TEX. GOV'T CODE § 418.173(a).

Massachusetts[133] applied not only to states mandating vaccines under their police powers, but to the federal government's scope of authority as well.[134]

In addition, the federal government admitted it lacked sufficient resources to enforce the mandate.[135] "With only a couple thousand state and federal OSHA inspectors nationwide, there is no mechanism for checking up on millions of workplaces to see whether they are in fact keeping vaccination and testing records."[136] As a result, "*enforcement* will largely fall to companies themselves."[137] So the lawyer could have advised the client to avoid running afoul of Texas criminal law in part because it appeared there is a good chance the client would not even be audited by OSHA, similar to advice a lawyer could provide about federal criminal marijuana enforcement.

On the other hand, the lawyer could not have explicitly told the client to violate the governor's order (which would be advising the client to commit a crime), but could point out that there was a chance that a court would determine the Texas state order is preempted by the federal OSHA regulations.[138] Moreover, as a Texas state court was willing to enjoin the enforcement of a law criminalizing mask mandates temporarily, a Texas state court may have been willing to temporarily enjoin the enforcement of a law criminalizing vaccine mandates.

In addition, because of this uncertainty, the lawyer could also have pointed out that the client may have to disobey the law and enact a vaccine policy, or at least threaten to do so, to mount a good-faith challenge to the law. In fact, the lawyer could probably have directed the client to examples of other vaccine policies that other employers had threatened to enact under those circumstances in the hopes of triggering enforcement, as long as the lawyer consistently noted that this would be criminal conduct.[139] Arguably, this would not have crossed the line between advice regarding consequences and assistance in the first place. Still, even if it did cross the line, the ability to "advise or assist" a client with determining the validity of a law, according to Comments [9] and [12], can engender assisting disobedience.[140] The key points are: (1) the motive must be a good faith challenge to a law's validity; and (2) the lawyer cannot help the client

133. 197 U.S. 11 (1905) (holding that state law allowing cities to require smallpox vaccination was a legitimate exercise of the state's police power to protect the public health and safety of its citizens).

134. *See supra* note 108 (noting OSHA's COVID regulations). *See generally* Dorit Rubinstein Reiss & T. Tony Yang, *How Congress Can Help Raise Vaccine Rates*, 96 NOTRE DAME L. REV. REFLECTION 42 (2020), http://ndlawreview.org/publications/archives/volume-96-issue-1/ (discussing Congress's role in increasing vaccination rates).

135. Andrea Hsu, *Biden's vaccine rules for 100 million workers are here. These are the details*, NPR (Nov. 4, 2021), https://www.npr.org/2021/11/04/1048939858/osha-biden-vaccine-mandate-employers-100-workers.

136. *Id.*

137. *Id.*

138. Empl. Safety & Health Guide P 15103A (C.C.H.), 2015 WL 8455650 (noting OSHA regulations normally preempt inconsistent state health and safety laws); Deborah Greenfield, Acting Deputy Solicitor, U.S. DEP'T OF LAB. (Feb. 3, 2010), https://www.osha.gov/laws-regs/standardinterpretations/2010-02-03-0 (discussing preemption provisions of relevant enabling statutes).

139. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(2)(a), cmt. e (AM. LAW INST. 2000).

140. *See* SDCL Ch. 16-18, Appx. A, Rule 1.2, cmts. [9] and [12].

commit a crime under the arguably invalid law "with impunity." In other words, the lawyer can assist the client with disobedience if there is a genuine argument that a law is invalid, and the lawyer is only helping to facilitate that challenge, not trying to find a way for the client to evade criminal responsibility.

D. THERE IS NO CASE LAW CONTRARY TO THIS FORMULATION

There is very little case law or scholarly comment discussing how far a lawyer can go when advising a client with a good faith challenge. The primary case is *Werme's Case*.[141] The New Hampshire Supreme Court rejected a lawyer's argument that she had not violated Rule 1.2(d) because the criminal statute at issue (she asserted) was unconstitutional under the First Amendment.[142] However, notwithstanding this holding, the case does not contradict the analysis above. Instead, it helps explain what "too far" really means when trying to follow that analysis.

In *Werme's Case*, the lawyer's client, a mother, was contesting the state's allegation that she had abused her child.[143] Under New Hampshire law, court records regarding abuse proceedings were confidential, and disclosure without court authorization was a misdemeanor.[144] At the lawyer's direction, the mother had disclosed information from the case to a local newspaper and provided the paper with confidential court records.[145] The lawyer had never sought permission from the court to disclose the records, so the court referred the matter for discipline.[146]

The lawyer first argued her client had not violated the statute, but the court determined that did not matter because the lawyer had advised the client to violate the law, which Rule 1.2(d) prohibits.[147] The lawyer then argued that the statute was an unconstitutional prior restraint under the First Amendment and was void, so she could advise the client to violate it.[148] Relying on Comment [12] to Rule 1.2, the lawyer argued that "determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute," which "empowered her to self-determine the validity of the statute and advise her client to disobey it because she concluded [the statute] was unconstitutional."[149] The Supreme Court of New Hampshire summarily rejected this argument. The lawyer could have asked the court for permission to disclose and supported the request with her constitutional arguments; she could have raised the same arguments on an appeal from a denial; or she could have filed an independent

141. 839 A.2d 1 (N.H. 2003).
142. *Id.* at 2-3.
143. *Id.* at 1-2.
144. *Id.* at 2-3 (citing N.H. REV. STAT. ANN. § 169-C:25 (2009)).
145. *Id.* at 2.
146. *Id.* at 2-3.
147. *Id.*
148. *Id.*
149. *Id.* at 2.

declaratory relief action to make the same arguments.[150] The court also noted that the lawyer had expressed an intent to continue to counsel clients to violate the statute "unless the United States Supreme Court declares it constitutional."[151] The court ultimately ruled that this was not a "good faith" effort to determine the validity of the law.[152]

Werme's Case does not prohibit the advice or even "assistance" contemplated by the hypothetical regarding a state criminal prohibition against vaccine mandates or any other conflicting criminal statutes. Instead, it helps demonstrate what constitutes a good-faith test case, civil disobedience tied to an appeal to a higher law, and simple law-breaking.[153] The lawyer did not counsel her client about the consequences of compliance as opposed to non-compliance with the statute. Nor did she explain how the client could mount a good-faith challenge to the law. The lawyer instead decided to advise her clients to violate the law until she was told otherwise.

IV. A PLACE FOR THE "RULES OF REASON" APPROACH

But what if *both* of the conflicting laws at issue impose criminal liability for violating them? In other words, what if a client faces inconsistent criminal laws and only wants to know which law to follow, i.e., the client is not interested in challenging either law? For example, what if the OSHA regulations in the referenced hypothetical above imposed a criminal sanction or penalty, like the Texas governor's order? Rule 1.2(d) and Comments [9] and [12] still do not address this final issue. It is here that a true "Rules of Reason" approach makes sense.

As noted above, a critical animating principle behind the "Rules of Reason" approach to marijuana-related advice and assistance was the foreseeability of a state-federal conflict regarding the criminality of certain conduct:

> We do not believe that by adopting Rule 1.2(d), our state judiciary meant to declare a position on this debate or meant to preclude lawyers from counseling or assisting conduct that is legal under state law. Rule 1.2(d) was based on an ABA model and there is no indication that anyone — not the ABA, not the state bar, and not the state court itself — specifically considered whether lawyers may serve in their traditional role in this sort of unusual legal situation.

150. *Id.* at 2-3.

151. *Id.* at 2.

152. *Id.* at 2-3.

153. *See* W. William Hodes, *Rethinking the Way Law is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019, 1022 n.7 (1999), https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1580&context=klj (writing that this part of Rule 1.2(d) "requires distinguishing between good faith test case litigation, classic civil disobedience by appealing to higher law, and surreptitious civil disobedience, which is no different than law-breaking.").

> Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy.[154]

It is even more unlikely that the drafters of Rule 1.2(d) (or states that have adopted that rule) ever envisioned a situation where no matter which path the client chooses (i.e., obey the state law or obey the federal law), the client would violate at least one criminal law. Within this context, further comment from the New York State Bar's Ethics Committee captures the client's and lawyer's quandary:

> We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here is profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.[155]

Under the "Rules of Reason" approach to violating one sovereign's criminal law or another's, when there is no clear answer whether either or both of the laws are valid, a lawyer should be permitted to advise a client about the full range of risks associated with each path. The lawyer should also be permitted to advise the client which path seems most appropriate. Otherwise, clients caught between directly conflicting criminal laws will proceed without full representation.

V. CONCLUSION

Conflicts between the laws enacted by the federal government and by state or local governments (and between those passed by state and by local governments) are increasing and will likely continue to do so. As the stakes of these political battles escalate, so too will the potential consequences of violating competing and conflicting laws. If these conflicts do not put citizens in a position where at least one criminal law will be violated, no matter what a person does, lawyers and their clients can navigate Rule 1.2(d) by applying a plain-meaning

154. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 1024, *supra* note 38.
155. *Id.*

approach. However, when criminal statutes conflict, the "Rules of Reason" approach to the Rules should be employed to protect lawyers from discipline so that clients will receive competent, useful advice and representation in these difficult situations.