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Proposed Rule 1.2.1 Public Comment Form

Commenting on behalf of an organization	No
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State	California
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If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	None of the Alternatives Above

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From the present wording, it appears that lawyers including prosecutors may take all these actions with respect to witnesses who are not their clients. Everyone should be aware of prosecutors including the state bar prosecutors calling witnesses in order for the witness to provide materially false testimony and to authenticate bogus documents.

The proposed rules state: ". . . lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*" Soliciting materially false testimony by a witness should be prevented by this rule but according to the state bar's OCTC such a restriction means that it would be doing the Respondents' work for them. Thus, it may suborn perjury and offer into evidence materially false documents. The thing which the OCTC finds objectionable is for Respondent to object to the OCTC's unethical behavior

As we have seen with prosecutors in the Baca case (<http://lat.ms/1znOjpN>) January 31, 2015 LA Times, U.S. Judges See 'Epidemic' of

Prosecutorial Misconduct in State, by Maura Dolan), prosecutors believe that this rule and similar rules do not apply to them. Perhaps, they hang their hat on the word "client" and interpret that to mean private attorneys or criminal defense attorneys but not to include prosecutors who do not have a client in the same sense.

In doing a word search for "Client" in the Rules of Professional Conduct, my computer did not turn up a definition of client. My apologies if I missed it. While people say that "the public" is the prosecutor's client, I do not see that definition. However, defining "client" to include "the public" would not solve the problem with both proposed rules. In soliciting perjury and offering false documents, the prosecutor is not advising its client, i.e. the public. It is theoretically advancing the interests of the public, if one can say that gross prosecutorial misconduct advances the public's good.

The attitude of prosecutors is that these rules do not apply to them and they can advance the public's interest by violating every aspect of these rules. The State Bar's OCTC goes so far as to deny that any rule which actually mentions prosecutors apply to it, especially Rule 5-110.

When the rules are undergoing revision, they should clearly revised to apply to all attorneys including all prosecutors and to state bar OCTC. These two proposed rules should make clear that the attorneys may not advance their client's interests by engaging in the objectionable behavior with witnesses. The Scott Dekraai Case shows that Rule 5-110 was no deterrent to such misconduct. Furthermore it continues today in other cases such as the prosecution's use of falsified results from the Sheriff's Crime lab in Orange County. Neither rule even attempts to constrain regular prosecutors or the OCTC.

Proposed Rule 1.2.1 Public Comment Form

Professional Affiliation	Pryor Cashman LLP
Commenting on behalf of an organization	No
Name	Thomas H. Vidal
City	Los Angeles
State	California
Email address	tvidal@pryorcashman.com
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	None of the Alternatives Above

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Neither the originally proposed rule nor these two alternatives protect attorneys who, in good conscience believe a law, rule, or ruling is invalid and who represent clients who may need to challenge those laws, rules, or rulings. The language in the proposed alternatives that an attorney may counsel or assist a client in a good faith effort to “determine” the “validity, scope, meaning, or application of a law, rule, or ruling of a tribunal” is woefully inadequate in this regard.

It is woefully inadequate, because the word “determine” does not convey the same force as test or challenge and may be construed more narrowly than those terms. It is also inadequate because under current Rule 3-210, the attorney—whether or not in representing a client—is permitted to “take appropriate steps” him- or herself. The original language of Rule 3-210 is superior, and I would propose incorporating these concepts into Rule 1.2.1 as follows.

Rule 1.2.1 Advising or Assisting the Violation
of Law

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, or fraudulent.

(b) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal, unless the lawyer believes in good faith that such law, rule, or ruling is invalid.

(c) Notwithstanding paragraphs (a) and (b), 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, test, or otherwise challenge the validity, scope, meaning, or

application of a law, rule, or ruling of a tribunal;
and

(3) take appropriate steps in good faith to determine, test, or challenge the validity of any law, rule, or ruling of a tribunal.

*** **

Proposed Rule 1.2.1 Public Comment Form

Commenting on behalf of an organization	No
Name	Sara Gardner
City	Sacramento
State	California
Email address	saraggardner@gmail.com
If you have a preference (for either Alternative 1 or 2.), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

June 8, 2018

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.2.1 Advising or Assisting the Violation of Law

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the two alternative versions of proposed Rule 1.2.1 – Advising or Assisting the Violation of Law – currently out for public comment. COPRAC supports the adoption of ALT2. The Committee believes ALT2's language in Comment [6] provides useful clarification to practitioners regarding the scope of the Comment's application to legal assistance in situations where California law may conflict with federal or tribal law. In particular, the Committee considers the clarification that a lawyer may assist a client in drafting, interpreting, administering, or complying with California laws “even if the client's actions might violate the conflicting federal or tribal law” to provide helpful guidance to lawyers from whom such assistance is sought.

Thank you for your consideration of our comments.

Very truly yours,

Andrew Dilworth, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

Proposed Rule 1.2.1 Public Comment Form

Commenting on behalf of an organization	No
Name	Daniel Horwitz
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Email address	dhorwizesq@aol.com
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	None of the Alternatives Above
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>These measures, as applied to fraud and "violations of any law,rule or ruling of a tribunal" fails to adequately define the conduct prohibited with sufficient specificity. Example: It may be advantageous for a debtor not to show up for a judgment debtor examination because, for example, he ill, elderly, frail and preparing to file bankruptcy. If I advise the client to not show up for the examination proceeding, knowing he will likely have filed his bankruptcy petition before the warrant process is completed, I would be in violation of this section, and subject to discipline. This new rule puts me at odds and in conflict with what I may know to be in my client's best interests, and giving advice that I know is not in my client's best interest The proposed rules would appear to open a door to a floodgate of complaints and lawsuits over whether an attorney's advice was to engage in what an opposing party or counsel might see as wrongful, but which are actually a differing perspective of the same facts, or a better alternative for the client despite risks. Please take out the references to "fraudulent, or a violation of any law, rule, or ruling of a tribunal.*</p>

Proposed Rule 1.2.1 Public Comment Form

Professional Affiliation	City Attorney for southern California cities
Commenting on behalf of an organization	No
Name	Karl Berger
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State	California
Email address	kberger@hensleylawgroup.com
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Thank you for taking action on this important matter. For government attorneys, Alternative 2 - with Comment 6 - is the best alternative. While this does not necessarily go far enough in providing guidance, it certainly does provide a path forward. Attached for your convenience are our previous correspondence with the Bar regarding the need for this type of guidance.
Attachment	20170830HLG_-_Follow-up_request_for_cannabis_ethics-signed.pdf (599k)

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August 30, 2017

Andrew Tuft, Staff Counsel
State Bar of California
Committee on Professional Responsibility and Conduct
180 Howard Street
San Francisco, CA 94105

Re: Cannabis Ethical Obligations; follow-up to January 2017 request

Dear Mr. Tuft:

In January of this year, we requested a formal opinion from the California State Bar regarding our ethical obligations in advising our government clients regarding cannabis. The two pieces of correspondence are enclosed for your reference (without attachments). As noted in the second letter, we also spoke on the phone regarding the matter. To date, we have not received a written response.

Enclosed for your review is an article regarding a San Diego attorney who is reportedly being prosecuted by the District Attorney's office. While we do not yet know the outcome of that case, it is deeply disconcerting and causes us to renew our request for a formal opinion.

In the absence of a State Bar opinion, we provided advice to our colleagues in March regarding what steps to take when counseling our clients regarding this matter. A copy of that presentation is included (without attachments). Perhaps this can help formulate an opinion from the Bar.

We urgently need guidance on this subject. Thank you in advance for your assistance. Please contact us if you have any questions.

Very truly yours,

Karl H. Berger
on behalf of Hensley Law Group

818.333.5120 phone - 818.333.5121 fax

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January 9, 2017

Andrew Tuft, Staff Counsel
State Bar of California
Committee on Professional Responsibility and Conduct
180 Howard Street
San Francisco, CA 94105

Re: Proposition 64 - Adult Use of Marijuana Act ("AUMA"); Ethical Obligations

Dear Mr. Tuft:

As you are aware, on November 8, 2016 a significant majority of California voters approved Proposition 64 – the Adult use of Marijuana Act ("AUMA"). Accordingly, California law – with some restrictions – now allows recreational use of cannabis products within the state of California.¹

The United States Code, however, continues to list cannabis as a Schedule I drug.² A Schedule I drug is generally defined as one that has no currently accepted medical use and a high potential for abuse.³ Using a Schedule I drug in violation of these federal laws is a crime.⁴ Aiding and abetting persons who violate the United States Code is also a crime.⁵

While the United States Department of Justice⁶ and the United States Congress⁷ have suggested that this federal law should not be enforced where ballot initiatives legalized cannabis products within the state's jurisdiction (such as California), the statutory prohibition within the United States Code remains unchanged. Notably, if the United States Senate confirms Senator Jeff Sessions as United States Attorney General, the DOJ's current posture on prosecutions may change. Senator Sessions has a well-documented position opposing the use of marijuana.

We represent various cities in Southern California as city attorney. Government Code § 41801 provides that a city attorney "advise[s] ... city officials in all legal matters pertaining to city business." Additionally, the city attorney is obligated to "frame an ordinance or resolution

required by the [city council].”⁸ We are statutorily required, therefore, to not only advise our cities as to the law, but also to draft local regulations.

Among other things, the AUMA allows jurisdictions such as cities to either regulate or prohibit commercial cultivation, distribution, and sale (collectively, “commercial use”) of cannabis products within their jurisdictional boundaries. Some of our clients may be considering local regulations that would allow commercial use of cannabis products. Generally, some cities’ interest arises from the AUMA’s authorization for local jurisdictions to impose a tax upon commercial use of cannabis products.

As you know, Business and Professions Code § 6068 provides, in part, that an attorney’s duty includes supporting “the Constitution and laws of the United States and of this state.” This is reflected in Rule 3-210 of the Rules of Professional Conduct which provides that:

“A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.”

As city attorneys, we also adhere to the *Ethical Principles for City Attorneys* adopted by the City Attorney’s Department for the League of California Cities on October 6, 2005. Principle 1 of the *Ethical Principles* provides that

“[a]s an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law’s purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public’s trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations.”

An example for upholding Principle 1 of the *Ethical Principles* is:

“The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney’s good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be “creative” to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city’s actions.”

This reflects the Business and Professions Code and Rule 3-210 discussed above.

The conflict between federal law and the AUMA presents us with an ethical quandary. We are faced with fulfilling our statutory responsibilities as city attorneys and our ethical duties. Absent clear guidance from the California State Bar, we are unsure whether we can advise our clients.

In researching this issue, we found Opinion No. 2015-1 from the San Francisco Bar Association which generally provides that an attorney may ethically advise a client as to business transactions involving medical marijuana. This does not, however, address the AUMA and is not of statewide application.

Bar Associations from other states where cannabis products were legalized have either amended their respective Rules of Professional Responsibility or issued opinions that generally allow attorneys to ethically advise clients as to state and federal laws affecting cannabis products. These are enclosed for your review.

Based upon the foregoing, we ask for an opinion from the California Bar as to our ethical obligations in advising our government clients considering the conflict between the AUMA and the United States Code.

Thank you in advance for your assistance. Please contact us if you have any questions.

Very truly yours,



Karl H. Berger
on behalf of Hensley Law Group

Enclosures

c: Patrick Whitnell, General Counsel for League of California Cities

¹ Voters previously approved Proposition 215 in 1996 which provided a defense to criminal prosecutions for the use of cannabis products for medical purposes, i.e., “medical marijuana.” See Health and Safety Code § 11362.5.

² 21 U.S.C.A. § 812(c).

³ 21 U.S.C. § 812(b)(1).

⁴ 21 U.S.C. §§ 841(b), 844a(a), 846, 960(b).

⁵ 18 U.S.C. § 2(b); 21 U.S.C. § 846.

⁶ See Memorandum dated August 29, 2013 (enclosed).

⁷ See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, § 538; Continuing Appropriations Act of 2016, Pub. L. 114-53, § 103 (2015). See also, *United States of America v. Marin Alliance for Medical Marijuana* (United States District Court, N.D., 2015) 139 F.Supp.3d 1039 (noting Congress’s action) and *Qualified Patients Ass’n v. City of Anaheim* (2010) 187 Cal.App.4th 734 (noting that federal law does not preempt state or local regulations as to medical marijuana).

⁸ Government Code § 41802.

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January 13, 2017

Andrew Tuft, Staff Counsel
State Bar of California
Committee on Professional Responsibility and Conduct
180 Howard Street
San Francisco, CA 94105

Re: Follow-up to letter dated January 9, 2017

Dear Mr. Tuft:

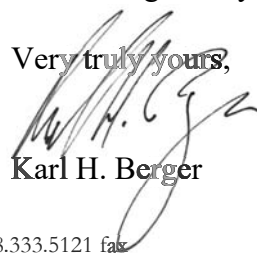
Thank you for your phone call today along with your reference to Ethics Opinion No. 527 issued by the Los Angeles County Bar Association on August 12, 2015. I appreciate the conversation.

Based upon our call, I understand that you will be referring our request (along with several others) to the Committee on Professional Responsibility and Conduct (COPRAC). You hoped that COPRAC would consider this matter sometime during the calendar year.

As I emphasized, both the opinions from the San Francisco County Bar Association and the Los Angeles County Bar Association address medical marijuana. We believe, however, that that this is distinguishable from AUMA which allows the recreational use of cannabis and cannabis related products. Further, we believe that the nominee for United States Attorney General – if confirmed – could reverse previous federal policy regarding the enforceability of the United States Code. Consequently, we believe that a change in the Rules or an Opinion issued by COPRAC are critical to provide guidance as to our ethical obligations.

Again, thank you for your courtesy. We look forward to hearing from you.

Very truly yours,



Karl H. Berger

818.333.5120 phone - 818.333.5121 fax

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Home / Legal / Prosecution of San Diego Pot Attorney Leaves Lawyers on Edge

1



PROSECUTION OF SAN DIEGO POT ATTORNEY LEAVES LAWYERS ON EDGE

MON, 08/14/2017

In the ambiguous world of marijuana law, simply advising a client who operates a marijuana business could theoretically land you in trouble. It's a fear that is growing among legal professionals since the prosecution of cannabis attorney Jessica McElfresh in San Diego.

McElfresh is facing multiple felony charges. As Voice of San Diego notes, her case "comes at a time of increased uncertainty over how law enforcement will treat the marijuana industry in San Diego – and it's being taken by some as a sign that it will not be permissive."

POPULAR CONTENT

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In late May, then-District Attorney Bonnie Dumanis filed a slew of criminal charges, alleging that James Slatik, a medical-marijuana entrepreneur, and his business partners sought to illegally manufacture and sell hash oil across the country. The defendants were also charged with money laundering and obstruction of justice.

The DA alleged that Slatik's lawyer, McElfresh, was in on the scheme, saying that she hid evidence of the hash oil from city inspectors during an April 2015 inspection of Slatik's Med-West facilities in Kearny Mesa.

The evidence for the allegations was an email McElfresh sent to her client about the inspection.

"They've been there once and went away, operating under the theory that no actual marijuana is there," she wrote. "We did a really, really good job giving them plausible deniability – and it was clear to them it wasn't a dispensary. But, I think they suspected it was something else more than paper."

Prosecutors say her words are evidence that she had "orchestrated a charade for city inspectors." But McElfresh says it was just part of a larger conversation about a zoning inspection and ensuring that Slatik's facility would not be confused with a dispensary.

What's most disturbing to some legal observers is how prosecutors got their hands on this email in the first place. On July 7, Judge Charles Rogers ruled the email was not protected by attorney-client privilege and could be used as evidence to file charges. That sent a chill down many attorneys' spines.

One of those attorneys is Gina Austin with Citizens for Patient Rights.

"We have several clients who may also be in the files that were seized by the DA," Austin said. Another San Diego-based criminal defense lawyer, Michael Crowley, said the case underscores the confusion surrounding cannabis law in this country.

In waving the attorney-client privilege, the DA relied in part on federal statute, which still prohibits marijuana per the Controlled Substances Act.

"The only thing [McElfresh] did wrong," said her attorney Eugene Iredale, "was to advise a client in a field of law where the rules are rapidly changing, and what is legal and is not legal is not entirely clear on any particular point."

If that's true, then a number of other attorneys could be at similar risk of prosecution and denial of attorney-client privileges. They're now watching and waiting to find out McElfresh's fate.

COMMENTS

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POLICY



“WHERE’S WALDO? FINDING ETHICS IN A FIELD OF GRASS: MARIJUANA AND YOUR LAW LICENSE.”



Karl H. Berger

March 24, 2017

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I last presented to the San Diego City Attorney's Association in 1996. The topic? Newly adopted Proposition 215 – the Compassionate Use Act ("CUA"). Apparently, I have a theme....

This is not a "how to" presentation regarding implementing CUA or Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act" ("AUMA"). Rather, it is a reality check about our ethical obligations when advising our clients regarding CUA and AUMA.

The United States Code lists cannabis as a Schedule I drug. A Schedule I drug is generally defined as one that has no currently accepted medical use and a high potential for abuse.¹ Using a Schedule I drug in violation of these federal laws is a crime.² Aiding and abetting persons who violate the United States Code is also a crime.³

Under the Obama Administration, the United States Department of Justice⁴ and the United States Congress⁵ suggested that this federal law should not be enforced where ballot initiatives legalized cannabis products within the state's jurisdiction (such as California). It is unclear, however, whether the Trump Administration and United States Attorney General Jeff Sessions will maintain the DOJ's previous posture.

As recently as February 27, 2017, Mr. Sessions⁶ noted that he was very concerned about a perceived uptick in violence associated with cannabis use. His comments suggest he may be taking an even more conservative stance regarding cannabis than that discussed by Press Secretary Sean Spicer⁷ on February 23, 2017.

Up until November 2016, the attorneys in our firm did not need to worry much about the ethics of cannabis: all of our clients amended their respective municipal code to add prohibitions regarding medical marijuana. As a result, we did not have an obvious conflict between state and federal law.

Voter approval of AUMA, however, presents a different legal and ethical landscape. AUMA allows cities to either regulate or prohibit commercial cultivation, distribution, and sale (collectively, "commercial use") of cannabis products for recreational purposes within their jurisdictional boundaries. The siren's song of new revenue from cannabis taxes is leading several

¹ 21 U.S.C. § 812(b)(1).

² 21 U.S.C. §§ 841(b), 844a(a), 846, 960(b).

³ 18 U.S.C. § 2(b); 21 U.S.C. § 846.

⁴ See Memorandum dated August 29, 2013.

⁵ See Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, § 538; Continuing Appropriations Act of 2016, Pub. L. 114-53, § 103 (2015). See also, *United States of America v. Marin Alliance for Medical Marijuana* (United States District Court, N.D., 2015) 139 F.Supp.3d 1039 (noting Congress's action) and *Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734 (noting that federal law does not preempt state or local regulations as to medical marijuana).

⁶ See, www.usatoday.com/story/news/politics/2017/02/27/attorney-general-jeff-sessions-vows-new-violent-crime-fight/98500006/

⁷ See, www.fortune.com/2017/02/23/marijuana-enforcement-white-house/

of our clients to consider adopting regulations approving commercial cannabis operations pursuant to CUA and/or AUMA. This desire now places us in an ethical conundrum: federal law and California law are seemingly in antithetical conflict.

Government Code § 41801 provides that a city attorney “advise[s] ... city officials in all legal matters pertaining to city business.” Additionally, the city attorney is obligated to “frame an ordinance or resolution required by the [city council].”⁸ We are required, therefore, to not only advise our cities as to the law, but also to draft regulations to implement local law.

Business and Professions Code § 6068 provides, in part, that an attorney’s duty includes supporting “the Constitution and laws of the United States and of this state.” This is reflected in Rule 3-210 of the Rules of Professional Conduct which states that:

“A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.”

In 2005, the City Attorney’s Department for the League of California Cities adopted the *Ethical Principles for City Attorneys*. Principle 1 of the Ethical Principles⁹ states that

“[a]s an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law’s purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public’s trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations.”

An example for upholding Principle 1 of the Ethical Principles is:

“The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney’s good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be ‘creative’ to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city’s actions.”

This reflects the Business and Professions Code and Rule 3-210 discussed above.

⁸ Gov. Code § 41802.

⁹ www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Ethical-Principles-for-City-Attorneys

We researched this ethical dilemma. The California State Bar offers no guidance. There are only two “official” opinions in California that address the problem: Opinion No. 2015-1 from the San Francisco Bar Association and Opinion No. 527 issued by the Los Angeles County Bar Association. Both generally provide that an attorney may ethically advise a client as to business transactions involving medical marijuana. They do not, however, address AUMA and are not of statewide application. And, they do not address the additional duties of a city attorney, i.e., drafting regulations that contradict the prohibitions of federal law.

In January 2017, our firm requested that the State Bar provide guidance to city attorneys regarding the matter. It does not appear that our request will be taken up by the Committee on Professional Responsibility and Conduct.¹⁰

What is pending, however, is a draft opinion from the California Supreme Court Committee on Judicial Ethics Opinions. Entitled “Extrajudicial Involvement in Marijuana Enterprises,” Draft Opinion 2017-010 generally notes (1) that an interest in a commercial cannabis enterprise violates federal law; (2) a violation of federal law violates a judge’s obligation to comply with the law; and (3) as a result, such an interest involves impropriety or the appearance of impropriety. Accordingly, the Draft Opinion finds that judges should not have an interest in commercial cannabis activities.

Combining that Draft Opinion with those from the San Francisco Bar Association and Los Angeles Bar Association, one can glean the following practical guidance (in no particular order):

- It may be ethical to advise our clients regarding activities that are permitted under CUA and AUMA;
- We must inform our clients that activities involving cannabis remain a potential violation of federal law and take every effort to ensure that our clients do not circumvent federal law;
- We must inform our clients that the CUA and AUMA do not *legalize* cannabis activities. Rather, CUA/AUMA decriminalize cannabis activities under California law.

Applying this advice to our own practice, we have done the following:

- In ordinances, memoranda, and discussions regarding regulations, we have advised (verbally and in writing) that cannabis continues to be listed as a Schedule I drug by federal law. Enacting regulations complying with California law and drafting, for example, ballot measures imposing cannabis taxes are (we believe) governmental functions that do not obviously violate federal law.

¹⁰ We encourage you to send a “me too” letter to the State Bar asking for an opinion.

- Engaging in business activities involving cannabis may constitute a federal crime. Assisting clients with commercial ventures, e.g., when a city acts in its proprietary capacity, may violate federal law and thus compromise our ethical obligations. Accordingly, we have advised that cities not enter into contracts, e.g., development agreements and leases, with cannabis operations.

Copies of our letters to the State Bar are available (just email me at kberger@hensleylawgroup.com) and were also provided to the League of California Cities. Attached are the opinions discussed above.



**ORANGE COUNTY
BAR ASSOCIATION**

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FEDERAL BAR ASSOC.,

OC CHAPTER

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OC LAVENDER BAR ASSOC.

OC TRIAL LAWYERS ASSOC.

OC WOMEN LAWYERS ASSOC.

THURGOOD MARSHALL BAR ASSOC.

June 28, 2018

Angela Marlaud

Office of Professional Competence, Planning and Development

The State Bar of California

180 Howard Street

San Francisco, CA 94105-1639

Email: Angela.Marlaud@calbar.ca.gov

**Re: Public Comment re: Proposed Rule 1.2.1 of the Rules
of Professional Conduct**

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning the State Bar of California's request for public comment regarding reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct in response to the California Supreme Court's Administrative Order 2018-04-11.

Founded over 100 Years ago, the OCBA has over 7,400 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, of differing ethnic backgrounds and political leanings, has approved these comments prepared by the OCBA's Professionalism and Ethics Committee.

We generally support and prefer the proposed modifications to Comment 6 set forth in Alt 2 provided by the Rules Revision Commission ("Commission") over the Supreme Court's language set forth in the Alt 1 version. We believe that the Alt 2 version makes the language of Comment 6 more precise.

The Supreme Court added language providing that the lawyer has a mandatory obligation to inform the client about any conflict between California law and related federal or tribal law, which is retained in both versions. We note, however, that there is another statement added by the Supreme Court in the final sentence which the Commission did not address or seek to clarify. It appears in both the Alt 1 and Alt 2 versions: "[U]nder certain circumstances [the lawyer] may also be required to provide legal advice to the client regarding the conflict." To have such language in a formal comment to a disciplinary rule stating that legal advice concerning a particular subject *may be required*, without explaining those circumstances, fails to provide the necessary guidance. The statement that something may

be required in certain circumstances provides a lack of clarity as to when the giving of such advice is discretionary or when it is mandatory.

Moreover, because the rule already provides that the lawyer must inform the client about the conflict of laws, it is unclear what the proposed rule means by “providing legal advice”. Isn’t informing a client about a conflict “providing legal advice”? Is there some additional “legal advice” that is contemplated by this rule? If so, how far does the attorney have to go beyond merely advising of the conflict?

In this instance, the parenthetical references to rules 1.1 (duty of competence) and 1.4 (communication) do not provide adequate guidance as to the circumstances in which a lawyer may be **required** to provide legal advice regarding the two conflicting bodies of applicable law beyond the disclosure that such conflict exists. If Comment 6 retains the sentence proposed by the Supreme Court, we suggest it should describe or at least provide an example of the circumstances requiring such legal advice. One potential example is where the client has specifically requested advice on the difference between the conflicting bodies of law. However, even that example seems to be more in the nature of advice to comply with the standard of care than disciplinary guidance.

In conclusion, we believe the Commission’s modification suggested in Alt 2 improves upon the Supreme Court’s proposed language in Alt 1. But neither version goes far enough to explain the last sentence of Comment 6 and the circumstances that would dictate the necessity for further legal advice to the client regarding the conflict between California law and federal or tribal laws.

Thank you for the opportunity to submit public comment on the revision to this important proposed rule, and for your consideration of our comments.

Thank you for considering our comments.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION



Nikki Miliband
2018 President

Proposed Rule 1.2.1 Public Comment Form

Professional Affiliation	Professor of Law, McGeorge School of Law, University of the Pacific
Commenting on behalf of an organization	No
Name	Francis J. Mootz III
City	Sacramento
State	California
Email address	jmootz@pacific.edu
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018
Attachment	Mootz_Public_Comment_on_Rule_1.2.1.docx (25k)

Public Comment
“Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct”

Submitted by:

Professor Francis J. Mootz III, McGeorge School of Law, University of the Pacific

Professor Alex Kreit, Thomas Jefferson School of Law

Professor Michael Vitiello, McGeorge School of Law, University of the Pacific

Submitted:

July 2, 2018

1. Persons Submitting this Public Comment¹

Francis J. Mootz III, Alex Kreit, and Michael Vitiello are full-time law professors at ABA-approved law schools in California who teach and research cannabis law. This Public Comment is submitted by them in their individual capacities. Their institutional affiliations are provided for identification only.

2. Recommendation

We urge the Board of Trustees of the California Bar (“Board”) to submit Alternative 2 of Proposed Rule 1.2.1 to the California Supreme Court for adoption as part of the Rules of Professional Conduct of the State Bar of California (“Rules”). We also urge the Board to provide additional clarification of the scope of Proposed Rule 1.2.1 as quickly as possible after its adoption because the language of Alternative 2 still contains ambiguities.

3. Analysis

On April 11, 2018, the Supreme Court of California issued an Administrative Order that directed the Board to consider an alternative to Proposed Rule 1.2.1. The Board has presented the Supreme Court’s suggested language as Alternative 1 for public comment. In response, the Board prepared a modification of the Supreme Court’s proposal that clarified, sharpened, and enhanced the changes made by the Supreme Court. The Board’s modification is presented for comment as Alternative 2. We agree that Alternative 2 is a desirable improvement and should be adopted as part of the Rules.

Unlike the Rules of Professional Conduct in many other States, Comment 6 to Alternative 2 does not reference the state’s laws implementing a legal cannabis industry. For convenience, however, we will refer to the specific issues that might arise under the current situation in which one may lawfully engage in the (regulated) cannabis trade under state law even though the business remains illegal under federal law.

¹ We would like to thank Meghan L. Shiner (McGeorge School of Law ’20) for her superb research and drafting assistance in developing this Public Comment.

We address the two changes in Alternative 2 that pertain to the substantive effect of the Rule.² Comment 6 addresses the ethical obligation of lawyers when California law conflicts with federal or tribal law. First, Alternative 2 expands the activities that are deemed to be ethical. The Supreme Court’s proposed language would permit a lawyer to “assist a client in drafting, administering, or complying with California laws.” The Board supplemented this text by adding “interpretation” to the list of permissive activities. This is a critical addition. If the only listed activities are “drafting, administering or complying with,” one might mistakenly read the scope of Comment 6 to extend only to those working in a governmental capacity to create and enforce the state laws relating to cannabis use. The addition of “interpreting” makes clear that all lawyers in the state may offer their advice and counsel on the meaning and application of cannabis laws in California.

Additionally, Alternative 2 adds a clause following the permitted activities, clarifying that those activities are permitted “even if the client’s actions might violate the conflicting federal or tribal law.” It is important to make clear what was only implicit in the Supreme Court’s suggested language. Lawyers may counsel clients about the meaning of cannabis laws and regulations in the state, and may assist them in complying with those regulations, even if the client’s underlying conduct of engaging in the cannabis trade is a violation of federal law. We agree with the decision to retain the Supreme Court’s suggested language that this situation also imposes a mandatory duty on the attorney to inform the client of the existence of conflicting federal law (“must inform the client”).

Alternative 2 is the better option for bringing some clarity to the ethical obligations of lawyers dealing with clients involved in the state-legal cannabis trade. **However, Alternative 2 is still subject to misinterpretation, and so we urge the Board to provide additional clarification of Proposed Rule 1.2.1 as soon as practicable.** For example, consider an attorney who represents a wholesaler of cannabis products that operates in complete conformity with state law. Alternative 2 makes clear that a lawyer may give advice about the meaning of California cannabis laws and may assist the client to comply with those laws. However, the lawyer is likely to engage in conduct that goes beyond a narrow interpretation of “interpreting” and “complying.” For example, she may negotiate and conclude sales agreements, real estate purchases, and acquisition of inventory on behalf of the client. Additionally, she may provide general corporate counseling to facilitate the client’s business. All of these activities should be deemed ethical, but Alternative 2 does not make this point expressly and clearly. These considerations are even more pointed when one considers the role of an in-house lawyer employed by a cannabis business and deeply involved with all facets of the operation of the business.

We note that the Bar’s original draft of Comment 6 submitted on March 30, 2017 to the Supreme Court provided that lawyers may “assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws.” This approach is consistent with the clear majority approach in other states regarding the ethical dimensions of cannabis lawyering. States generally have included language to the effect that a lawyer may assist a client to engage in conduct authorized by the

² Several of the changes reflected in Alternative 2 improve readability and do not effect a substantive change. We concur with these changes.

state's cannabis laws,³ ensuring that there is no ambiguity. Failure to make this point clearly can lead to confusion. For example, the Maine Bar issued an ethics opinion in 2010 that concluded that lawyers may not ethically assist clients in the operation of their cannabis business, and then had to reverse course to make clear that such assistance is ethical.⁴

The need for clarification is all the more important given the shift from previous Rule 3-210 — which prohibited lawyers only from “advising the violation of any law” — to Proposed Rule 1.2.1 — which would prohibit “assist[ing] a client in conduct that the lawyer knows is criminal.” By adding the conduct of “assist” to the list of prohibited activities, Comment 6 should more clearly explain that assisting a client to engage in conduct that is in compliance with state law is permitted under the Rules of Professional Conduct.

We urge the Board to use the language in the original Comment 6 to correct the ambiguity in Alternative 2 by adding that lawyers may “assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws.” Additionally, it would clarify Alternative 2 if the Comment expressly stated that lawyers may ethically assist clients to comply with state law “whether as an attorney for a governmental entity or as counsel advising a non-governmental client.”

There is no basis for regarding members of the cannabis industry any less deserving of robust legal assistance when they engage in state-legal activities. The California legislature has expressly established that conduct in compliance with the state's cannabis laws is the lawful object of contract, is not contrary to good morals, and is not in conflict with public policy.⁵ The Board should recognize and acknowledge that it is a positive social good that clients who seek to

³ Some states have included similar language directly in the Rule, *see, e.g.*, ALASKA R. PROF'L CONDUCT 1.2(f) (Alaska R. of Ct. 2015) (“a lawyer may . . . assist [the client] to engage in conduct the lawyer reasonably believes is authorized by those laws”); OHIO R. PROF'L CONDUCT 1.2(D)(2) (Ohio Supreme Ct. 2017) (“A lawyer may . . . assist a client regarding conduct expressly permitted under [medical cannabis laws]”). Other states have chosen to include similar language in a Comment to the Rule, *see, e.g.*, COLO. R. PROF'L CONDUCT 1.2, comment 14 (Colo. Supreme Ct. 2018) (“A lawyer may . . . assist a client in conduct the lawyer reasonably believes is authorized [under cannabis laws]”); WASH. R. PROF'L CONDUCT 1.2, comment 18) (Wash. Supreme Ct. 2014) (“A lawyer may . . . assist the client in conduct the lawyer reasonably believes is authorized by [state cannabis laws].”)

⁴ *Compare* BD. OF OVERSEERS OF THE BAR PROF. ETHICS COMM'N., FORMAL OP. 199 (2010) *with* BD. OF OVERSEERS OF THE BAR PROF. ETHICS COMM'N., FORMAL OP. 215 (2017). The Maine Ethics Commission concluded: “Therefore, in clarifying and hereby replacing Opinion 214, the Commission opines that, notwithstanding current federal laws regarding use and sale of marijuana, Rule 1.2 is not a bar to assisting clients to engage in conduct that the attorney reasonably believes is permitted by Maine laws regarding medical and recreational marijuana, including the statutes, regulations, Orders and other state or local provisions implementing them.”

⁵ CAL. CIV. CODE 1550.5(b)(1)-(3) (enacted in 2017 as AB 1159).

participate in state-legal cannabis activities receive full representation by lawyers. As the Bar Association of San Francisco concluded in 2015 (before the legalization of adult-use cannabis in the state):

Without legal representation, those who want to engage in transactions related to medical marijuana may not fully understand their rights, duties, and liabilities. If, as a matter of ethics or policy, the bar were to refuse to represent people regarding medical marijuana, then non-lawyers would be deprived of essential legal representation.

We also believe that a lawyer's assistance to a client who wants to comply with the Compassionate Use Act should not be considered an act of moral turpitude because it does not suggest that the lawyer is dishonest, untrustworthy, or unfit to practice. *Cf.*, Bus. & Prof. Code § 6106 (allowing disbarment or suspension for commission of acts involving moral turpitude, dishonesty or corruption). To the contrary, the public's adoption of the Compassionate Use Act suggests that a lawyer who assists a client in complying with it is fulfilling a public service.⁶

We believe that Alternative 2 is the preferable language, but that it should be further clarified to eliminate any uncertainty or ambiguity.

4. Conclusion

We urge the Board to recommend Alternative 2 for adoption by the Supreme Court rather than Alternative 1. However, the new Rule and Comments must immediately be revised to ensure that it provides clear direction and guidance to attorneys that they may assist clients to engage in conduct that is authorized by California cannabis laws and regulations.

Contact Information:

Francis J. Mootz III
McGeorge School of Law
3200 5th Avenue
Sacramento, CA 95817
916-739-7385
jmootz@pacific.edu

⁶ THE BAR ASS'N OF SAN FRANCISCO, Op. 2015-1 (2015).



THE STATE BAR
OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

OFFICE OF CHIEF TRIAL COUNSEL
ENFORCEMENT UNIT
Melanie Lawrence, Interim Chief Trial Counsel

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<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2228

July 2, 2018

Justice Lee Edmon
Randall Difuntorum
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comment on Proposed Revisions to Rule 1.2.1 of the Rules of Professional Conduct

Dear Justice Edmon and Mr. Difuntorum:

The Office of Chief Trial Counsel (OCTC) thanks the Commission for the opportunity to express its comments on the issues the Supreme Court referred to the State Bar in the Supreme Court's April 11, 2018 Order regarding rule 1.2.1. With any revision to any of the Rules of Professional Conduct, OCTC wants to assure that the rules (1) protect the public; (2) are discipline rules that are not purely aspirational; and (3) are clearly written so as to be understood by the membership and enforceable by our office. Also, the Comments to the Rules should be used sparingly and only to elucidate, and not to expand, upon the rules themselves.

The issue before the Commission is what version of Comment 6 to rule 1.2.1 to recommend to the Board of Trustees and the Supreme Court. OCTC supports Alt 2.

Both Alt 1 and Alt 2 capture the same concepts and are almost identical except Alt 2 redrafted the first sentence in Comment 6 into it two sentences. It also places the references to other rules after the last sentence instead of being cited earlier in the Comment.

The first sentence of Alt 1 states: "Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law and, despite such a conflict, to assist a client in drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions that execute or apply those laws."

Alt 2 states: "Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law."

Comment on Proposed Revisions to Rule 1.2.1 of the Rules of Professional Conduct
June 25, 2018
Page 2

OCTC believes Alt 2 is preferable because it is more clearly written and therefore should be more readily understood by attorney-licensees and more easily enforced by our office.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Melanie Lawrence', with a long horizontal flourish extending to the right.

Melanie Lawrence
Interim Chief Trial Counsel

Proposed Rule 1.2.1 Public Comment Form

Commenting on behalf of an organization	No
Name	Robert Traylor
City	Lompoc
State	California
Email address	rob@roberttraylorlaw.com
If you have a preference (for either Alternative 1 or 2.), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018

Proposed Rule 1.2.1 Public Comment Form

Professional Affiliation	Lozano Smith
Commenting on behalf of an organization	No
Name	Mark K. Kitabayashi
City	Los Angeles
State	California
Email address	mkitabayashi@lozanosmith.com
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018
Attachment	Comment_Letter.pdf (304k)



Mark K. Kitabayashi

E-mail: mkitabayashi@lozanosmith.com

July 3, 2018

Via Electronic Upload: fs16.formsite.com/SB_RRC/1-2-1/index.html

Ms. Angela Marlaud
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Re: Comment Regarding Proposed Rule 1.2.1

Dear Ms. Marlaud:

The following is in response to the Commission for the Revision of the Rules of Professional Conduct's ("Commission") invitation for public comment to Rule 1.2.1 and the two proposed alternative versions. As a firm that provides advice and counsel to certain clients regarding marijuana dispensaries, we support the adoption of Alternative 2 ("Alt2").

In particular, under the first sentence in Alt2, Comment No. 6, the addition of "interpreting" California laws is vital as an essential function of an attorney's obligations toward his/her clients. We are asked regularly to interpret the law through recommendations for the protection of our clients and the inclusion of the term "interpreting" leaves no room for misunderstanding of our obligation when advising and/or assisting a client with respect to the legal consequences of any proposed course of conduct related to cannabis, or to make a good faith effort to determine the validity, scope, meaning, or application of laws relative to same.

Thank you for your consideration.

Sincerely,

LOZANO SMITH

A handwritten signature in blue ink, appearing to read 'Mark K. Kitabayashi', with a long horizontal flourish extending to the right.

Mark K. Kitabayashi

MKK/MFL
[00586233]

Limited Liability Partnership

7404 N. Spalding Avenue Fresno, California 93720-3370 Tel 559-431-5600 Fax 559-261-9366

Proposed Rule 1.2.1 Public Comment Form

Professional Affiliation	Lawyer
Commenting on behalf of an organization	No
Name	Jerome Sapiro, Jr.
City	San Francisco
State	California
Email address	jsapiro@sapirolaw.com
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	See attachment
Attachment	498ltr_Commission_re_1.2.1.docx (24k)

THE SAPIRO LAW FIRM

77 VAN NESS AVENUE, SUITE 201
SAN FRANCISCO, CA 94102-6042
(415) 771-0100

JEROME SAPIRO, JR.
DAVID A. SAUERS
GARY ALABASTER
JOHN FINBARR HAYES (1932-2016)

July 3, 2018

Commission for the Revision of the Rules of Professional Conduct
The State Bar of California
180 Howard Street
San Francisco, CA 94105

re: Proposed Comment 6, Rule 1.2.1

Ladies and Gentlemen:

I did not review the proposals until today. I regret not having done so sooner.

I prefer the Commission's edits. However, I offer two suggestions.

In the second sentence is the phrase, “. . . the lawyer may assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law.” The word “drafting” makes the intent of that part of the phrase unclear. If the Commission intends that the lawyer may only draft laws, then the word “drafting” is correct. That is illustrated by abridgment of the phrase to state, “. . . the lawyer may assist a client in drafting, . . . California laws, However, lawyering involves more than that. For example, a lawyer may be involved with negotiating and drafting documents other than laws. That should also be permissible under the proposed comment. I fear that there is a risk that, under the traditional concept *inclusio unius exclusio alterius*, there is a risk that the comment may be interpreted to mean that drafting anything other than a law is prohibited. That mistaken interpretation should expressly be precluded by the wording of the comment.

In the third sentence is the phrase, “. . . the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict” In my opinion, a lawyer in this situation should do more than just advise the client about the conflict between the laws. Merely stating that the laws conflict is inadequate. I suggest that the concept be expanded to include requiring the lawyer to warn the client about the potential consequences to the client if the client is found to have violated federal or tribal law. For example, one way of phrasing the expansion could be: “. . . the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict *and the*

Commission for the Revision of the Rules of Professional Conduct

July 3, 2018

Page 2

reasonably foreseeable potential consequences to the client if the client is found to have violated federal or tribal law.”

Thank you for your good work.

Sincerely,

Jerome Sapiro, Jr.

9930.16:498

Proposed Rule 1.2.1 Public Comment Form

Commenting on behalf of an organization	No
Name	Joshua Mandell
City	Los Angeles
State	California
Email address	joshua.mandell@akerman.com
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	See letter dated July 3, 2018
Attachment	Letter_to_State_Bar_re_Rul_1.2.1.PDF (49k)

July 3, 2018

VIA ONLINE SUBMISSION

Ms. Angela Marlaud
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

**Re: PUBLIC COMMENT RE PROPOSED RULE OF PROFESSIONAL CONDUCT
1.2.1 ALTERNATIVE 2 - SUPPORT**

Thank you for the opportunity to provide a public comment regarding the two alternate versions of proposed Rule of Professional Conduct 1.2.1. As explained below, we urge the adoption of Alternative 2.

Akerman LLP is the first large law firm to form a national cannabis practice group. As the number of states legalizing cannabis for medical and adult use increases, there is growing disparity between federal and state laws concerning controlled substances. Businesses involved in the legal cultivation, processing, and distribution of cannabis, as well as those providing ancillary services, face an array of legal issues, including banking, regulatory compliance, branding and IP, federal taxation, corporate transactions and dispute resolution.

Our clients include cannabis investment funds, cultivators, processors, dispensaries and distributors, and suppliers of ancillary products and services. Our clients seek legal solutions to the full range of rulemaking, regulatory, transactional, legislative, and litigation challenges they confront and we seek to provide clear advice about the varying contours and conflicts within the law that must be navigated and respected. In undertaking such representation, we take pride in both our entrepreneurial spirit and our adherence to the canons of legal ethics. For example, I recently presented on a panel concerning Legal Ethics in the Representation of Cannabis Clients hosted by the Los Angeles County Bar Association.

California is implementing the Country's most robust regulations of cannabis businesses. State law requires licensing approval from both the State and local jurisdictions. State licensing applications require that, among other things, applicants submit copies of corporate documentation. The preparation such documentation naturally falls on the shoulders of attorneys. Moreover, with 58 counties and 482 incorporated cities across the State, each with the ability to

adopt their own rules, California's patchwork of laws demands that attorneys undertake the representation of clients in the cannabis industry. We have also heard that State and local regulators prefer that applicants be represented by counsel. In short, there are many reasons why the availability and assistance of counsel is important as California becomes the Country's largest and most important regulated cannabis economy. At the same time, we have heard attorneys express fear and discomfort in undertaking the representation of cannabis clients due solely to the conflict between state and federal law. These attorneys have informed us that they turned away prospective clients because of this issue.

Alternative 2 to proposed Rule 1.2.1, Comment [6], is preferable to Alternative 1 because the language "even if the client's actions might violate the conflicting federal or tribal law" expressly recognizes the conflict among the laws and in doing so clarifies that the attorney may nonetheless advise the client about how to comply with California law without fear that in giving such advice that the attorney is engaged in unethical conduct. This simple but important clarification will remove a barrier to entry and provide the comfort many attorneys currently lack but seek before agreeing to undertake the representation of clients in California's regulated cannabis industry. It will also provide important comfort to attorneys already engaged in the representation of clients in the cannabis industry that the services they provide are still within the bounds of ethical conduct. Accordingly, we urge the adoption of Alternative 2.

Sincerely,

/s/ Joshua Mandell

Joshua Mandell

Proposed Rule 1.2.1 Public Comment Form

Professional Affiliation	Various firms as listed on pages 4 and 5 of the attached pdf
Commenting on behalf of an organization	Yes
Name	Javier Bastidas
City	San Francisco
State	California
Email address	jbastidas@lpslaw.com
If you have a preference (for either Alternative 1 or 2,), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	None of the Alternatives Above
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Please see attached letter (five pages).
Attachment	01364317.PDF (275k)

July 3, 2018

Via Electronic Transmission Only

Angela Marlaud
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
E-mail: angela.marlaud@calbar.ca.gov

Re: Comments re Proposed Rule 1.2.1 of the Rules of Professional Conduct

Dear Ms. Marlaud:

These comments are hereby submitted pursuant to determination by the Rules Revision Commission (the "Commission") to take public comment on proposed **Rule 1.2.1** ("the Rule"). The Rule is currently under review by the Board of Trustees for the State Bar of California (the "Board"). While the Rule does not specifically address cannabis laws it does relate to conflicts between federal and state law and policy. As cannabis remains illegal at the federal level but well-regulated by California, the Rule will affect the practice of law in the cannabis industry and these comments will focus on Comment [6] to the Rule, as it pertains to lawyers practicing in the cannabis industry. For the reasons stated below, we respectfully request the Board reject all proposed changes and revert to the original language of Comment [6] or, in the alternative, adopt "Alternative Two" with recommended changes as set forth in detail below.

On March 30, 2017, when the Board presented the proposed Rule to our High Court, the language for Comment [6] read as follows:

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law policy.

In its April 11, 2018 Administrative Order, the Supreme Court directed the Board to consider the following language ("Alternative One") instead:

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in ~~conduct that the lawyer reasonably believes is permitted by~~ drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions ~~implementing that~~ execute or apply to those laws. If California law conflicts with federal or tribal law, the lawyer ~~should also advise~~ must inform the client ~~regarding about~~ related federal

or tribal law policy (see rule 1.4), and under certain circumstances may be required to provide legal advice to the client regarding the conflict (see e.g., rule 1.1).

The proposed language is vague, discourages participation by the legal community, and encourages illegal market activity.

First, the phrase, "*to assist a client in drafting, administering, or complying with California statutes, regulations, orders, and other state or local provisions that execute or apply to those laws*" is somehow both too limited and overly vague. For instance, it is clear by the language that drafting laws (e.g., rulemaking) and administering laws (e.g., working within government departments) related to cannabis would be permitted activities. But the majority of licensed attorneys neither draft nor administer cannabis laws. In this way, the language is extremely limited. However, it then reads that attorneys can assist a client in complying with a cannabis law. One might interpret this strictly-- to advising on what a statute requires (e.g., what application materials must be submitted)—or broadly (e.g., helping a client do anything reasonably related to a regulated business). In this way, the language is vague and uncertain.

Obviously, attorneys cannot and should not be permitted to assist clients in breaking applicable law. Thus, the use of the word, "comply," would seem unnecessary if it is not intended to limit the attorney's actions. Drafting a contract that is not specifically required under applicable law (e.g., a license agreement), advocating a client's position in court or at a public hearing, and filing documents on behalf of a cannabis client may not be "assistance in compliance" and could each be interpreted as prohibited conduct, leaving an attorney subject to disciplinary proceedings and ultimately a loss of her/his license to practice. With the above language, it is altogether unclear where the State's disciplinary body would draw the line as to what attorney activity is acceptable and what actions cross that line as violations of the State's rules on proper, ethical behavior for attorneys. One purpose of the Rules of Professional Conduct and attendant Comments is to put attorneys on notice as to the acceptable scope of representation. As a result, we urge the Board to reject the proposed language as vague and unnecessarily restrictive.

Second, should the Board accept this new language as submitted, it would have a chilling effect on attorneys advising clients in the cannabis industry and pose an unnecessary risk to the cannabis industry as a whole, as attorneys and firms determine the practice area to be too risky. The resulting void of quality legal services in the burgeoning cannabis industry will only serve to leave open a door for exploitation of licensed businesses and result in even the best cannabis businesses hiring personnel who will find themselves offering legal advice and opinions about compliance without a license. Just a few years ago, uncertainty about legality in this area resulted in cannabis entrepreneurs seeking corporate legal advice from untrained attorneys or members of the defense bar who were tolerant of the risks pertaining to the field. That advice in turn led to a large number of legal issues for such businesses, which are starting to enjoy more informed counsel as more and more attorneys enter the field. Any reversion to previous conditions is not healthy for California or the attorneys licensed to practice here.

Third, a regulated cannabis industry is not going away, and has only grown in California over the past 20 years. Californians have overwhelmingly decided to encourage this industry and the lawmakers created a complex regulatory environment to do so. We now have an obligation to provide attorneys who feel confident about openly helping these companies navigate the complex regulations in an ethical and lawful manner. Potentially turning lawyers into criminal accomplices, or threatening disciplinary action or suspension of attorneys' licenses, for mere involvement in this industry will most certainly foster a rogue industry. Left without quality legal counsel, these state-legal businesses will repeatedly find themselves, unintentionally or otherwise, running afoul of regulations.

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We believe that the Commission is aware of these issues and perhaps that explains why the Commission has presented an alternative to the High Court's proposed version of Comment [6]. While we believe the simple solution to resolve the issues discussed above is a return to the original language for Comment [6], we understand that the Board may feel compelled to make modifications to the language given the High Court's order to reconsider.

However, should the Commission recommend, or the Board decide to reject, the original language, we would support the adoption of Alternative Two of Comment [6] as preferable to Alternative One. While we appreciate the Commission's attempts to provide clarity with regard to what legal assistance is allowable, the proposed language of both versions under consideration still falls short to adequately protect this sector. The relevant language of Alternative Two reads as follows:

In the event of such a conflict, ~~to~~ the lawyer may assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions ~~that execute or apply to those laws~~, even if the client's actions might violate the conflicting federal or tribal law.

The last line of the above excerpt is what renders Alternative Two, in part, preferable to Alternative One. The inclusion of "interpreting" to the list of acceptable activities is also a welcome addition, and the use of "including" makes the entire clause more expansive, but we ask that the Commission also consider inserting "advocating," "negotiating," and "filing" to this list. Even so, attempting to capture all the actions a lawyer might possibly perform on behalf of a client under the Rule may be an impossible task, leaving attorneys still vulnerable to disciplinary action. However, the provision overall still suffers from lack of clarity and limited scope.

Therefore, we would unanimously support the addition of a **safe harbor** provision to protect that sector of the Bar assisting state-compliant cannabis businesses. There is precedent for such types of protection (*please see* AB 1159, codified by Section 1550.5 of the Civil Code and Section 956 of the Evidence Code). Respectfully, we request that the following clause be inserted at the end of Comment [6]:

"This Rule shall not be interpreted so as to limit or prohibit the provision of advice or services rendered in compliance with state and local cannabis laws and regulations."

The inclusion of one sentence could make clear to counselors across that state that they will not be targeted solely on the basis of their client list and will serve the state's newly legal cannabis industry well. We require higher numbers of experienced attorneys to practice in this field in order to properly and smoothly transition into the projected market.

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We sincerely hope that our collective voice as attorneys practicing in this field will help sway the Commission when it makes its Recommendations to the Board. Thank you for your time and consideration of these comments. Please feel free to reach out to us if you have any questions.

Very truly yours,



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Proposed Rule 1.2.1 Public Comment Form

Commenting on behalf of an organization	No
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If you have a preference (for either Alternative 1 or 2.), please indicate which proposed rule alternative you support. If you do not have a preference, select "None of the Alternatives Above" and specify terms of your proposal. If you believe no rule is necessary, please state your reasons.	Alternative 2 - Commission's Proposed Rule Adopted on May 8, 2018