LEGAL ETHICS AND STATE MARIJUANA LAWS

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I. BRIEF HISTORY OF MARIJUANA REGULATION
Marijuana was not regulated under federal law until Congress passed the Marihuana Tax Act of 1937 (which was repealed in 1970).

State efforts to regulate marijuana use in the early 20th century targeted recreational use, but permitted medical use.

- All twenty-two states that had prohibited marijuana by the 1930s created exceptions for medical purposes. See Raich v. Gonzales, 500 F.3d 850, 865 (9th Cir. 2007)

- By 1965, although possession of marijuana was a crime in all fifty states, almost all states had created exceptions for "persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person." Leary v. United States, 395 U.S. 6, 16-17 (1969)
Marijuana was not prohibited under federal law until Congress passed the Controlled Substances Act in 1970.

Congress placed marijuana on Schedule I, making all its uses, including medical, unlawful.
II. FEDERAL LAW
“[I]t shall be unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”

- 21 USCS § 841(a)(1)

“It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice ....”

- 21 U.S.C. § 844(a)
The CSA prohibits possession of a controlled substance “unless such substance was obtained . . . pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice.”

21 U.S.C. § 844(a)
POSSESSION OF MEDICAL MARIJUANA LEGAL UNDER THE CSA?

The CSA defines “practitioner” as “a physician . . . licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to distribute, dispense, [or] administer . . . a controlled substance in the course of professional practice.”

21 U.S.C. § 802(21)
DISPENSING MEDICAL MARIJUANA PROHIBITED UNDER CSA

“[I]t shall be unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”

21 USC § 841(a)(1)
PENALTIES UNDER THE CSA

- Possession of marijuana is punishable by up to one year in jail and a minimum fine of $1,000 for a first conviction.
- Manufacture or distribution of less than 50 plants or 50 kilograms of marijuana is punishable by up to 5 years in prison and a fine of up to $250,000 (21 U.S.C. § 841(b)(1)(D)).
- For 50-99 plants, or 50-99 kilograms, the penalty increases to not more than 20 years in prison and a fine of up to $1 million for an individual, or $5 million if other than an individual, for the first offense (21 U.S.C. § 841(b)(1)(C)).
- For 100-999 plants, or 100-999 kilograms, the penalty increases to between 5 and 40 years in prison and a fine of $2-5 million (21 U.S.C. § 841(b)(1)(B)((vii))).
- For 1000 plants, or 1000 kilograms, the penalty increases to a minimum of between 10 years to life in prison and a fine of $4-10 million (21 U.S.C. § 841(b)(1)(A)(vii)).
PENALTIES UNDER THE CSA

Penalties may double for distributing more than 5 grams to a minor (under the age of 21) and distributing or manufacturing within 1,000 feet of a school, university, playground, public housing, or within 100 feet of a youth center, public pool or video arcade.

21 USC §§ 859, 860
LEGAL WITHIN STATE ≠ AFFIRMATIVE DEFENSE

No affirmative defense under the CSA for complying with the marijuana laws of a particular state. U.S. Attorneys may prosecute medical marijuana patients even if their activity is protected under state law.

Gonzales v. Raich, 545 U.S. 1 (2005)
LEGAL WITHIN STATE ≠ AFFIRMATIVE DEFENSE

At trial, federal prosecutors have been successful at preventing the jury from hearing that the alleged criminal activity was legal under state law.

U.S. v. Rosenthal, 454 F.3d 943, 947 (9th Cir. 2006) (affirming the district court’s exclusion of evidence and argument relating the defendant’s medical marijuana defense)
Money laundering is the process of making illegally-gained proceeds (i.e. "dirty money") appear legal (i.e. "clean").

- Bank Secrecy Act (1970)
- Money Laundering Control Act (1986)
- Anti-Drug Abuse Act of 1988
- Money Laundering Suppression Act (1994)
- USA PATRIOT Act of 2001
- Intelligence Reform & Terrorism Prevention Act of 2004
18 U.S.C. § 1956
“Laundering of Monetary Instruments”

“Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity ... with the intent to promote the carrying on of specified unlawful activity .... shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.”

FEDERAL ASSET FORFEITURE

Allows for seizure and forfeiture of assets that represent the proceeds of, or that were used to facilitate the commission of, federal crimes.
21 U.S.C. 881(a)(7)

“The following shall be subject to forfeiture to the United States and no property right shall exist in them ... All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment.”
Administrative forfeiture is an in rem action that permits the federal seizing agency to forfeit the property without judicial involvement. Property that can be administratively forfeited is:

- Merchandise the importation of which is prohibited;
- A conveyance used to import, transport, or store a controlled substance;
- A monetary instrument;
- Or other property that does not exceed $500,000 in value.
ADDITIONAL FEDERAL CRIMES

- 21 U.S.C. § 846 – Conspiracy
21 U.S.C. § 846 – Conspiracy

“Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”
21 U.S.C. § 854
“Investment of Illicit Drug Profits”

“It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of this title or title III punishable by imprisonment for more than one year in which such person has participated as a principal within the meaning of section 2 of title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce....”

- 21 USCS § 854(a)
21 U.S.C. § 854
“Investment of Illicit Drug Profits”

Penalty:

“Whoever violates this section shall be fined not more than $50,000 or imprisoned not more than ten years, or both.”

- 21 USCS § 854(b)

“It is unlawful for any person ... to sell or offer for sale drug paraphernalia.”

-21 U.S.C. 863(a)(1)

Penalty

“Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under title 18, United States Code.”

21 USC § 863(b)
21 U.S.C. 856
“Maintaining a Drug-Involved Premises”

Except as authorized by this title, it shall be unlawful to:

1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;

2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856
“Maintaining a Drug-Involved Premises”

Penalty:

1) Any person who violates subsection (a) of this section shall be sentenced to a term of imprisonment of not more than 20 years or a fine of not more than $500,000, or both, or a fine of $2,000,000 for a person other than an individual.

2) a civil penalty of not more than the greater of--
   (A) $250,000; or
   (B) 2 times the gross receipts, either known or estimated, that were derived from each violation that is attributable to the person.
III. STATE ACTION
STATE ACTION

Notwithstanding the federal ban, 23 states and the District of Columbia have legalized certain marijuana-related activity.

➢ To date, four states and the District of Columbia have legalized recreational marijuana (however, D.C.'s model continues to ban sales)

➢ 23 states have legalized marijuana for medical purposes

➢ 11 other states have legalized the limited use of low-THC forms of marijuana for medical use.
No state permitted medical marijuana usage until California's Compassionate Use Act of 1996.

Thus, from 1970 to 1996, the possession or use of marijuana -- medically or otherwise -- was proscribed under state and federal law.
NY’S COMPASSIONATE CARE ACT

- Signed into law in July 2014
- Proposed regulations issued December 18, 2014 (comment period ended on Feb. 17, 2015)
- $10,000 application fee (non-refundable)
- $200,000 registration fee (refundable if you are rejected)
- If you don’t have a facility you need to put up a $2mm bond
- Limited number of operators (only 4 manufacturers, with each allowed up to 5 dispensaries. Registrations are valid for 2 years at a time and are renewable)
- No “pot smoking”
IV. TENSION BETWEEN FEDERAL AND STATE GOVERNMENTS

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FEDERALISM CRISIS

- State governors have refused to implement duly enacted state laws for fear that their subordinates will be prosecuted by federal authorities.

- Local police officers are concerned that they may be committing federal crimes by returning seized property to individuals who have committed no state law offense—and wonder whether they are obligated by federal law to make arrests for conduct expressly legalized by their state. Oregon v. Kama, 39 P.3d 866 (Ore. App. 2002)
CSA DOES NOT VIOLATE THE 10\textsuperscript{TH} AMENDMENT

Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of marijuana in the Controlled Substances Act.

\textit{Gonzales v. Raich}, 545 U.S. 1 (2005)
ANTI-COMMANDEERING
DOCTRINE

1. Precludes Congress from commanding state legislatures and executives “to enact or enforce a federal policy or program,” but

2. that Congress can subject the states to regulation by “generally applicable laws.”

CSA DOES NOT IMPLICATE PROHIBITION ON FEDERAL “COMMANDERING”

The Controlled Substances Act "does not require the [state legislatures] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."

The Supremacy Clause is the provision in Article Six, Clause 2 of the United States Constitution that establishes the United States Constitution, federal statutes, and treaties as "the supreme law of the land."
“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’”

Gade v. National Solid Waste Management Assn.,
“Repugnance” or “positive conflict” preemption exists where it is logically possible for a regulated party to comply with both laws, but logically impossible for courts to apply both laws to the same case: one law in effect permits a violation of the other.

A state medical marijuana law positively conflicts with the federal Controlled Substances Act, which prohibits the individual use of marijuana for any purpose.
“OBSTACLE” PREEMPTION

A conflict will be found if the state law “stands as an obstacle to the accomplishment and execution of the full purposes of Congress.”

Hines v. Davidowitz, 312 U.S. 52, 67 (1941)
People who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law.

The DOJ said that it was committed to the “efficient and rational use” of its resources and that prosecuting patients and distributors who are in “clear and unambiguous compliance” with state laws did not meet that standard.
2011 COLE MEMORANDUM

“Overruled” the 2009 Ogden Memorandum:

Stated that “commercial operations” in the business of “cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities are in violation of the Controlled Substances Act, regardless of state law,” and that “such persons are subject to federal enforcement action, including potential prosecution.”

* * * *

“The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law .... Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other financial laws.”
U.S. DOJ Deputy Attorney General James Cole issued a memorandum to all U.S. Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.

The 2013 Cole Memo reiterates Congress’s determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The 2013 Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations.
1. Preventing the distribution of marijuana to minors
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property
The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for those purposes affects the traditional joint federal-state approach to narcotics enforcement.”

* * *

The DOJ “expect[s] that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”

* * *

“If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.”

-2013 Cole Memorandum
V. ABA MODEL RULES
ABA CANONS OF PROFESSIONAL ETHICS (“CANONS”)

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY ("MODEL CODE")

Originally adopted by ABA in 1969. Was amended several times until August 1983 when it was replaced by the Model Rules of Professional Conduct.
ABA MODEL RULES OF PROFESSIONAL CONDUCT (“MODEL RULES”)

- The Model Rules replaced the ABA’s Model Code in 1983.

- While some states ethics rules still follow the Model Code, the majority of states now base their ethics rules on the Model Rules (California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct).
ABA MODEL RULES = ADVISORY ONLY

The ABA Model Rules of Professional Conduct are advisory only. The Rules as adopted in your state are controlling.
COMPARISONS WITH MODEL RULES

Comparisons of each state’s rules with the Model Rules can be found here:

http://www.americanbar.org/groups/professional_responsibility/policy/charts.html
VI. FEDERAL v. STATE ETHICS RULES
STANDARDS OF PROOF

While the general standard of proof of misconduct in the state and federal courts is by a preponderance of the evidence, some exceptions exist. In re Capoccia, 59 N.Y.2d 549, 551 (1983).

For example, the SDNY and EDNY have opted to impose a higher standard of proof of misconduct – clear and convincing evidence – which affects the finding of misconduct and the level of penalty applied. L. Civ. R. 1.5
DO STATE ETHICS RULES APPLY IN FEDERAL COURT?

“The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law.”

_In re Snyder_, 472 U.S. 634, fn 6 (1985)
“While the federal courts have independent control over attorneys practicing in federal courts, they rely heavily on state admission and discipline practice.

* * *

“Even though the two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, the Federal courts should make every effort to coordinate its discipline practice with that of the state.

“Since, with rare exceptions, the practicing federal bar is drawn from the state bar, this Court should normally not depart from state practice respecting professional proprieties. It would create unnecessary tension for lawyers if they had to determine in each case whether state or federal professional ethics would need to be followed.

* * *

“It should be noted that the Civil Rules of this Court embody the policy of following state practice wherever there are lacunae in federal practice.”
In Re Isserman,
345 U.S. 286, 287 (1953)

“This Court (as well as the federal courts in general) does not conduct independent examinations for admission to its bar. To do so would be to duplicate needlessly the machinery established by the states whose function it has traditionally been to determine who shall stand to the bar.”
VII. ETHICAL ISSUES FACING LAWYERS
MODEL RULE 1.2(d)

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of 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.”
MODEL RULE 8.4

It is professional misconduct for a lawyer to:

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

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
ETHICAL ISSUES RAISED BY RULES 1.2(d) AND 8.4

Given that cultivation, manufacturing, distribution, and use of marijuana is prohibited by the CSA:

- Can lawyers advise clients on state marijuana laws?
- Can lawyers assist clients in forming and operating a state-licensed marijuana business?
- Can a lawyer participate in a state-licensed marijuana business as an owner or director?
- Can state or local government lawyers advise their clients on promulgating marijuana laws, collecting marijuana tax revenues, and enforcing state marijuana laws that violate the CSA?
VIII. STATE BAR DECISIONS
STATES TO HAVE CONSIDERED THESE ETHICAL ISSUES

1. Maine
2. Arizona
3. Connecticut
4. Colorado
5. Nevada
6. Washington
7. Illinois
8. Alaska
9. North Dakota
10. New York
A lawyer representing or advising clients under Maine’s Medical Marijuana Act would “involv[e] a significant degree of risk which needs to be carefully evaluated.”

Attorneys must determine “whether the particular legal service being requested rises to the level of assistance in violating federal law.” If so, the lawyer likely will be in violation of Rule 1.2.

Drew distinction between permissibly advising on the law and impermissibly “assist[ing] in violating federal law.”
Declined to interpret Rule 1.2 as prohibiting a lawyer from advising clients regarding conduct compliant with state law, but forbidden by federal law, since to do so would “depriv[e] clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits.”
ARIZONA
AZ State Bar Ethics Op. 11-01 (February 2011)

Advises that a lawyer may perform legal services related to the state’s Medical Marijuana Act so long as:

1. The conduct is fully compliant with state law requirements
2. The lawyer advised the client on potential federal law implications and consequences, and
3. The client, having received full disclosure, elected to proceed with a course of action specifically permitted by state law.
Follows the approach taken by Maine

A lawyer may advise a client on the requirements of state and federal marijuana law, and the conflicts between them, but cannot assist clients in conduct that “rises to the level of assistance in violating federal law.”

“[L]awyers may advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act .... [but] may not assist clients in conduct that is in violation of federal criminal law. Lawyers should carefully assess where the line is between those functions and not cross it.”

“We decline to categorize particular factual circumstances that may raise issues of culpability because the circumstances may be so various as to make the effort valueless”
An attorney who is a “qualified patient” under the terms of the Connecticut Palliative Use of Marijuana Act and who possesses medical marijuana is accordance with the State Act does not violate Rule 8.4

Cautions that “an attorney who possesses or uses the drug in compliance with the State Act may be engaged in conduct that violates federal law, [and] the lawyer may still face discipline [under Connecticut’s ethical rules governing lawyers] in the event he or she is convicted of a serious crime in federal court or in another state.”
On Jan. 1, 2015, Connecticut’s RPC 1.2(d) was amended as follows:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

(1) discuss the legal consequences of any proposed course of conduct with a client;

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; or

(3) Counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”
A lawyer’s personal use of marijuana under Colorado’s Medical Marijuana Code does not, standing alone, violate the Colorado Rules of Professional Conduct.

The Colorado Bar Association expressly declined to weigh in on whether a lawyer violates the Rules by counseling or assisting clients in legal matters related to the cultivation, possession, use, or sale of medical marijuana under Colorado law.
Effective Dec. 10, 2012, Colorado law permitted and regulated the personal use of marijuana in the same way that personal use of alcohol is permitted and regulated.

“The Committee knows of no instance in which a Colorado lawyer has been disciplined for counseling or representing clients with regard to marijuana use or commerce that is lawful under Colorado law but unlawful under federal law.”

“The novelty and complexity of the conflict between Colorado and federal law prevent the Committee from devising a bright line distinction between lawyer conduct that complies with Colo. RPC 1.2(d) and lawyer conduct that violates it.”
COLORADO

“[A] lawyer does not violate Colo.RPC 1.2(d) by:

1. representing a client in proceedings relating to the client’s past activities

2. By advising governmental clients regarding the creation of rules and regulations implementing [Colorado’s marijuana use laws]

3. By arguing or lobbying for certain regulations, rules, or standards; or

4. By advising clients regarding the consequences of marijuana use or commerce under Colorado or federal law

“[F]or good or ill, under the plain language of Colo. RPC 1.2(d), it is unethical for a lawyer to counsel a client to engage, or assist a client, in conduct that violates federal law. Between these two points lies a range of conduct in which the application of Colo.RPC 1.2(d) is unclear.”
“Public policy considerations favor lawyers providing the full range of legal advice authorized ... so that their clients may comply with Colorado’s marijuana use laws. ‘[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs.’” (citing Hickman v. Taylor, 329 U.S. 495, 514 (1947) (Jackson, J., concurring).
“Nevertheless, unless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by [Colorado law]. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client’s past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d)”
While there is no “single, bright line answer” delineating permissible conduct from impermissible conduct, “the plain language of Colo.RPC 1.2(d) prohibits lawyers from assisting clients in structuring or implementing transactions which by themselves violate federal law.” This includes:

- Drafting or negotiating contracts to facilitate the purchase/sale of marijuana
- Drafting or negotiating leases for properties or facilities, or contracts for resources or supplies, that clients may use to cultivate, manufacture, distribute, or sell marijuana, even though such transactions comply with Colorado law, and even though the law or the transaction may be so complex that a lawyer’s assistance would be useful....”
Comment 14 to Colo. RPC 1.2
(Amended and Adopted on March 24, 2014)

In response to this opinion, the Colorado Supreme Court adopted marijuana-related amendments to the RPC. Comment 14 to Rule 1.2, amended and adopted on March 24, 2014, now provides:

“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 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.”

N.B.: Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
Soon after Colorado’s Supreme Court adopted its comments to RPC 1.2, Nevada followed with nearly identical language:

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

- Recognized the medical use of marijuana in 1998
- In 2012, it legalized a state-licensed recreational market under Initiative 502
- In 2014, the Supreme Court of Washington adopted comment 18 to RPC 1.2:

  “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 ... 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.”
What constitutes a “change in federal enforcement policy”? 

Comment only addresses the state-license recreational marijuana market under I-502, but fails to address attorneys advising qualified patients regarding compliance with Washington’s medical marijuana laws.
WASHINGTON
(Jan. 8, 2014)

With certain qualifications:

- Attorneys may advise and assist clients in the formation and operation of a state-licensed marijuana business under I-502

- Attorneys may own and operate an I-502 marijuana business;

- Attorneys may purchase marijuana in compliance with I-502
Notes the complexity of the state’s statutory and regulatory medical marijuana scheme, and remarks that this is “a classic example of a business in serious need of legal advice and counsel,” and that “the provision of legal advice to those engaged in nascent medical marijuana businesses is far better than forcing such businesses to proceed by guesswork.”
Concludes that attorneys may provide services – such as negotiation and drafting legal documents – that go beyond the provision of legal advice:

“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.”
Makes reference to the “safe harbor” identified in the Cole Memo:

“[A]n Illinois lawyer who represents and counsels medical marijuana clients should tread carefully over the legal terrain. When advising a client concerning conduct governed by the new Illinois law, the importance of the client’s conformity with the law and regulations should be stressed. The safe harbor provided by the DOJ Memorandum depends, in part, on ‘whether the operation is demonstrably in compliance with a strong and effective state regulatory system.’”
Opinion is conditioned on current federal policy remaining in place:

“The guidance on prosecutorial discretion provided by the DOJ Memorandum is subject to change, so lawyers providing advice in this field should be up to date on federal enforcement policy, as well as any modifications of federal and state law and regulations. Under the present state of affairs, it is the opinion of the Committee that the provision of legal services to clients involved in the medical marijuana business is consistent with the Rules of Professional Conduct.”
At the same time as it issued the opinion, the ISBA recommended to the Illinois Supreme Court Rules Committee to amend Rule 1.2(d):

“In the judgment of the ISBA, the ethical conundrum faced by Illinois lawyers who represent medical marijuana businesses is sufficiently grave to merit a change in Rule 1.2(d) along the lines of the Connecticut amendment. Contemporaneously with the publication of this opinion, the ISBA is recommending to the Illinois Supreme Court Rules Committee that just such an amendment be promulgated.”
ALASKA

Alaska Bar Ass’n Ethics Comm. Article
Ethics Implications of the Law Legalizing Some Sales of Marijuana: An Informal Preliminary Analysis

- In a recent election, voters approved Ballot Measure 2, an initiative that legalized certain recreational use and distribution of marijuana in Alaska. The law took effect on February 24, 2015.
- Alaska State Bar Association’s Ethics Committee issued an article, not an official opinion.
- Article addressed 3 issues: (1) a lawyer’s personal use of marijuana; (2) advising clients about the parameters of the new law; and (3) assisting with a marijuana business.
ALASKA

Alaska Bar Ass’n Ethics Comm. Article

Ethics Implications of the Law Legalizing Some Sales of Marijuana: An Informal Preliminary Analysis

Regarding a lawyer’s personal use of marijuana, the ethics committee stated:

- Rule 8.4(b) defines a criminal act as professional misconduct only when the act reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer. Personal use of marijuana does not trigger this concern.

- Points out that no Alaska lawyer has ever been disciplined for discrete and private use of marijuana.

- Notes that “excessive marijuana usage that affects one’s practice would be a very different matter,” and that “[d]rug dealing or other marijuana-related conduct that would be a felony under either the old law or the new one likely would be unethical as well.”
Regarding advising clients about the parameters of the new law, the ethics committee stated:

- Begins by recognizing that Alaska Professional Conduct Rule 1.2(d) prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows is criminal, and that “[a]dvising a client about how he or she could open a marijuana business that complies with the new Alaska law would entail advising a client how to violate the federal laws that still prohibit all marijuana sales.”

- States that the Alaska Rules of Professional Conduct Committee has recommended amendments to the Alaska Rules “to make giving advice on complying with the Alaska law clearly ethical in Alaska.” Stated that “if adopted by the Alaska Supreme Court, the amendments would likely take effect in October 2015.”

- Nevertheless concludes that “[i]n the short term, even prior to a formal rule amendment, it seems that a lawyer who gives advice that accurately reflects both state and federal laws should not be subject to professional discipline in Alaska.”
Regarding assisting with a marijuana business, the ethics committee stated:

- “This is the hardest issue to analyze under the current state of the law.”

- “Because the line between giving advice and actually drafting the documents is very gray, we believe that a principled line can’t be drawn and ... we believe that an Alaska lawyer probably could ethically provide to a marijuana business that is legal under Alaska law the same types of business law services a lawyer could provide to any other legal business.”

- The question of the lawyer actually participating in the business – as by investing or being on a board of directors – is more complex. The uncertainties as to how the ethics rules will develop suggest that, until the Supreme Court or Bar Board of Governors has spoken, a lawyer should exercise caution and not become directly involved in operating a business that remains illegal under federal law.”

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Issue was whether an attorney licensed to practice in North Dakota, and who qualifies for medical marijuana treatment under Minnesota law may live and use medical marijuana prescribed by a physician in Minnesota and retain his license to practice law in North Dakota (where marijuana has not been legalized in any form for any purpose).

Concludes that under such circumstances, the attorney would be in violation of RPC 8.4(b), and he would be divested of his license to practice law in North Dakota.
NORTH DAKOTA

- Concluded that “as a schedule I controlled substance under federal law, marijuana has been determined to have a high potential for abuse and to have no accepted medical use for treatment and lack accepted safety for use under medical supervision.”

- “So if Attorney purchased, possessed or ingested marijuana in Minnesota, the attorney would be violating federal law each and every time Attorney did so. In other words, Attorney would be engaging in a ‘pattern of repeated offenses’ that indicates indifference to legal obligations and constitute a violation of N.D.R. Prof. Conduct 8.4(b).”

- That marijuana would have been recommended to the attorney by a physician under Minnesota’s statutory regimen is irrelevant: Because marijuana is a schedule I controlled substance, "it does not logically follow that there could be a valid prescription for a substance that has no medical use or lacks accepted safety," and the North Dakota legislature did not enact controlled substance laws "to put North Dakota in the perplexing position where it must recognize out-of-state marijuana prescriptions even though the same exact prescription cannot be made legal for its own citizens."
NEW YORK

NYS Bar Ass’n, Comm. On Prof. Ethics, Op. 1024 (Sep. 29, 2014)

“[T]he question presented by the state’s medical marijuana law is highly unusual if not unique: Although participating in the production, delivery or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana.”

“Both the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to promote their compliance with state law and current federal policy.”

“Under these unusual circumstances ... the Committee concludes that Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.”

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“[I]t 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.”

Citing Matter of Vinluan v. Doyle, 60 A.D.3d 237, 243 (2d Dept. 2009)
NEW YORK

NYS Bar Ass’n, Comm. On Prof. Ethics, Op. 1024 (Sep. 29, 2014)

Invoking the 2013 Cole Memo:

- “[T]he [2013 Cole] memorandum might fairly be read as an expression by the current Administration that it will not enforce the federal criminal law with regard to otherwise-lawful medical marijuana activities that are carried out in accordance with a robust state regulatory law and that do not implicate the identified federal enforcement priorities.”

- “[I]n this situation the federal enforcement policy also depends on the availability of lawyers to establish and promote compliance with the “strong and effective regulatory and enforcement systems” that are said to justify federal forbearance from enforcement of narcotics laws that are technically applicable.”
“We conclude that the New York Rules of Professional Conduct permit lawyers to give legal assistance regarding the CCA that goes beyond a mere discussion of the legality of the client’s proposed conduct. In general, state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation.”
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