

The Intersection of Professional Duties and Federal Law as States Decriminalize Marijuana

By Mark J. Fucile

Mark J. Fucile is a partner with Fucile & Reising LLP in Portland, Oregon.

Introduction

Since 1996, more than 20 states and the District of Columbia have enacted statutes permitting various forms of “medical” marijuana.¹ In 2012, voters in two of those states—Colorado and Washington—approved initiatives also decriminalizing “recreational” marijuana.² At the same time, growing, distributing, and possessing marijuana remain illegal under federal criminal law.³ For lawyers working with clients in marijuana-related businesses in states where marijuana has been decriminalized, this dichotomy creates a difficult intersection under their respective variants of ABA Model Rule of Professional Conduct 1.2(d)—which broadly permits lawyers to advise clients on the legal consequences of conduct but prohibits lawyers from assisting clients with conduct the lawyer knows is criminal.

This article first surveys the legal landscape lawyers working with clients in marijuana-related businesses face. The article then evaluates the efforts made to date to reconcile duties under Model Rule 1.2(d) with the continuing prohibition on marijuana by federal criminal law.

Although Model Rule 1.2(d) is the ethical focal point here, it is important to note that other aspects of the law of lawyering reside in this uncomfortable intersection. Questions on personal use of marijuana by lawyers may arise under state versions of Model Rule 8.4(b). Lawyers contemplating going into marijuana-related businesses with clients face issues under Model Rule 1.8(a), in addition to those posed by Model Rules 1.2(d) and 8.4(b). Further, in many states, lawyers take an oath prescribed by court rules or state statutes to uphold federal law as well as state law.⁴

The Legal Landscape

To put the tension under Model Rule 1.2(d) in context, it is useful to begin with a short summary of the legal landscape confronting lawyers in jurisdictions that have decriminalized “medical” and/or “recreational” marijuana.⁵ Four key features of that landscape stand out.\

First, although states have decriminalized marijuana, at least some have done so within the context of state regulatory systems.⁶ For example, Washington's Initiative 502 on "recreational" marijuana adopted by its voters in 2012, created a comprehensive licensing system for marijuana producers and retailers under the state Liquor Control Board.⁷ Thus, "decriminalization" does not necessarily mean "no regulation."⁸

Second, notwithstanding state decriminalization, the federal Controlled Substances Act⁹ (CSA) has listed marijuana as a "Schedule 1" controlled substance.¹⁰ Schedule 1 includes drugs with a "high potential for abuse"¹¹ and, accordingly, carries the most severe criminal penalties—with commercial-scale activities defined as felonies and possession of small amounts classified as misdemeanors.¹² (The Schedule 1 designation of marijuana may have reflected the times—the CSA was enacted in 1970.) Although the attorney general has authority under the CSA to remove marijuana from Schedule 1,¹³ no such proceedings have been initiated,¹⁴ nor is any federal legislation anticipated that will soften or remove marijuana's classification in the near future.¹⁵ Moreover, in the context of medical marijuana, the United States Supreme Court rejected a constitutional challenge to the CSA relatively recently.¹⁶

Third, under the Supremacy Clause of the United States Constitution,¹⁷ states are generally prohibited from immunizing conduct through state law that is prohibited under federal law.¹⁸ Although there may be a question over the extent to which the CSA preempts inconsistent state law,¹⁹ there is no similar question about the federal government's authority to enforce its own criminal statutes. As the Second Circuit put it recently: "Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized."²⁰ State courts have readily acknowledged this point in addressing various facets of medical marijuana legalization. The Oregon Supreme Court, for example, noted: "To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so."²¹

Fourth, the United States Department of Justice has issued a series of memoranda addressing enforcement of federal law in states that have decriminalized "medical" or "recreational" marijuana, or both. Generally referred to by their authors—respectively, Deputy Attorneys General Ogden and Cole—the memoranda are addressed to United States attorneys and provide guidance to federal prosecutors in exercising their discretion on enforcement of the CSA.²² The memoranda generally counsel that absent particular circumstances such as organized crime involvement, federal prosecutorial resources should not ordinarily be focused on individuals who are involved in marijuana-related businesses or possess marijuana, as long as they are acting in accord with comprehensive state regulatory law. At the same time, in both the memoranda and court cases discussing them, the Department of Justice has made plain that it is not ceding its ability to enforce the CSA.²³

In sum, lawyers in states that have decriminalized marijuana face a legal landscape where federal law still clearly prohibits marijuana—but the federal government has an announced policy of generally not enforcing that law if marijuana-related business comports with a comprehensive state regulatory system. That policy, however, is just that: a current policy that may change depending on a host of factors ranging from new enforcement priorities to a different federal administration.

Reconciling Model Rule 1.2(d) with Federal Law

Model Rule 1.2(d) is straightforward:

“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.”

Accompanying Comment 9 succinctly captures the essential difference between “advising” and “assisting”:

“There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”

There is nothing in the legislative history of Model Rule 1.2(d) suggesting any particular controversy surrounding these twin notions.²⁴ Similarly, the cases involving state variants of Model Rule 1.2(d) do not illustrate any particular difficulty in drawing this distinction—at least absent the unusual jurisdictional circumstances created by state marijuana decriminalization.²⁵ In fact, the case law includes lawyers disciplined under state counterparts to Model Rule 1.2(d) for assisting clients in drug-related criminal activities.²⁶

The jurisdictional divide, however, has created considerable uncertainty for lawyers with clients in state-permitted marijuana businesses. Although “advising” on state regulatory structures is not controversial, “assisting” is both more problematic and more practical. It is more problematic in light of the continuing federal prohibition. It is also more practical because marijuana businesses need the same range of mundane legal assistance in areas such as contract negotiation, rental agreements, zoning and employment law as business clients in any number of other areas.

To date, three primary approaches have emerged to address this uncertainty.²⁷

Three State Approaches

First, some states have simply counseled that lawyers cannot assist state-permitted businesses as long as the conduct of the business violates federal law.²⁸ An opinion from the Maine Board of Overseers put it this way: “Maine and its sister states may well be in the vanguard regarding the medicinal use and effectiveness of marijuana. However, the Rule (*i.e.*, Maine’s version of Model Rule 1.2(d)) which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not.”²⁹ While having the virtue of simplicity, this approach effectively deprives clients of legal counsel in the operational aspects of businesses that are permitted by state law.

Second, some have proposed immunity from disciplinary prosecution for assisting clients with marijuana-related conduct permitted by state law. In Colorado, for example, the state ethics committee issued an opinion in 2013—No. 125—concluding that under the existing Colorado Rules of Professional Conduct lawyers could not assist clients with marijuana-related activity under state law because that conduct remained prohibited by federal law.³⁰ The ethics committee then proposed amendments to the Rules of Professional Conduct that would have created immunity from disciplinary prosecution in this context.³¹ As is discussed next, the Colorado Supreme Court ultimately rejected the immunity approach in favor of a comment harmonizing state and federal law. The Florida Bar, in contrast, adopted a policy generally insulating lawyers from disciplinary prosecution for assisting on Florida state medical marijuana regulation as long as the lawyer also advises on federal law and enforcement policy.³² The immunity approach has its own simplicity. At the same time, it lacks the flexibility to address potential changes in federal enforcement policy triggered by altered circumstances or federal administrations that would leave lawyers free in a disciplinary sense to assist businesses that are being prosecuted under federal criminal law.

Third, still others have taken a blended approach by way of ethics opinions, comments or rule amendment. Arizona, for example, concluded in a state bar ethics opinion that lawyers could both advise and assist clients operating under the state medical marijuana statute as long as the federal government maintained its current enforcement policy and no court concluded that the CSA preempted the Arizona “medical” marijuana law.³³ The Colorado Supreme Court, in turn, harmonized state and federal law by issuing a comment to Colorado’s version of Model Rule 1.2 that allows lawyers to assist clients under the state marijuana system as long as the lawyers also “advise the client regarding related federal law and policy.”³⁴ Nevada followed with a similar comment patterned closely on the Colorado formulation.³⁵ The Washington Supreme Court, too, followed the Colorado template but expressly predicated it with the phrase, “at least until there is a change in federal enforcement policy[.]”³⁶ Connecticut adopted an amendment to its version of RPC 1.2(d) effective in 2015 that also harmonizes state and federal law by permitting a lawyer to advise or assist a client with conduct permitted by Connecticut law “provided the lawyer counsels the client about the legal consequences . . . under other applicable law[.]”³⁷ The connection—direct as in Arizona and Washington or implicit as in Colorado, Nevada and Connecticut—with the current federal enforcement policy is both the strength and the weakness of the blended approach. It is the strength in that it analytically harmonizes the dichotomy between state and federal law by focusing on the fact that the latter will not generally be enforced if conduct complies with the former. It is also the weakness in that it only works as a practical matter as long as the current federal enforcement policy continues.

Conclusion

As more states decriminalize at least “medical” and perhaps “recreational” marijuana despite federal law to the contrary, lawyers will continue to grapple with the inherent tension under Model Rule 1.2(d) in advising and assisting marijuana-related clients. At the same time, bar associations and state courts will also continue to grapple with a set of imperfect solutions to address this uncertainty while balancing the practical need to counsel clients.

Endnotes

1. See White House Office of National Drug Control Policy, *Marijuana Resource Center: State Laws Related to Marijuana*, <http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana> (last visited Feb. 23, 2015).
2. *Id.* As I write this shortly after the November 2014 elections, Alaska and Oregon recently voted to follow Colorado and Washington.
3. See 21 U.S.C. §§ 841, 844.
4. See, e.g., WASH. A.P.R. 5(d), ORE. REV. STAT. 9.250(2).
5. For two excellent surveys on the general legal context from the Congressional Research Service, see Todd Garvey, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws* (Nov. 9, 2012) [hereinafter Garvey], <https://www.fas.org/sgp/crs/misc/R42398.pdf>; Todd Garvey and Brian T. Yeh, *State Legalization of Recreational Marijuana: Selected Legal Issues* (Jan. 13, 2014) [hereinafter Garvey and Yeh], <https://www.fas.org/sgp/crs/misc/R43034.pdf>.
6. See generally Garvey, *supra*, at 4.
7. See Washington State Liquor Control Board, *I-502 Implementation*, <http://www.liq.wa.gov/marijuana/I-502> (last visited Feb. 23, 2015).
8. Even in states that have decriminalized marijuana in some fashion, local jurisdictions may still be permitted to prohibit or otherwise limit marijuana-related businesses. See generally Washington Attorney General Opinion 2014, No. 2 (Jan. 16, 2014) (considering this issue in conjunction with implementation of Washington Initiative I-502), available at http://www.atg.wa.gov/AGOOpinions/Opinion.aspx?section=archive&id=31773#.VOuLE_nF_Is.
9. 21 U.S.C. § 801, *et seq.*
10. Pub. L. No. 91-513, Title II (1970).
11. 21 U.S.C. § 812(b)(1), (c).
12. See 21 U.S.C. §§ 841, 844.
13. See 21 U.S.C. § 811.
14. See *Americans for Safe Access v. Drug Enforcement Administration*, 706 F.3d 438 (D.C. Cir. 2013) (upholding denial of citizen petition to reclassify marijuana).
15. See generally Garvey and Yeh, *supra* note 5, at 26-28. In late 2014 as a part of an omnibus budget bill (Pub. L. No. 113-235), Congress prohibited the Justice Department from using the funds appropriated to prevent states from implementing their “medical” marijuana laws. This limitation did not address “recreational” marijuana.
16. *Gonzales v. Raich*, 545 U.S. 1 (2005) (under the Commerce Clause). See also *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007) (on remand, rejecting other Constitutional challenges, including the Tenth Amendment). The Supreme Court earlier considered—and rejected—an implied “medical necessity” exception to the CSA’s approach to marijuana in *United States v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483 (2001).
17. U.S. Const. art. VI, cl. 2.
18. See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824).

19. See 21 U.S.C. § 903 (CSA preempts state law when there is a “positive conflict”). See generally Garvey, *supra* note 5, at 9-14 (compiling cases addressing various aspects of preemption in the marijuana context); Garvey and Yeh, *supra* note 5, at 12-21 (including a discussion of preemption based on United States treaty obligations).
20. *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013); *accord Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 at *4 (W.D. Wash. May 25, 2006) (unpublished) (applying same principle to eligibility criteria for federally funded housing).
21. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 529 (Or. 2010); *accord County of San Diego v. San Diego NORML*, 81 Cal. Rptr. 3d 461, 825-26 (Cal. App. 2008) (noting that California’s “medical” marijuana statute does not confer immunity from federal prosecution).
22. See David W. Ogden, Memorandum, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEPARTMENT OF JUSTICE (Oct. 19, 2009), <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>; James M. Cole, Memorandum, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (June 29, 2011), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; James M. Cole, Memorandum, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (“recreational” marijuana).
23. See, e.g., *Montana Caregivers Ass’n v. U.S.*, 841 F. Supp. 2d 1147, 1148-49 (D. Mont. 2012) (“A reasonable person, having read the entirety of the Ogden Memo, could not conclude that the federal government was somehow authorizing the production and consumption of marijuana for medical purposes. Any suggestion to the contrary defies the plain language of the Memo.”); *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1111-12 (E.D. Cal. 2012) (rejecting estoppel argument by medical marijuana dispensary seeking to bar enforcement of the CSA); *Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1153-59 (N.D. Cal. 2011) (denying TRO to medical marijuana dispensaries challenging federal enforcement of the CSA).
24. See ABA, *A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013* 47-64 (2013).
25. See ABA, *ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* 41-43 (7th ed. 2011).
26. See, e.g., *In re Goldberg*, 520 A.2d 1147 (N.J. 1987) (lawyer disciplined under, among others, New Jersey RPC 1.2(d) for assisting client in illegal narcotics conspiracy); *In re Wolff*, 788 N.W.2d 594 (N.D. 2010) (lawyer disciplined under, among others, North Dakota RPC 1.2(d) for assisting client in purchasing illegal narcotics).
27. Some commentators have suggested novel interpretations of Model Rule 1.2(d) that focus on specific intent to violate the CSA rather than simply knowledge that the assistance rendered is to a business violating the CSA. See Sam Kamin and Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 905-14 (2013). Others commentators have criticized this approach, noting that there is no “intent” requirement in Model Rule 1.2(d). See Alec Rothrock, *Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer’s Professional Health?*, 89 DENV. U. L. REV. 1047, 1056-57 (2012).
28. See Maine Board of Overseers of the Bar Op. 199 (2010) [hereinafter Maine Op. 199]; Connecticut Bar Ass’n Prof’l Ethics Comm. Informal Op. 2013-02 (2013).
29. Maine Op. 199, *supra* note 28, at 2.
30. An earlier Colorado ethics opinion, Formal Op. 124 (2012), concluded that a lawyer’s personal use of “medical” marijuana would not ordinarily violate its version of Model Rule 8.4(b).

31. See Report of Amendment 64 Subcommittee—See Colorado Task Force Report on the Implementation of Amendment 64, <http://www.colorado.gov/cms/forms/dor-tax/A64TaskForceFinalReport.pdf>.

32. See Gary Blankenship, *Board adopts medical marijuana advice policy*, THE FLORIDA BAR NEWS (June 15, 2014), <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/575b2ba3c91f53dd85257cf200481980!OpenDocument>. In another variant, Minnesota’s new “medical” marijuana statute includes an immunity provision specifically addressing regulatory discipline of attorneys. See MINN. STAT. ANN. § 152.32(2)(i) (2014). Further illustrating the sometimes discordant approaches at the state level, however, North Dakota followed Minnesota’s new statute with an ethics opinion (14-02) concluding that personal use of “medical” marijuana by a North Dakota lawyer in Minnesota would violate North Dakota RPC 8.4(b).

33. State Bar of Arizona Op.11-01 (2011).

34. Colorado RPC 1.2, cmt. 14 (adopted as Rule Change 2014(05), Mar. 24, 2014).

35. Nevada RPC 1.2, cmt. 1 (adopted as ADKT 0495, May 7, 2014).

36. Washington RPC 1.2, cmt. 18 (adopted as Supreme Court Order 25700-A-1079, Nov. 6, 2014).

37. The Connecticut amendment was approved on June 13, 2014. See Jay Stapleton, *Judges Vote to Allow Lawyers to Represent Medical Marijuana Growers*, CONNECTICUT LAW TRIBUNE (June 26, 2014), www.ctlawtribune.com. The change follows a Connecticut Bar ethics opinion issued in 2013 (Informal Op. 2013-2) concluding that the Connecticut RPCs as then written permitted advice, but not assistance. Oregon has a similar amendment under review. See Oregon State Bar 2014 House of Delegates Meeting Agenda, *Amendment of Oregon Rule of Professional Conduct 1.2: Board of Governors Resolution No. 5* (Nov. 7, 2014), https://www.osbar.org/_docs/leadership/hod/2014/14HODagenda.pdf.