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(Draft #6, for 6/8/19 Meeting)

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**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 17-0001**

ISSUES: May a lawyer provide advice and assistance to a client with respect to conduct permitted by California's marijuana laws, despite the fact that the client's conduct, although lawful under California law, might violate federal law?

DIGEST: A lawyer may ethically advise a client concerning compliance with California's marijuana laws and may assist the client in conduct permitted by those laws, despite the fact that the client's conduct may violate federal law. Such advice and assistance may include the provision of legal services to the client that facilitate the operation of a business that is lawful under California law (e.g., incorporation of a business, tax advice, employment advice, contractual arrangements and other actions necessary to the lawful operation of the business under California law). A lawyer may not, however, advise a client to violate federal law or provide advice or assistance in violating state or federal law in a way that avoids detection or prosecution of such violations. The lawyer must also inform the client of the conflict between state and federal law, including the potential for criminal liability, the penalties that could be associated with a violation of federal law, and, where appropriate, must advise the client of other potential impacts upon the lawyer-client relationship, including the attorney-client privilege, that may result from the fact that the client's conduct may be prohibited under federal law.

AUTHORITIES

INTERPRETED: Rules of Professional Conduct 1.1, 1.2.1, 1.4, 1.4.2, 1.6, 1.7, 1.8.1, 8.4;
Business and Professions Code §6068 (a), 6106.

California has recently adopted a comprehensive and complex regulatory scheme covering the use, production, and sale of marijuana for both medicinal and adult recreational use. Many local California communities also regulate marijuana businesses. At the same time, both possession

CLEAN

and commercial production, distribution and sale of marijuana remain unlawful under federal law, with violators potentially subject to criminal penalties and civil forfeitures. Those wishing to engage in a California based marijuana business need compliance advice with respect to both state and federal law and assistance in establishing and operating businesses that comply with state law. Lawyers wishing to provide such services are, however, understandably concerned that counseling or assisting conduct that may violate federal criminal law will subject them to discipline for professional misconduct. Relying in significant part on recent changes to the California Rules of Professional Conduct, this opinion aims to address those concerns.

STATEMENT OF FACTS

A lawyer has been asked to advise and assist a client who plans to conduct a business engaged in growing, distribution and/or sale of marijuana within the State of California. The client seeks advice and assistance that will enable her to comply with California laws permitting, regulating and taxing such activities, including obtaining any required permits and dealing with state and local regulatory authorities. She also would like advice and assistance with respect to related business activities, including business formation, financing, supply chain contracts, real estate, employment law, and taxation.

In addition, the lawyer and the client have been discussing several aspects of the proposed representation, including (1) the possibility that the lawyer will hold client funds in excess of any amount required to cover legal fees in the lawyer's client trust account, as a "rainy day" fund against the possibility that federal authorities will seize the client's assets; (2) the possibility that the lawyer will assist the client in establishing off shore bank accounts into which the proceeds of the business will be placed; (3) the possibility that in lieu of fees, the lawyer will be compensated for her services by acquiring an interest in the client's business.

DISCUSSION

I. Scope of the Opinion

The conflict between state and federal law that gives rise to the need for this opinion presents difficult questions concerning the relationship between those two bodies of law. This opinion, however, is limited to the issue of the lawyer's obligations—and susceptibility to professional discipline—under the California Rules of Professional Conduct and the State Bar Act when providing advice and assistance with respect to conduct regulated under both state and federal law. This opinion does not address any issues of federal criminal law, except as assumed background for its ethical analysis, does not assess the likelihood of criminal or civil proceedings stemming from alleged violations of federal criminal law, and is not binding on state or federal

law enforcement authorities. Nor does it address the effect of a criminal conviction of a lawyer in a subsequent disciplinary proceeding against the lawyer. *See* Business & Professions Code §§ 6101-02. Finally, because the opinion is based on California law and policy, its conclusions are limited to California lawyers counseling or assisting with respect to conduct occurring in California.

II. Legal Background

As is now well known, federal law and California law differ in their approach to the cultivation, possession, distribution and sale of marijuana. Under the federal Controlled Substance Act (“CSA”), it is illegal to manufacture, distribute or dispense a controlled substance, including marijuana, or to possess a controlled substance with intent to do any of those things. (21 U.S.C. § 841 (a) (1); 21 U.S.C. § 812, Schedule 1 (c) (10); (d)). Depending on the quantities involved and other factors, penalties for violating those laws can range from five years to life imprisonment. 21 U.S.C. §§ 841 (b) (1) (A)-(B) and 960 (b). A person who “aids, abets, counsels, commands, induces or procures” the commission of a federal offense or who conspires in its commission is punishable as a principal to the offense. 18 U.S.C. §2 (a); 18 U.S.C. §371; 18 USC §846. It is also illegal to possess marijuana, even for personal medicinal use. *Id.* §812, §844 (a). .

In addition to criminal prosecution, persons engaged in the production, distribution or sale of marijuana in violation of federal law are subject to forfeiture both of assets used in operating that business and in proceeds traceable to its operation. 18 U.S.C. §§ 981, 983. Such assets could include bank accounts, investor profits, including those already paid out to investors, land and buildings.

Notwithstanding this federal prohibition, thirty-three states have taken steps to legalize marijuana.¹ Thirty states have legalized marijuana for medical use. Ten states have legalized marijuana for adult recreational use. California has legalized both medical and recreational use. The California approach to medical marijuana was originally codified in the Compassionate Use Act of 1996 (“CUA”), Health & Safety Code § 11362.5, as supplemented by the Medical Marijuana Program Act (“MMPA”), relating to the prescription, possession and use of marijuana for medicinal purposes. That statute has now been greatly expanded, and in significant part replaced, by the Medicinal and Adult-Use Cannabis Regulation and Safety Act of 2017 (“MAUCRSA”), which comprehensively regulates cultivation, transport, distribution and sale of marijuana for both medicinal and adult recreational use. This statutory framework has in turn

¹ See National Conference of State Legislatures, Marijuana Overview [<http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> (last accessed March 26, 2019)].

CLEAN

given rise to an extensive scheme of regulations promulgated by the Bureau of Cannabis Control, 16 California Code of Regulations § 5000 et seq., the California Department of Public Health, 17 California Code of Regulations § 40100 et seq., and the California Department of Food and Agriculture, 3 California Code of Regulations § 8000 et seq. Possession, prescription, use, cultivation, transportation, distribution, testing and sale of marijuana that complies with the CUA, MMPA or the permitting and regulatory requirements of the MAUCRSA is not subject to criminal punishment or assets seizure under state law. Health and Safety Code §11362.5 (c), (d); 11362.7-.83; Business & Prof. Code § 26032 (a). Conduct falling outside those boundaries, however, remains subject to criminal prosecution and civil forfeiture under state law. Health & Safety Code §§11357-61; 11469-95.

Because California law permits and regulates conduct that is criminal under federal law, there is a potential conflict between federal and state law regulating marijuana. . There is recent authority that regulation of intrastate cultivation, possession, use and commercialization of marijuana is a lawful exercise of Congressional power to regulate interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). It is also clear that federal law will not recognize a non-codified defense of medical necessity to a prosecution under the CSA, even in a state which has legalized and regulated medical marijuana. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). Accordingly, California courts construing the CUA and MMPA have concluded that the permissions and exemptions granted by those statutes under California law have “no impact on the legality of medical marijuana under federal law.” *City of Garden Grove v. Superior Court* (2007) 157 Cal. App. 4th 355, 385; *Qualified Patients Ass’n v. City of Anaheim* (2010) 187 Cal. App. 4th 734, 759. . At the same time, California marijuana laws are not preempted by federal law. There is no express or field preemption relating to marijuana. *Qualified Patients*, 187 Cal. App. 4th at 756-58. Moreover, because California has chosen to legalize complying marijuana related activities by suspending state criminal law enforcement, rather than by requiring conduct unlawful under federal law, there is no direct conflict preemption. *City of Garden Grove*, 157 Cal. App. 4th at 385; *Qualified Patients*, 187 Cal. App. 4th at 758-59. Nor is there obstacle preemption, since under anti-commandeering principles state agencies cannot be compelled to enforce federal law and since the ability of federal authorities to enforce those laws is unimpaired by California law. *Qualified Patients*, 187 Cal. App. 4th at 759-63, *County of San Diego v. San Diego NORML* (2008) 165 Cal. App. 4th 798, 827.

Though federal authorities thus have the power to enforce federal criminal law against persons who are exempt from state prosecution because they are in compliance with state law, in recent years they have used that power sparingly. In the so-called Cole Memorandum, the United States Department of Justice advised that it did not intend to use federal resources to prosecute under federal law, patients and their caregivers who were in “clear and unambiguous compliance” with state medical marijuana laws, except in cases involving broader issues of federal policy, such as sale to minors or money-laundering. Memorandum from James M. Cole,

Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013). More recently, then Attorney General Sessions declared that in deciding which marijuana cases to prosecute, given limited resources, federal prosecutors “should follow the well-established principles that govern all federal prosecutions” and rescinded prior Justice Department guidance with respect to medical marijuana prosecutions as unnecessary. Memorandum from Jefferson B. Sessions, Attorney General, to All United States Attorneys, Marijuana Enforcement (January 4, 2018). In addition, in 2014, Congress passed the Rohrabacher-Farr amendment to an appropriations bill, which prohibited the Justice Department from spending appropriated funds to prevent enumerated states, including California, from implementing state laws that authorize the use, distribution, possession or cultivation of medical marijuana. That amendment has been repeatedly renewed since then, most recently in February 2019. The Amendment has been interpreted as prohibiting federal prosecutors from spending funds for the prosecution of individuals who engage in conduct permitted by state medical marijuana laws in full compliance with those laws. *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

In summary, California has established an extensive and complex scheme of state and local regulation of the production, distribution and use of both medical and recreational marijuana. Compliance with that scheme results in exemption from relevant state criminal penalties; non-compliance can lead to criminal and civil sanctions under state law. Much of the conduct permitted under California’s regulatory scheme is subject to prosecution as a federal felony or misdemeanor; under the federal scheme compliance with state law may sometimes provide a defense in medical marijuana cases, but is unlikely to do so in cases involving recreational use. Indeed, a lawyer’s assisting such conduct may itself be a federal crime.

III. Counseling and Assisting with Respect to California and Federal Marijuana Law.

Four provisions bear directly on the question whether California-licensed lawyers are subject to discipline for providing advice or assistance with respect to state and federal marijuana law: California Rule 1.2.1 (Advising or Assisting the Violation of Law); California Rule 8.4 (b) (“commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness or fitness in other respects”); Business and Professions Code 6068(a) (Supporting the Constitution and Laws of the United States and This State); and Business & Professions Code §6106 (Moral Turpitude, Dishonesty or Corruption). Because rule 1.2.1, which became effective November 1, 2018, is the most recent, complete and authoritative statement of California’s approach to these questions, we analyze it first, and then discuss the remaining three provisions in light of that analysis. Our discussion builds on two important county bar association opinions dealing with this topic: Bar Association of San Francisco, Opinion 2015-1 and Los Angeles County Bar Association Opinion No. 527 (2015). Though both those opinions precede the adoption of Rule 1.2.1, their analysis informs and reinforces ours.

A. Counseling and Assisting Under Rule 1.2.1 and Comment [6]

Rule 1.2.1 provides as follows:

“(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*

“(b) Notwithstanding paragraph (a), a lawyer may:

- (1) discuss the legal consequences of any proposed course of conduct with a client; and
- (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal.”

The rule does not define the critical terms “counsel” or “assist.” Like other California ethics Committees that have dealt with this issue, we adopt the definitions of those terms used in the Restatement (Third) of the Law Governing Lawyers § 94 (2000). That section defines counseling, by a lawyer, as “providing advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client's action.” Restatement § 94, Comment (a), para. 3. It defines “assisting a client” as providing, with a similar intent, other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency.” Id.

Comment [6] to rule 1.2.1 provides specific guidance for situations involving conflicts between state and federal law. It states in full:

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, or administering, or interpreting 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. If California law conflicts with federal or tribal law, the lawyer must inform the client about related tribal or federal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see Rules 1.1 and 1.4).

Permitted Advice. Under Rule 1.2.1 and Comment [6] a lawyer may provide advice concerning the validity, scope and meaning of California state and local laws permitting and regulating the production, distribution and sale of marijuana, even if the client’s contemplated course of conduct clearly violates federal law, so long as the lawyer believes that the client is engaged in a good faith effort to comply with California law. That permission is express in comment [6]. It is

also supported textually by rule 1.2 (b). Rule 1.2.1 (b) (1) permits “advice” concerning the consequences “of any proposed course of conduct,” including courses of conduct that the lawyer knows to be criminal or fraudulent. And Rule 1.2.1 (b) (2) permits a lawyer to counsel or assist a client to “make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, rule, or ruling of a tribunal.” These provisions collectively support the conclusion that “a lawyer is not advising a client to violate federal law when the lawyer advises the client on how not to violate state law.” LACBA No. 527 at 9.

At the same time, any advice that the lawyer gives about California law must be accompanied by clear and explicit information about any conflict with related federal law and policy. The Comment does not specify the level of detail that the lawyer must provide, but common sense suggests that given the current state of California and federal law relating to marijuana, the lawyer must at a minimum explain clearly that the client’s contemplated conduct violates federal criminal law, the penalties for such a violation, and any related risks of civil forfeiture. Often, as the Comment itself suggests, the lawyer’s duty of competence may require more detailed advice, a subject that we discuss further below.

In addition, the lawyer’s right to advise concerning compliance with California law does not extend to advice about how to avoid detection of, or to conceal, a violation of California or federal criminal law. This conclusion is reinforced by Comment [1] to the Rule, which notes “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.” *Accord*, Los Angeles No 527 at 12 (“advice and assistance directed to violating federal law is not permitted”).

Permitted Assistance. Comment [6] states explicitly that in cases of conflict between California and federal law a lawyer may assist a client in “interpreting or complying with California laws...even if the client’s actions might violate the conflicting federal... law.” On its face, this language encompasses assistance in conduct that raises an actual or potential issue of interpretation or compliance with state or local laws regulating marijuana, but it is not limited to such assistance. Rather the inclusive term “California laws” permits a lawyer dealing with a conflict between state and federal law to assist in conduct calling for interpretation of or compliance with any laws that are relevant to the client’s proposed actions, including generally applicable laws relating to contracts, real property, employment, taxation, and other subjects, even “if the client’s actions might violate...federal law.”

This reading is supported by considerations of policy. The case for permitting assistance in interpreting or complying with California marijuana laws is strong: “if a lawyer is permitted to *advise* a client on how to act in a manner that would not result in a California crime, the lawyer should be able to *assist* a client in carrying out that advice so the California crime does not occur.” LACBA No. 527 at 11 (emphasis in original). Given the complexity and pervasiveness of the California regulatory scheme, and the severe consequences of a violation, it makes sense

to construe the client’s right to assistance to encompass every situation where such a violation could occur—the proposed reading of the term “California laws” accomplishes that goal. In addition, a rule that permitted assistance in interpreting and complying with California marijuana law (say, by helping to obtain a permit) but denied assistance in interpreting and complying with the general laws applicable to the formation and operation of that business would hardly advance the California substantive policies in question. Finally, to the extent that the concern is the degree of conflict between federal and state law, it would make little sense to authorize assistance in interpreting or complying with California law that conflicts with federal law, while denying such assistance with respect to California laws that raise no issue of conflict.

The lawyer’s permission to assist is not, however, unlimited. It, too, is conditioned upon the lawyer having provided information about the conflict between state and federal law in the manner required by the Rule. Moreover, the permission to assist, like the permission to give advice, does not extend to assistance in evading detection or prosecution under state or federal law. *Id.* Comment [1]; LACBA 527 at 12.²

Limitations on the lawyer’s ability to provide assistance imposed by rule 1.2.1 may also trigger obligations to communicate with the client under rule 1.4.³ Specifically rule 1.4 (a) (4) provides

² None of these conclusions depend on the content of federal enforcement policy, which is not a factor discussed in any of the relevant provisions. The fact that a federal law is not regularly enforced does not by itself render the law a nullity or relieve those subject to the law of their obligation to comply. Moreover, because the specifics of announced federal enforcement policies can and do change with changing times and changing administrations, they provide uncertain support for ethics policy making. That does not mean that federal enforcement policy is irrelevant to the conclusions reached here. Most obviously, if federal enforcement policy resulted in regular and successful prosecution of marijuana businesses conducted in compliance with state law, or of their lawyers, there would, as a practical matter, be little or no interest in the questions explored here. In addition, it is relevant that the broad course of federal enforcement in recent years reflects few, if any, prosecutions, despite the fact that over the same period thirty-three states have legalized medicinal or adult use of marijuana. Given that this course has persisted (1) through different administrations and under different written policies, (2) in the face of a vast expansion of state-regulated commercial activity occurring in plain view, (3) without apparent Congressional challenge, and, (4) in the medical marijuana arena, with some direct Congressional support, it is difficult not to view it as indicating some federal tolerance, if not support, for good faith state experimentation in this field of law.

³ Rule 1.4 provides, in pertinent part that:

(a) A lawyer shall:

that a lawyer who knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law must advise the client of the relevant limitations on the lawyer's conduct.

Other California Authorities: Our reading of rule 1.2.1 is consistent with the policy considerations previously identified in other California authorities on this issue. California residents are entitled, as a matter of fairness, to understand “their rights, duties and liabilities” under California law. San Francisco Opinion 2015-1 at 3; LACBA No. 527. This consideration is especially powerful where, as here, the law involved is complex and criminal sanctions are associated with its violation. Such advice also advances California public policy by increasing the likelihood that the purposes of California’s comprehensive and complex regulatory scheme will be fulfilled. These goals can be accommodated, consistent with respect for federal law, provided that lawyers also provide meaningful information on conflicting federal law and policy and the sanctions for its violation. SF 2015-1 at 3; LACBA 527 at 13. In the case of marijuana specifically, this balance of policy goals is strongly and independently reaffirmed by recent California legislation, signed by the Governor, amending the crime-fraud exception to the California attorney client privilege to provide that the exception “shall not apply to legal services rendered in compliance with state and local laws on medical cannabis or adult use cannabis” and that “communications for the purpose of rendering those services” remain privileged, provided that the “lawyer also advises the client on conflicts with respect to federal law.” California Evidence Code §956 (b). That legislation aligns all three branches of state government in support of the approach outlined here.⁴

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client’s informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client’s objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer’s conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

⁴ Similar approaches to the ethical issues of counseling and assisting conduct permitted by state laws have now been adopted in virtually every jurisdiction that has legalized marijuana for medical or adult recreational use. In some states, the conclusion is reflected in an opinion construing existing Rules of Professional Conduct, *see, e.g.*, Arizona Ethics Opinion 11-01; Illinois Informal Opinion 14-07, New York State Bar Association, Opinion 1024 (2014);

B. Counseling and Assisting Under Other Relevant Provisions of California Law.

Several other rules and statutes can be read as bearing on the scope of permitted counseling and assistance to a California marijuana business. Our construction of those provisions is informed by our reading of Rule 1.2.1, because it represents the most recent, specific and authoritative statement of California disciplinary policy on these issues.

Rule 8.4 (Maintaining the Integrity of the Profession) provides that it is “professional misconduct for a lawyer to: ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.” The rule potentially applies because there could be circumstances where a lawyer’s counseling or assistance in conduct permitted by California marijuana law could be prosecuted as a criminal act under federal law. Our conclusion is that so long as the lawyer conduct at issue complies with rule 1.2.1, and in particular with the balance struck in that rule between promoting the objectives of state law and candid advice and non-deceptive conduct concerning federal law, any resulting crime should not be viewed for disciplinary purposes as “reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness in a lawyer in other respects.”

Business and Professions Code Section 6068 (a) provides that it is the duty of an attorney “[t]o support the Constitution and laws of the United States and of this state.” For the reasons elaborated above, we conclude that conduct that complies with rule 1.2.1 sufficiently supports both California and federal law to comply with this provision.

Finally, Business and Professions Code Section 6106 states, in pertinent part, that “[t]he commission of any act involving moral turpitude, dishonesty or corruption...constitutes a cause for disbarment or suspension.” Again, for the reasons stated above, we do not think that counseling or advice that complies with rule 1.2.1 can properly be viewed as involving “moral turpitude, dishonesty, or corruption” for purposes of discipline under California law.

C. Counseling and Assistance: Analysis of the Statement of Facts

Based on this background, we conclude that the lawyer in the Statement of Facts may, consistent with the California Rules of Professional Conduct and the Business and Professions Code, provide advice and assistance to any client whom the lawyer believes to be engaged in a good

Washington Advisory Opinion 2015-01; in some by new or amended Rules of Professional Conduct, *e.g.*, Colorado Rules of Professional Conduct 1.2, Comment [14], Nevada Rules of Professional Conduct 1.2, Comment [1]; in some by statute, Minnesota Statutes 152.32 (i); and in some by changes in prosecutorial policy. *See, e.g.*, Board Adopts Medical Marijuana Advice (Florida, June 15, 2014); Massachusetts BBO/OBC Policy on Legal Advice on Marijuana (March 29, 2017). The statutes and rules in each of these states differ in their details from those in California—but the similar approaches adopted reflect broadly shared judgments concerning how best to balance the underlying policies.

faith effort to comply with state or local laws regulating the medicinal or adult-recreational use of marijuana. The lawyer may also provide such advice and assistance in interpreting any other relevant California law, including generally applicable laws relating to entity formation, contracting, real estate, employment and taxation. Accordingly, the lawyer may both advise and assist the client in, among other things, obtaining regulatory approvals necessary to conduct a marijuana business, in drafting documents and negotiating transactions, and in other steps reasonably required to make that business functional and profitable, in compliance with California law.

The lawyer may not, however, provide advice or assistance in conduct that enables the client to evade detection or prosecution under California or federal law. The client's request that the lawyer permit the client to create a "rainy day fund," kept in the lawyer's trust account, to protect against the risk of a federal seizure of the client's assets clearly falls into that category, since it seems principally intended to conceal those assets from federal law enforcement. The client's request for assistance in establishing off shore bank accounts to receive the proceeds of the business very likely falls into the forbidden category as well. If the lawyer knows that the client expects such assistance, the lawyer should advise the client of the limitations on the lawyer's conduct imposed by the Rules of Professional Conduct and the State Bar Act. Rule 1.4 (a) (4).

IV. Additional Ethical Considerations

Competence. Competent representation of a regulated marijuana business requires specialized learning: notably mastering a novel, complex and rapidly evolving body of state and local statutes and regulations. In addition, the scope of competent representation will always encompass the basic information on conflicting federal law that must be provided to comply with rule 1.2.1, and may often require additional advice going beyond such information. A lawyer who is unable to acquire the full range of required learning through study, or through consulting or associating another attorney, should limit the representation to those issues where she has or can acquire the requisite learning, and advise the client to obtain separate counsel with sufficient learning to represent the client on other issues presented. Rule 1.1.

Confidentiality and Privilege. Traditionally, under California law, there is no attorney-client privilege "if the services of the lawyer were sought or obtained to enable anyone to commit or plan to commit a crime or fraud." Cal. Evid. Code §956 (a). As described above, the Evidence Code has now been modified to make clear that this crime-fraud exception does not apply to "legal services rendered in compliance with state and local laws on medical cannabis or adult use cannabis," and that confidential communications provided for the purpose of rendering those services remain privileged, "provided the lawyer also advises the client on conflicts with respect to federal law." *Id.* Section 956 (b).

Under this provision, a client whose lawyer has complied with rule 1.2.1 may be able to claim the privilege in a state court proceeding. But in a federal criminal or forfeiture proceeding, the

governing privilege law will be federal, and the federal, rather than the state, crime-fraud exception will apply. *United States v. Zolin*, 491 U.S. 554 (1989). The trigger for that exception is that the lawyer’s advice was sought in furtherance of a federal crime. *Id.* To the extent that conduct permitted under state law constitutes a federal crime, there is a risk in a federal court proceeding that the lawyer’s files may be discoverable and the lawyer may be called as a witness, that the court will rule that because of the crime-fraud exception the privilege does not apply to confidential communications between lawyer and client, and that the lawyer will be ordered to testify concerning those communications. In those circumstances, the lawyer may face a conflict between her statutory duty of confidentiality under California law, which contains no express exception for compliance with a court order, *see* Rule 1.6 and Business and Professions Code § 6068 (e), her statutory obligation to obey a court order, Business and Professions Code § 6103, *In the Matter of Collins*, 2018 WL 1586275 (State Bar Ct. Rev. Dep’t 2018), and her own interest in avoiding imprisonment or fines for contempt.

The potential unavailability of the privilege and its potential consequences should be disclosed to the client at the outset of the representation, because it is information that is “reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.4 (b).

Conflict of Interest. Under Rule of Professional Conduct 1.7 (b), a lawyer is required to obtain the client’s informed written consent, and to comply with rule 1.7 (d), whenever there is a significant risk that the lawyer’s representation of the client, including the lawyer’s ability to comply with his duties of competence, confidentiality and loyalty, may be materially impaired by a conflict between the client’s interest and a personal interest of the lawyer. To the extent that there is a risk of criminal prosecution, either of the client or of the lawyer, such a potential conflict may be present, particularly because of the risk that in connection with such prosecutions pressure may be brought on both the client and the lawyer to testify against each other. Where such a risk exists, the lawyer would be obliged to inform the client of the conflict pursuant to Rule 1.4 (a) (1) and Rule 1.7 and to seek the client’s informed written consent thereto.

Liability Insurance and Banking. Rule of Professional Conduct 1.4.2 (a) states that “a lawyer who knows or reasonably should know that the lawyer does not have professional liability insurance” must inform the client of that fact, in writing, at the time of the engagement. Some lawyers may have difficulty in obtaining malpractice insurance for a practice representing commercial marijuana businesses, or they may discover that their insurance policy contains an express exclusion for criminal conduct. If a lawyer is not able to obtain insurance for her marijuana practice, or has reason to know that the insurance contract will not be effective with respect to that practice, the lawyer should disclose that fact in writing to the client pursuant to Rule 1.4.2.

Lawyers may also find that they are unable to find a bank that will allow them to establish a client trust account for a practice which involves representing marijuana businesses. If a lawyer finds that she is unable to provide that service, she should so inform the client pursuant to Rule 1.4 (a) (3).⁵

Lawyer Investment in the Client’s Marijuana Business. The Statement of Facts raises the possibility that the lawyer will make an investment in the entity that carries out the business in lieu of legal fees. Given the analysis above, there can be no ethical objection to such an investment based upon a conflict between state and federal law. The same principles that permit a California business to receive a California lawyer’s assistance in complying with California law, notwithstanding any resulting violation of federal law, should also permit that client to pay for those services and for the lawyer to receive payment in the form of an interest in that business. In making such an investment, however, the lawyer must comply with other relevant Rules. Thus, if the investment opportunity is in substance a payment for legal services it must satisfy the standards of Rule 1.5. In addition, the lawyer’s investment will constitute a business transaction with the client, subject to the requirements of Rule 1.8.1 that the terms of the transaction be fair and reasonable to the client, that there be full disclosure of its terms, and of the lawyer’s role, in writing, in a manner that the client can reasonably be expected to understand, that the client be represented, or advised in writing to seek representation, by independent counsel, and that the client gives informed written consent to the terms of the transaction and the lawyer’s role. Finally, the fact that the lawyer is taking a financial stake in the client business will ordinarily give rise to a significant risk that the lawyer’s representation of the client may be materially impaired by the lawyer’s own financial interests, requiring compliance with rules 1.7 (a) and (d), including the client’s informed written consent to these potential conflicts.

Organizational Clients and Constituents. One important goal of California’s expanded regulatory scheme is to draw former participants in the unregulated market into the regulated markets created by that scheme. Assuming that purpose is successful, it seems likely that many new participants will choose, perhaps for the first time, to conduct their business using an organizational form. Lawyers for these organizations should be alert to their obligation to conform their representation to the concept that the client is the organization itself, rather than its constituents. Rule 1.13 (a). In particular, they should take special care to explain the identity of the client to organizational constituents whenever it is known or reasonably knowable that the interests of the organization and the constituent are adverse Rule 1.13 (f).

⁵ This opinion does not discuss the further question of what kind of marijuana-related practice would be feasible, consistent with the relevant Rules of Professional Conduct and the State Bar Act, if the lawyer is unable to maintain a client trust account.

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Truthfulness to Third Parties. Rule 4.1 (b) forbids a lawyer from failing “to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,” unless disclosure is barred by the lawyer’s duty of confidentiality. The fact that a business is engaged in commercial marijuana activity—as well as the nature and degree of that engagement—is likely to be a material fact in many transactions between that business and with a third party, notably because it has a material impact on the financial, legal, and reputational risks of dealing with the business. Moreover, depending on the circumstances, including the expectations and situation of the third person, the client’s intentional failure to disclose such facts may itself be a form of civil fraud. Judicial Council of California, California Civil Jury Instructions (CACI), No. 1901 (Concealment). In addition, under Rule 1.2.1., given the present conflict between federal and state marijuana regulation, a lawyer may not assist in conduct that is intended to conceal the client’s actions or evade prosecution for them. For all these reasons, lawyers representing marijuana businesses should be alert to situations where the lawyer’s duty of truthfulness may bar the lawyer from assisting the client in dealings with a third party unless the material facts regarding the client’s business have been disclosed. In such situations, if the client declines to permit disclosure, the lawyer must inform the client of the relevant limitations on the lawyer’s conduct, Rule 1.4 (a) (4), and should consider withdrawal from the matter. Rule 4.1 Comment [5].

CONCLUSION

A California-licensed lawyer is permitted to advise and assist the client in interpreting and complying with California law, including laws permitting and regulating commerce in marijuana, even if the client’s conduct violates federal law, provided that the lawyer informs the client of the conflict between state and federal law and does not advise or assist the client in concealing or evading prosecution for that conduct. The fact that the client’s conduct is unlawful under federal law may give rise to other limitations on the lawyer’s representation of the client, which must be disclosed to the client consistent with the lawyer’s duty to communicate information relevant to the representation.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.