

Marijuana and Your License to Practice Law

A Trip Through the Ethical Rules, Halfway to Decriminalization

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Introduction

Advising clients about marijuana laws while staying ahead of the ethics police.

We start with the proposition that 21 U.S.C. §841(a)(1), the Controlled Substances Act or CSA, makes it a federal crime to manufacture, distribute or possess with intent to distribute marijuana. From time to time, the Department of Justice has issued memos on their enforcement priorities. Two are most significant for our purposes. First, the October 19, 2009 memo. It said that federal resources may be best used by not prosecuting marijuana patients and their caregivers who were in “clear and unambiguous compliance” with state medical marijuana laws. The same memo, however, did not withdraw enforcement from commercial enterprises, especially those that are for profit. And, second, the August 29, 2013 memo from Deputy Attorney General James M. Cole which articulated a hands-off

approach, with exceptions, for recreational marijuana enterprises which complied with state law.

In the meantime, at least 30 states and the District of Columbia have medical marijuana provisions on the books. Seven states have decriminalized recreational use altogether. Patients, sellers, growers, dispensaries, retail establishments, and the various businesses with which they interact all need legal advice. Colorado estimates a \$1 billion/year marijuana industry with over \$200 million in tax revenue flowing to the state.

I. The Rule 1.2(d) conundrum.

Both the Colorado and ABA Model Rules of Professional Conduct, 1.2(d), provide:

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.

How can lawyers ethically advise their clients regarding medical and recreational marijuana use, even if it is legal under state law, when such use is criminal under federal law?

The first ethics opinion to address the problem was Maine's Opinion 199 from the Maine Board of Overseers of the Bar. (Construing Maine Rule of

Professional Conduct 1.2(e) which is substantially similar to Model Rule 1.2(d)). Simply put, the opinion punted. After reciting the now-well understood problem, and noting that “the rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not”, the opinion instructed attorneys facing the dilemma to perform the analysis required by the rule. “Where the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis.” (Maine has since issued a new opinion calling for amendment of Rule 1.2(e), the successor to 1.2(d). [Maine Op. 214.](#))

Early the next year the State Bar of Arizona, in [Ethics Opinion 11-01](#), stated:

A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act (“Act”), despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client’s proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client’s activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

The committee noted the obvious: It’s important for the clients to have assistance of counsel in complying with state law. In fact, this function is “traditionally at the heart of the lawyer’s role.” After all, compliance with the law is enhanced when

people can ask lawyers what it is. Arizona then went on to interpret 1.2(d) as recited above, essentially allowing lawyers to jump through enough definitional hoops that their behavior is not unethical. Arizona would apparently find that when consulting with a client who wants to lease premises to sell medical marijuana it's all right to explain that such conduct is legitimate under state law, illegal under federal law, and then go about reviewing the lease for them as if they don't intend to sign it. While the outcome is admirable, the intellectual somersault is dubious. *See also* King County (Washington) Bar Association *Ethics Advisory Opinion on I-502 & Rules of Professional Conduct*, October, 2013, to like effect.

Two years later Connecticut joined the fray with Informal Opinion 2013-02, January 16, 2013. Connecticut, too, focused on the comment to Rule 1.2 which reads, "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." Connecticut then went on, again in the context of medical marijuana, to state "it is our opinion that lawyers may advise clients of the requirements of the Connecticut palliative use of marijuana act." They urged lawyers to "carefully assess" where the line between consultation and explanation on the one hand and participating in criminal enterprises is to be drawn. In short, they parroted the Maine approach.

The Colorado Bar issued its opinion regarding medical marijuana use and

lawyer consultations in CBA Formal Ethics Opinion 124, April 23, 2012¹.

However, Colorado focused not on Rule 1.2, but on Rule 8.4 which makes it unethical for a lawyer to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” After reviewing Colorado’s medical marijuana provisions, the committee determined that 8.4(b) was not violated unless there was additional evidence that the lawyer’s conduct adversely reflected on their honesty, trustworthiness or fitness as a lawyer. In other words, not every crime is automatically an ethical violation. More is needed. The opinion concluded that advising a client in good faith to comply with Colorado medical marijuana statutes was neither dishonest or untrustworthy, nor evidence of the lawyer’s unfitness.

None of these opinions really answers the core inquiry of what to do when a lawyer is called upon to assist the client in the medical/recreational marijuana context. Until recreational marijuana sales and use were authorized by the Washington and Colorado voters in November, 2012, there was no need. The issue was first squarely confronted in Colorado’s CBA Opinion 125 as amended in October, 2013². The lengthy opinion reached the conclusion that because of Rule 1.2(d) lawyers that advise clients under Colorado’s medical and recreational

¹ The Opinion has since been amended to cover medical and recreational marijuana use.

² The opinion was withdrawn after Rule 1.2(d) was amended.

statutes are acting unethically if they assist clients in structuring or implementing transactions which, by themselves, violate federal law. Examples of forbidden conduct include: drafting or negotiating contracts to facilitate the purchase or sale of marijuana, drafting leases for facilities, and/or contracts for supplies, to be used in the cultivation, manufacture, distribution or sales of marijuana even if they comply with Colorado law. In the committee's view such work aids and abets and/or is part of a conspiracy to violate federal law. However, the opinion does recognize that explaining the law to a client is different from urging them to violate, or participating with them in violating, the law.

The committee also had questions about advising a client regarding tax preparation and tax planning if the intent is to assist the client in violating federal controlled substance statutes.

Having articulated the Rule 1.2 problem, the committee urged that the rule be amended. On March 24, 2014, the Court responded by promulgating the following comment to Rule 1.2:

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Amended and Adopted by the Court, En Banc, March 24, 2014,

effective immediately. Justice Coats and Justice Eid would not approve Comment [14].

The comment is interesting in a number of ways. First, it's just a comment, not a black letter change. C.R.P.C. Preamble [21] notes that "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Second, it manages to avoid using the word marijuana. Third, two justices dissented, something rare if not unheard of in the court's rulemaking history. Nevertheless, it codifies (sort of) the current practice of Colorado's regulators and provides a level of protection for Colorado lawyers. However, lawyers admitted in Colorado Federal District court should see section VI and VII, below.

The Nevada State Bar followed Colorado on May 7, 2014. It adopted the following comment to N.R.P.C. 1.2:

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

Since Washington decriminalized recreational marijuana use, their bar also needed guidance. Regulators responded by adding a new comment to Rule 1.2:

[18] At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and

meaning of Washington Initiative 502 (Laws of 2013, ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.

Oregon also amended 1.2(d):

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

Minnesota’s change came legislatively. Minnesota Statutes

152.32(2)(i):

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

Other authorities include New York State Bar Ethics Opinion 1024

(9/29/14), ¶ 6:

...[T]he Committee concludes that Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.”

And, Illinois State Bar Ethics Opinion 14-07 October 2014:

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

The Committee agrees: when a new statutory and regulatory system is promulgated by the State of Illinois, Illinois lawyers must be permitted to advise clients on how to conform their conduct to the law.

Alaska has amended 1.2(d) to create an exception, embodied in a new subsection:

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

Hawaii amended 1.2(d) in October, 2015, as it ramped up its medical marijuana program (new material is underlined):

Rule 1.2.

AUTHORITY BETWEEN CLIENT AND LAWYER.

* * *

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law, and may counsel or assist a client regarding conduct expressly permitted by Hawai'i law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

New Mexico presents a novel analysis. The state's RPC 16-102(D), like Model Rule 1.2(d), states:

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

The New Mexico Supreme Court considered amending the rule to clarify marijuana related legal work was not unethical. The court declined, noting there was no need since discipline was not being sought against lawyers for a marijuana-related violation of the rule. The State Bar then opined that [the rule does indeed prohibit a lawyer from counseling or assisting a marijuana business](#). Apparently New Mexico lawyers will have to be content with this informal solution.

Several states authorized/expanded medical and/or the recreational use of marijuana in the November 2016 election. Massachusetts, Nevada, California and Maine voted to approve recreational marijuana.

Massachusetts Bar Counsel announced they will not prosecute lawyers who would otherwise run afoul of the rules so long as they advise clients of Federal law and policy. California has not taken formal action, but the Bar Association of San Francisco has opined there that his no ethical issue provided the client is advised of federal law. [Op 2015-01](#). Maine's opinions

were discussed above; it does not appear that Maine has amended rule 1.2 as recommended by [opinion 214](#).

Florida approved medical marijuana; the Bar Board of Governors had previously announced [a no-prosecution policy](#) for marijuana lawyers in lieu of a rules change.

II. Personal use.

Setting aside the issues of how to advise clients in the marijuana industry, let's turn to the issue of personal use. Again, a Colorado lawyer's use of marijuana, medically or recreationally, is still a violation of federal law. Remember that 8.4(b) limits a lawyer's criminal conduct when it adversely reflects on the lawyer's honesty/trustworthiness/fitness to practice. Colorado's Opinion 124 refuses to find the required nexus between the criminal conduct of personal use and the honesty/trustworthiness component of Rule 8.4(b). Relying on state constitutional and statutory enactments, the committee admits that they would be hard pressed to find that such behavior adversely reflects on the lawyer's fitness. As an aside, one can only shake one's head at how the times have changed.

In addition, Rule 1.16 prohibits a lawyer from representing a client when the lawyer's physical or mental condition materially impairs the lawyer's ability. In this regard it is sensible to look at marijuana intoxication and/or use as if it were alcohol or any other medication. If the lawyer cannot refrain from intoxication,

then they should withdraw from the case pursuant to 1.16(a)(2).

III. Reporting misbehavior by lawyers.

Another rule, 8.3(a), governs a lawyer's duty to report. A lawyer who knows another lawyer who is so impaired that they can't perform their duties, must ask themselves if there is a substantial question regarding the lawyer's honesty, trustworthiness or fitness as a lawyer and act accordingly. See the ABA Commission on Ethics and Professional Responsibility Formal Opinion 03-431 (2003) (lawyer's duty to report another lawyer who may suffer from disability or impairment). All of this is common sense; none of us wants to work with a colleague who is intoxicated on the job.

What about intoxication off the job? No opinion has squarely addressed that issue. The ethics opinions have found that medical use is not an ethical violation so presumably recreational use which doesn't impact one's day-to-day lawyering should not adversely impact the lawyer's fitness and trustworthiness to be a lawyer. For some guidance on employer bans on "off duty" marijuana use in Colorado see, *Coates v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (Colorado's Lawful Activity statute provides no protection for employee's "off duty" medical marijuana use because it is unlawful under federal law.).

IV. Supervision of subordinates and non-professional staff.

Rule 5.1, *et. seq.*, advises lawyers of their obligations to train and supervise

subordinates and non-professional staff. In this regard marijuana use is just one more thing to train. It is only a slight oversimplification to say that the supervising lawyer is responsible for the subordinate's behavior – technically they must appropriately train the subordinates on ethics, and avoid ratifying misbehavior.

Subordinate lawyers must be advised they can't encourage the violation of federal law any more than the partners are allowed to.

Colorado's Opinion 124, since withdrawn, also briefly discussed a lawyer's obligation to supervise under Rule 5.1(a) and (b), and presumably this would go to nonprofessional staff as well.

V. Owning a marijuana operation.

Here the K.C.B.A. produced the first authority. They have considered the conduct of a lawyer who owns a marijuana dispensary in compliance with state law. Despite the fact that the conduct in question would surely be felonious under the CSA, the opinion finds no 8.4 violation. The opinion follows the lead of Colorado's Opinion 124, (which originally dealt only with personal use of medical, and not recreational, marijuana) in stating that even though criminal under federal law, there is no nexus between the conduct and the lawyer's "honesty, trustworthiness, or fitness." I am unaware of any other time a felony has been so characterized.

The Washington State Bar Association has concurred in its opinion [201501](#).

VI. Colorado U.S. District Court.

Under the Colorado U.S. District Court Local Rules, the Colorado Rules of Professional Conduct “are adopted as standards of professional responsibility” for the Federal District Courts, with a few exceptions. D.C.COLO. LAttyR 2(a). One of the exceptions relates to Colorado’s 1.2(d) and comment 14, *infra*. The latest version of the local rule, which took effect on December 1, 2014, allows a lawyer to advise a client about Colorado’s medical and recreational schemes, but does not go so far as condoning assistance. Here’s the convoluted text of the Federal local rule:

D.C.COLO.LAttyR 2 STANDARDS OF PROFESSIONAL CONDUCT

(a) Standards of Professional Conduct. Except as provided by subdivision (b) or order or rule of the United States Bankruptcy Court for the District of Colorado, the Colorado Rules of Professional Conduct (Colo. RPC) are adopted as standards of professional responsibility for the United States District Court and the United States Bankruptcy Court for the District of Colorado.

(b) Exceptions. The following provisions of the Colorado Rules of Professional Conduct (Colo. RPC) are excluded from the standards of professional responsibility for the United States District Court and the United States Bankruptcy Court for the District of Colorado:

...

(2) Colo. RPC 1.2(d), Comment [14] (counseling and assisting client regarding Colorado Constitution art. XVIII, §§ 14 and 16 and related statutes, regulations, or orders, and other state or local provisions implementing them), except that a lawyer may advise a client regarding the validity, scope, and meaning of Colorado Constitution art. XVIII, §§ 14 and 16 and the statutes, regulations, orders, and other state or local provisions implementing them, and, in these

circumstances, the lawyer shall also advise the client regarding related federal law and policy.

So, we have a federal court telling us it's OK to violate federal law³.

VII. Other Federal Courts.

Arizona's Federal District Court imports the Arizona Rules of Professional conduct to govern the lawyer conduct. LRCiv 83.2(e). Those rules make no exception for marijuana practice, but the state bar has a favorable opinion. See the above discussion of [Opinion 11-01](#). See also [this 2011 update](#).

The Federal District Court for New Mexico has similarly adopted the state's Rules of Professional Conduct, LR-Civ. 83.9, without a relevant exception.

Conclusion

If ever an essay was a slice in time, this is it. In the last two years several states have amended their rules to address the problem of lawyers providing appropriate advice under state law while assisting the violation of federal law. Stay tuned for more changes in the months ahead.

³ For more on the Colorado Federal District Court rule, see Wald, Liebman, and Bertrand, "Clients in the Marijuana Industry: Navigating State and Federal Rules" in the August, 2015, *The Colorado Lawyer*, p. 61.