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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 cannabis 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 cannabis 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). However, a lawyer may not 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 and the penalties that could be associated with a violation of federal law. Where appropriate, the lawyer must also advise the client of other potential impacts upon the lawyer-client relationship, including upon the attorney-client privilege, that may result from the fact that the client's conduct may be prohibited under federal law.

**AUTHORITIES**

**INTERPRETED:** Rules 1.1, 1.2.1, 1.4, 1.4.2, 1.6. 1.7. 1.8.1, and 8.4 of the Rules of Professional Conduct of the State Bar of California.<sup>1</sup>

Business and Professions Code sections 6068, subdivision (a), and 6106.

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<sup>1</sup> Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

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California has recently adopted a comprehensive and complex regulatory scheme covering the use, production, and sale of cannabis<sup>2</sup> for both medicinal and adult recreational use. Many local California communities also regulate cannabis businesses. At the same time, both possession and commercial production, distribution, and sale of cannabis remain unlawful under federal law, where violators are potentially subject to criminal penalties and civil forfeitures. Those wishing to engage in a cannabis business based in California need compliance advice with respect to both state and federal law and assistance in establishing and operating a business that complies with state law. Lawyers wishing to provide such services are 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 the sale of cannabis within the State of California. The client seeks advice and assistance that will enable the client to comply with California laws, which permit, regulate and tax such activities, including obtaining any required permits and dealing with state and local regulatory authorities. The client would also 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 the possibility that the lawyer will: (1) 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, with the possibility that federal authorities might seize the client's assets; (2) assist the client in establishing offshore bank accounts into which the proceeds of the business may be placed; and (3) be compensated for the provision of legal services by acquiring an interest in the client's business in lieu of fees.

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<sup>2</sup> The terms marijuana and cannabis are, for all purposes relevant to this opinion, legally and functionally equivalent. In this opinion we generally use the term cannabis because that is the term used in recent California legislation on the subject and, increasingly, by businesses in the field and lawyers who represent those businesses. In few instances, we use the term marijuana where it appears more appropriate in context. No difference in meaning is intended by the use of either term.

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### 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 a 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 does not address the effect of a federal criminal conviction of a lawyer in a subsequent disciplinary proceeding against the lawyer or the lawyer's obligation to self-report criminal proceedings or convictions to the State Bar. *See* Business and Professions Code sections 6101-02; 6068 (o)(4)-(5). Finally, because this opinion is based on California law and policy, conclusions made here are limited to California lawyers counseling or assisting with respect to conduct occurring in California. As noted below this Committee's opinions are non-binding, including on state or federal law enforcement authorities.

#### II. Legal Background

As now well known, federal law and California law differ in their approach to the cultivation, possession, distribution and sale of cannabis. Under the federal Controlled Substance Act ("CSA"), it is illegal to manufacture, distribute or dispense a controlled substance, including cannabis, 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, Schedules I(c)(10) and (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), 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 under federal law to possess cannabis even for personal medicinal use. *Id.* §§ 812, 844(a). In certain circumstances, persons taking proceeds from a cannabis business may also be charged under federal money laundering statutes. (18 U.S.C. §§ 1956-57.)

In addition to criminal prosecution, persons engaged in the production, distribution or sale of cannabis in violation of federal law are subject to forfeiture of both the assets used in operating that business and the 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.

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Notwithstanding this federal prohibition, thirty-three states have taken steps to legalize cannabis.<sup>3</sup> Thirty states have legalized cannabis for medical use. Ten states have legalized cannabis for adult recreational use. California has legalized both medical and adult recreational use. The California approach to medical cannabis was originally codified in the Compassionate Use Act of 1996 (“CUA”), Health and Safety Code section 11362.5, as supplemented by the Medical Marijuana Program Act (“MMPA”), addressing the prescription, possession and use of cannabis 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 cannabis for both medicinal and adult recreational use. This statutory framework has in turn given rise to an extensive scheme of regulations promulgated by the Bureau of Cannabis Control (Cal. Code Regs., tit. 16, § 5000 et seq.), the California Department of Public Health (Cal. Code Regs., tit. 17, § 40100 et seq.), and the California Department of Food and Agriculture (Cal. Code Regs., tit. 3, § 8000 et seq.). Possession, prescription, use, cultivation, transportation, distribution, testing and sale of cannabis in compliance with the CUA, MMPA, and MAUCRSA is not subject to criminal punishment or assets seizure under state law. (Health & Safety Code, §§ 11362.5(c), 11362.5(d), 11362.7-.83; Bus. & Prof. Code, § 26032(a).) However, conduct falling outside those boundaries 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 conflict between federal and state law regulating cannabis. There is authority that regulation of intrastate cultivation, possession, use, and commercialization of cannabis is a lawful exercise of Congressional power to regulate interstate commerce. (*Gonzales v. Raich* (2005) 545 U.S. 1, 29 [125 S. Ct. 2195].) It is also clear that federal law will not recognize a defense of medical necessity to a prosecution under the CSA, where a necessity defense for marijuana is not provided in statute, even in a state which has legalized and regulated medical cannabis. (*United States v. Oakland Cannabis Buyers’ Cooperative* (2001) 532 U.S. 483 [121 S. Ct. 1711].) 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 [68 Cal.Rptr.3d 656]; see also, *Qualified Patients Ass’n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 759 [115 Cal.Rptr.3d 89].) At the same time, California cannabis laws are not preempted by federal law. There is no express or field preemption

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<sup>3</sup> See *National Conference of State Legislatures, Marijuana Overview* [<http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>] (last accessed: July 15, 2019)].

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relating to cannabis. (*Id.* at p. 756-58.) Moreover, because California has chosen to legalize complying cannabis 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 v. Superior Court*, *supra*, at p. 385; *Qualified Patients Assn v. City of Anaheim*, *supra*, at p. 758-59.) Nor is there obstacle preemption, since state agencies cannot be compelled to enforce federal law under anti-commandeering principles and the ability of federal authorities to enforce those laws is unimpaired by California law. (*Id.* at p. 758-63; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 826-827 [81 Cal.Rptr.3d 461].)

Although 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, they have used that power sparingly in recent years. 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. (Cole, J. (August 29, 2013). Guidance Regarding Marijuana Enforcement [Memorandum]. Washington, D.C.: U.S. Department of Justice.) More recently, then Attorney General Sessions declared that, given limited resources, federal prosecutors “should follow the well-established principles that govern all federal prosecutions” in deciding which marijuana cases to prosecute and rescinded prior Justice Department guidance with respect to medical marijuana prosecutions as unnecessary. (Sessions, J. (January 4, 2018). Marijuana Enforcement [Memorandum]. Washington, D.C.: U.S. Department of Justice.) 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 renewed repeatedly since then, most recently in February 2019, and it 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 and are in full compliance with those laws. (*United States v. McIntosh* (9th Cir. 2016) 833 F.3d 1163, 1177.)

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 cannabis. Compliance with that scheme results in exemption from relevant state criminal penalties, while 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 cannabis cases but is unlikely to do so in cases involving recreational use. Indeed, a lawyer's counseling or assisting such conduct may itself be a federal crime. Because federal prosecutorial policy for marijuana offenses is subject to change, and because the statute of limitations for such offenses can be five to ten years, depending on the violation, it is possible that California lawyers who assist clients in complying with California marijuana laws may be criminally prosecuted under federal law in the future,

### **III. Counseling and Assisting with Respect to California and Federal Cannabis Law**

Four provisions bear directly on the question of whether California-licensed lawyers are subject to discipline for providing advice or assistance with respect to state and federal cannabis law: rule 1.2.1 (Advising or Assisting the Violation of Law); rule 8.4(b) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); Business and Professions Code section 6068(a) (it is the duty of an attorney to support the Constitution and laws of the United States and of this state); and Business and Professions Code section 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 this question, 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 ethics opinions dealing with this topic: Bar Association of San Francisco Ethics Opinion No. 2015-1 and Los Angeles County Bar Association Formal Opinion No. 527 (2015). Although both 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.

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The rule does not define the critical terms “counsel” or “assist.” Like other California ethics committees that have addressed this issue, we adopt the definitions of those terms as stated in the Restatement (Third) of the Law Governing Lawyers § 94 (2000). “Counseling” by a lawyer is defined as “providing advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client's action.” (Rest.3d Law Governing Lawyers § 94, Comment (a), para. 3.) *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, including, but limited to, laws permitting and regulating the production, distribution and sale of cannabis, even if the client's contemplated course of conduct 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], which generally applies to any conflict between California and federal law. It is also supported textually by rule 1.2(b). Rule 1.2.1(b) (1) permits discussing the consequences “of any proposed course of conduct,” including courses of conduct that the lawyer knows is 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 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.” Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 9.

At the same time, any advice that the lawyer gives about California law must be accompanied by a clear explanation of any conflict with related federal law and policy. The Comment does not specify the level of detail that the lawyer must provide, but given the current conflict between California and federal law relating to cannabis, the lawyer's ethical obligations both to the client and to respect federal require that the lawyer explain clearly that the client's

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contemplated conduct violates federal criminal law, the penalties for such a violation, and any related risks of civil forfeiture. Often, as Comment [6] suggests, the lawyer's duty of competence and communication 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 law. This conclusion is reinforced by Comment [1] to the rule 1.2.1, which notes, "there is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." See also, Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 12 ("advice and assistance directed to violating federal law is not permitted").

**Permitted Assistance.** Comment [6] explicitly states that in cases of conflict between California and federal law, a lawyer may assist a client in "drafting, or administering, or interpreting or complying with California laws . . . even if the client's actions might violate the conflicting federal . . . law."<sup>4</sup> On its face, the language permitting assistance in "interpreting or complying with California laws" plainly encompasses business lawyers' assistance in conduct that raises an actual or potential issue of interpretation or compliance with state or local laws regulating cannabis. It might even be argued that this language limits permitted assistance to interpretation of or compliance with such laws. We believe, however, that the inclusive term "California laws" is clearly broader than that, encompassing on its face assistance in interpreting or complying with all California laws, whether or not they directly concern cannabis. Accordingly, we think the better reading of Comment [6] is that it 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."

The legislative history of Rule 1.2.1 also clarifies that the fact the Comment itself ties permitted assistance to "interpreting" or "complying" is not intended to limit the activities in which the lawyer is permitted to engage. Thus, in response to written public comments from "Multiple Signatories (Bastidas)" on then-proposed Comment [6], expressing concern that it did not name certain specified forms of permitted assistance, the Second Commission on the Revision of the Rules of Professional Conduct wrote: "[T]he Commission does not believe it is necessary to add

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<sup>4</sup> The portion of this language concerning "drafting, or administering...California laws" applies to government lawyers and those involved in the political process, rather than private practitioners assisting cannabis businesses. We do not consider it further here.



‘advocating,’ ‘negotiating,’ or ‘filing’ to the list of permitted lawyer assistance in Comment [6]. The Commission believes the words ‘interpreting’ and ‘complying with’ are sufficiently broad to encompass each of the activities the commenter has identified as services that would typically be provided.” Supplemental Request That the Supreme Court of California Approve Amendments to Rules of Professional Conduct of the State Bar of California,” prepared by the State Bar of California and filed with the Supreme Court of California on August 24, 2018 at Appx. 5 [Synopsis of Public Comments], at pp. 9-10; see also response to Sapiro in the same Synopsis at p. 7.) Thus, the permitted assistance contemplated by the rule would encompass, among other things, applying for permits or other regulatory approvals and negotiation and drafting of transactional documents.

This reading of Comment [6] is strongly supported by considerations of policy. The case for permitting assistance in interpreting or complying with California cannabis 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.” Los Angeles County Bar Assn. Formal Opn. 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. Furthermore, a rule that permits assistance in interpreting and complying with California cannabis law (for example, helping to obtain a permit) but denies the same service 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 lawyer’s 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.* Rule 1.2.1 Comment [1]; Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 12.<sup>5</sup> Limitations on the lawyer’s ability to provide assistance imposed by rule 1.2.1 may also

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<sup>5</sup> 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 or consistently enforced does not by itself render the law a nullity or relieve those subject to

trigger obligations to communicate with the client under rule 1.4.<sup>6</sup> Specifically, rule 1.4(a) (4) provides 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.

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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 relatively few prosecutions, despite the fact that over the same period thirty-three states have legalized medicinal or adult use of cannabis. 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 cannabis 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.

<sup>6</sup> Rule 1.4 provides, in pertinent part that:

- (a) A lawyer shall:
  - (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.

**Other California Authorities:** Our analysis 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. Bar Association of San Francisco Ethics Opinion No. 2015-1 at 3; Los Angeles County Bar Assn. Formal Opn. No. 527. These considerations are 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. Bar Association of San Francisco Ethics Opinion No. 2015-1 at 3; Los Angeles County Bar Assn. Formal Opn. 527 at p. 13. In the case of cannabis 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 confidential communications provided for the purpose of rendering those services” remain privileged, provided that the “lawyer also advises the client on conflicts with respect to federal law.” (Evid. Code, § 956(b).) That legislation aligns all three branches of state government in support of the approach outlined here.<sup>7</sup>

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<sup>7</sup> 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 cannabis for medical or adult recreational use. In some states, the conclusion is reflected in an opinion construing existing Rules of Professional Conduct (*e.g.*, Arizona Ethics Opinion 11-01; Illinois Informal Opinion 14-07; New York State Bar Association Opinion 1024 (2014); Washington Advisory Opinion 201501 (2015)), 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 (*see*, Minnesota Statutes 152.32, subdivision (2)(3)(i)), and in some by changes in prosecutorial policy (*see*, *e.g.*, Board Adopts Medical Marijuana Advice (Florida, June 15, 2014) [<https://www.floridabar.org/the-florida-bar-news/board-adopts-medical-marijuana-advice-policy/>] (last accessed: July 15, 2019)); Massachusetts BBO/OBC Policy on Legal Advice on Marijuana (March 29, 2017) [<https://www.massbbo.org/Announcements?id=aOP36000009Yzb3EAC>] (last accessed: July 15, 2019)). 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.

**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 cannabis business. Our construction of those provisions is informed by our analysis of rule 1.2.1, because it represents the most recent, specific and authoritative statement of California disciplinary policy on this issue.

Rule 8.4 (Misconduct) 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 cannabis law could be prosecuted as a criminal act under federal law. Our conclusion is that so long as the lawyer’s 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 state and federal law, any resulting crime should not be viewed for disciplinary purposes as “reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”<sup>8</sup>

Business and Professions Code section 6068(a) provides that it is the duty of an attorney “to support the Constitution and laws of the United States and of this state.” Obviously, counseling or assisting in conduct that violates federal criminal law is potentially in significant tension with a provision requiring support for both federal and state law. For the reasons elaborated above, however, we conclude that conduct that complies with rule 1.2.1, in particular by making clear to clients the force of federal law and the sanctions for its violation and by avoiding any deception or concealment, 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.” The Supreme Court has stated under this provision, “discipline may be imposed only for criminal conduct having a logical relationship to an attorney’s fitness to practice” and that the term “moral turpitude must be defined accordingly.” *In re Lesansky* (2001) 25 Cal. 4<sup>th</sup> 11, 14. Counseling or assistance that complies with rule 1.2.1 cannot properly be viewed as having the kind of “logical relationship” to the attorney’s fitness to practice that would justify a finding of “moral turpitude, dishonesty, or corruption” for purposes of discipline under California law.

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<sup>8</sup> This discussion assumes that there has been no prior criminal prosecution or conviction. See Business and Professions Code sections 6101-02; 6068(o)(4)-(5).

**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 faith effort to comply with state or local law regulating the medicinal or adult-recreational use of cannabis. 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 cannabis business, drafting documents and negotiating transactions, and 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," and keep it in the lawyer's trust account, to protect against the risk of a federal seizure of the client's assets falls into that category, since it seems principally intended to conceal those assets from federal law enforcement. Depending on, among other things, the client's intent, the client's request for assistance in establishing offshore bank accounts to receive the proceeds of the business may very well fall 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). The issue of the contemplated investment in the client's cannabis business is discussed further in Section IV below.

**IV. Additional Ethical Considerations**

**Competence.** Competent representation of a regulated cannabis 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 providing basic information on conflicting federal law 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 and skill through study, or through consulting or associating with another attorney, should limit the representation to those issues that she has

or can acquire the requisite learning and skill and advise the client to obtain separate counsel with sufficient learning and skill to represent the client on other issues presented. Rule 1.1.<sup>9</sup>

**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 a fraud.” (Evid. Code, § 956(a).) As described above, the Evidence Code has now been amended to clarify that this crime-fraud exception “shall not apply to legal services rendered in compliance with state and local laws on medical cannabis or adult use cannabis.” Additionally, “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* (1989) 491 U.S. 554 [109 S. Ct. 2619]. 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 Bus. & Prof. Code, § 6068(e)), her statutory obligation to obey a court order (Bus. & Prof. Code, § 6103, *In the Matter of Collins* (Review Dept. 2018) 2018 WL 1586275), and her own interest in avoiding imprisonment or fines for contempt.

The potential unavailability of the privilege and its 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 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

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<sup>9</sup> Among the substantive law rights of the client that may be affected are the right to enforce contracts (which may be subject to a federal defense of illegality) and the right to seek discharge in bankruptcy.

## CLEAN

lawyer's representation of the client, including the lawyer's ability to comply with his duties of competence, confidentiality, and loyalty, will be materially limited by a conflict between the client's interest and the lawyer's own interests. To the extent that there is a risk of criminal prosecution, either of the client or of the lawyer, the lawyer should consider whether such a potential conflict may be present, particularly because pressure may be brought on both the client and the lawyer to testify against each other in connection with such criminal prosecution. Where the lawyer concludes that a significant risk of conflict exists, the lawyer must inform the client of the conflict pursuant to rule 1.4(a)(1) and rule 1.7, and seek the client's informed written consent thereto. [When the lawyer is in doubt about whether a potential conflict exists, the safer course would be to obtain such a waiver, which can also assist in demonstrating the lawyer's compliance with the obligations imposed by Rule 1.2.1.]

**Liability Insurance and Banking.** Rule 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 obtaining malpractice insurance for a practice representing commercial cannabis 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 cannabis practice or has reason to know that the insurance contract will not be effective with respect to that practice, the lawyer must so inform 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 cannabis businesses or deposit funds from those clients into the existing client trust account. If the client's business needs would normally call for the lawyer to provide safekeeping of the client's funds or property, and the lawyer is unable to do so, the lawyer should so inform the client pursuant to rule 1.4(a)(3).

**Lawyer Investment in the Client's Cannabis Business.** The facts presented in this opinion raise 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 on a conflict between state and federal law, so long as the arrangement is not intended to evade detection or prosecution under California or 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 the client to pay for those services and for the lawyer to receive payment in the form of an interest in that business.<sup>10</sup> However, in making such an investment the lawyer must

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<sup>10</sup> If the opportunity to invest in a client's cannabis business is not in payment for legal services permitted by Rule 1.2.1 then that Rule would not justify protection from discipline for such an

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. Additionally, the lawyer's investment will constitute a business transaction with the client, subject to the requirements of rule 1.8.1. Therefore, the terms of the transaction must be fair and reasonable to the client, full disclosure of its terms and of the lawyer's role in the transaction must be provided to the client in writing in a manner that should reasonably be understood by the client, and the client must give informed written consent to the terms of the transaction and the lawyer's role in it. In addition, the client must be represented or advised in writing to seek representation by an independent counsel. Finally, the fact that the lawyer is taking a financial stake in the client's business will ordinarily give rise to a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest which requires compliance with conflict rules 1.7(b) and (d), including obtaining the client's informed written consent.

**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 market 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 the concept that the client is the organization itself, rather than its constituents, and their obligation is to act in the organization's best lawful interests. 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).

**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 cannabis 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. (BAJI No. 1901 (2017).) In addition, under

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investment. A fortiori, Rule 1.2.1 would not bar discipline for a lawyer's decision to establish a free-standing cannabis business or to invest in a cannabis business owned by a non-client. Moreover, such investments may increase the risk of federal prosecution and of subsequent discipline based on a federal conviction. The status of such investments is outside the scope of this opinion.



## **CLEAN**

rule 1.2.1, given the present conflict between federal and state cannabis 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 cannabis 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 and should consider withdrawal from the matter. Rule 1.4(a)(4) and 4.1, Comment [5].

## **CONCLUSION**

Under the California Rules of Professional Conduct and the State Bar Act, 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 cannabis, 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 Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.





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October 4, 2019

Angela Marlaud  
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State Bar of California  
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Via E-Mail: [angela.marlaud@calbar.ca.gov](mailto:angela.marlaud@calbar.ca.gov)

Re: Proposed Formal Opinion Interim No. 17-0001

Dear Ms. Marlaud:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion Interim No. 17-0001.

Founded over 100 Years ago, the OCBA has over 9,000 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 Professionalism and Ethics Committee.

We believe that the opinion provides valuable guidance. At the same time, we have comments and suggestions that we believe could clarify, strengthen and improve the opinion and provide even more clarity for practitioners confronted with these dilemmas, which we address below.

At 16 pages, the opinion is lengthy and we suggest that the opinion be shortened. There are several topics that we believe can be deleted.

First at pages 4-5, the discussion of federal preemption of California law should be deleted. This is a controversial issue on which there is pending litigation and federal authorities disagree. As such, it is not COPRAC's mandate to opine on the legal issue of federal preemption.

At page 5, the lengthy discussion of DOJ treatment, now historical, could be deleted. Some of the authorities discussed involve medical marijuana, and are not relevant to recreational marijuana. Others involve historical federal policies that have been superseded for some time. We believe that the discussion may give false comfort to a practitioner looking for guidance. It may be preferable to accurately sum up the applicable current federal law as follows:

Under the federal Controlled Substances Act (CSA), it is illegal to manufacture, distribute, dispense or possess a controlled substance, including marijuana, and to import, export, sell or offer for sale drug paraphernalia, and to receive the proceeds of a crime under the laws

governing money laundering. In addition, those involved with assisting marijuana related businesses may be engaging in federal criminal conspiracy, aiding and abetting in violation of federal law or misprision of a felony (knowing concealment of a felony and failure to inform law enforcement). Further, the legality of possession and use under California State law has no effect on the applicability of the CSA, and California State marijuana laws necessarily violate federal law. Federal law can be enforced regardless of applicable California State statutes. The federal CSA provides for significant criminal penalties, including significant prison sentences and civil and criminal forfeiture under federal law.

At page 11, the statement that conduct in compliance with rule 1.2.1 “sufficiently supports both California and federal law” to comply with the duty of an attorney to “support the Constitution and laws of the United States...” under Business and Professions Code § 6068(a) does not seem accurate. Conduct that is permissible under rule 1.2.1 can violate federal law and therefore would not “support” federal law. We ask that this be clarified.

At page 13, in the discussion of conflicts of interest, we would appreciate further guidance regarding facts which would indicate a risk of criminal prosecution that rises to the level of creating a conflict of interest.

As to footnote 7, on page 14, the statement implies that a lawyer must have a client trust account. Of course, if a lawyer does not accept advance fees or otherwise hold funds that belong to the client or third parties, the lawyer does not need to have a client trust account. It may be feasible to have a marijuana-related practice without having a client trust account at all. Therefore, we think that this footnote could be deleted.

We recommend that the discussion of the lawyer’s investing in the client’s cannabis business, on page 14, be omitted from the opinion. Rule 1.2.1 addressed lawyers counseling and assisting clients but does not authorize ownership of an entity engaged in the marijuana business. If this discussion is not omitted, we recommend that the opinion caution lawyers that owning and operating a business involving the manufacture or distribution of marijuana would be a federal crime under the Controlled Substances Act.

Similarly, the discussion of the organization as client, at pages 14-15, does not seem necessary to this opinion as the discussion largely is applicable to any organization client.

Thank you for considering our comments.

Sincerely,

Orange County Bar Association

A handwritten signature in black ink, reading "Deirdre Kelly". The signature is fluid and cursive, with the first name "Deirdre" and last name "Kelly" clearly distinguishable.

Deirdre M. Kelly  
2019 President



**Los Angeles County Bar Association**

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Angela Marlaud  
Office of Professional Competence,  
Mandatory Fee Arbitration Program  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Interim Opinion 17-0001

Dear Angela:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on proposed Interim Opinion No. 17-0001. In LACBA Formal Opinion 527 (published in August, 2015), our Committee addressed many of the issues in the Interim Opinion in the context of the prior version of the Rules of Professional Conduct, which is cited in the Interim Opinion.

While our Committee agrees with many of the points made in the draft opinion (which are consistent with Formal Opinion 527), we have some concerns and suggestions, as set forth below.

Overall, we are concerned that this opinion may give too much comfort to attorneys, although it does reference some of the risks under federal law, and California State Bar discipline if an attorney is convicted. Statements about there being few if any prosecutions in the last 30 years in footnote 4 may mislead California attorneys, as both District Attorneys and Federal Prosecutors have brought criminal charges against California attorneys representing clients in marijuana businesses.<sup>1</sup> In Formal Opinion 527, our Committee stated in the context of federal policies in effect at the time:

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<sup>1</sup> Attorney Jessica McElfresh was charged with multiple felonies by the San Diego DA <https://www.voiceofsandiego.org/topics/news/san-diego-das-prosecution-of-pot-attorney-has-sent-chills-through-the-legal-community/> Attorney Nathan Hoffman did what this opinion would allow serving as corporate counsel, and also operating the business, and was indicted federally, and is serving four years, which he plead to in order to avoid a mandatory minimum of 10 years. <https://www.justice.gov/usao-edca/pr/los-angeles-lawyer-sentenced-4-years-prison-role-wide-ranging-marijuana-conspiracies>

While members may take solace from the latest federal appropriations legislation for 2015 and USDOJ's current position regarding prosecution, there is no guarantee that either will continue in the future. Because the federal statutes of limitations may be five to ten years, depending on the violation, if federal authorities change their position with respect to enforcement, it is possible that members who assist clients in compliance with California marijuana laws today may be criminally prosecuted in the future. (LACBA Formal Opinion No. 527, p. 6)

We recommend that the Interim Opinion include language along the lines of what our Committee stated in Formal Opinion No. 527 and acknowledge that prosecutions have occurred so that the Interim Opinion realistically appraises the profession about the inherent risks that still remain for the cannabis practitioner in light of the conflict between state and federal. The Interim Opinion advises that lawyers must fully inform a cannabis client about the risks under federal law. The Interim Opinion should do the same in advising the profession, as we attempted to do in Formal Opinion No. 527.

Also, we believe that federal criminal liability for money laundering is a risk of taking proceeds from a marijuana business. The only reference in the draft opinion is in regard to the Cole memorandum. We recommend that the opinion mention money laundering in the discussion of federal offenses on page 3 and reference 18 USC §§ 1956 and 1957.

The opinion provides on page 3 that it does not "address the effect of a criminal conviction of a lawyer in a subsequent disciplinary proceeding." We recommend that the opinion also should refer to the self-reporting obligation contained in Bus. & Prof. Code section 6068(o).

We note that the Interim Opinion concludes on page 11 that a lawyer's counseling and assistance in conduct permitted under California cannabis law is not moral turpitude under Business and Professions Code section 6106. We reached the same conclusion in Formal Opinion No. 527 at page 6. In so doing, we quoted *In re Lesansky* (2001) 25 Cal.4th 11, 14, in which the Supreme Court stated, "discipline may be imposed only for criminal conduct having a logical relationship to an attorney's fitness to practice, and [the] term 'moral turpitude' must be defined accordingly." We recommend that the Interim Opinion include that citation to show there is judicial support for COPRAC's advisory conclusion. However, the Interim Opinion should be clear that this does not mean a lawyer may engage in federal crimes that would not fall within the scope of counseling and assistance with California law.

We also recommend clarifications to the discussion on page 8, beginning under the heading "Permitted Assistance": Comment [6] to rule 1.2.1 contains some very awkward language – "the lawyer may assist a client in *drafting*, or *administering*, or *interpreting* or *complying* with, California laws". We are concerned that the wording

could be read as a limitation on a lawyer's activities to one of the four (italicized added) verbs in that phrase. We request that the Interim Opinion clarify this point. The "Permitted Assistance" section interprets the word "assist" very broadly (with which we agree), but it should clarify that assistance includes activities such as the negotiation of the terms of a lease and other activities that lawyers normally engage in on behalf of their clients that are beyond the specific terms in Comment [6]. While we believe these other activities should be covered by the protection afforded by Comment [6], we suggest the COPRAC opinion should expressly acknowledge this awkward language, and more importantly, clearly opine that such normal lawyer activities to assist a cannabis client in lawfully carrying its business under all aspects of California law are protected.

Several issues in the opinion employ a truncated, conclusory analysis detached from relevant law on the points involved. Essentially, the issue is identified, no law is cited, and there is no analysis, and a conclusion follows referencing prior discussion. At page 10, the opinion says that committing a federal law crime does not bear on a lawyer's fitness. This is incomplete or misleading since a conviction of certain federal crimes in relation to work performed for a cannabis client must be reported by prosecutors and court clerks to the State Bar and can serve as the basis for a state bar proceeding. Money laundering may be an example.

At page 10, the statement regarding the attorney's obligation to support the laws of the United States pursuant to Business and Professions Code § 6068(a) does not recognize that advising a company regarding violation of federal law does not "support" federal law. We request that the analysis be expanded. Our Committee addressed this point extensively in Formal Opinion No. 527 at pages 7 and 10. We suggest that the Interim Opinion address the point along the lines that our Committee addressed it in our opinion.

Authority should be cited for the statement on page 12 regarding the use of the client trust account to hide funds for a rainy day in a client trust account. There are discipline cases that can be cited for this proposition. In addition, COPRAC may wish to reference the discussion in LACBA Opinion No. 527, at page 6 and 7, and footnote 6, regarding moral turpitude.

In the discussion of competence on page 12, it would be good to mention that there are many other implications that may impact the client's businesses, including potential issues with contract enforceability and the availability of bankruptcy. Generally, a federally-unlawful business is not permitted to maintain a case in bankruptcy. The opinion should not attempt to pronounce on this issue, but lawyers should be cautioned that both they and their clients may be taking risks that ordinarily do not apply otherwise. See, e.g., *In re Way to Grow, Inc.*, Case No. 18-14330-MER, Dkt. No. 379 (Bankr. D. Co. Dec. 14, 2018); but also see *Garvin v. Cook Investments NW, SPNWY, LLC*, 922 F.3d 1031 (9th Cir. 2019); *In re Basrah Custom Design, Inc.*, 600 B.R. 368 (Bankr. E.D. Mich. 2019); *In re CWNevada LLC*, No. 19-12300-MKN, 2019 WL 2420032 (Bankr. D. Nev. June 3, 2019).

The first full paragraph on page 14 includes the statement that “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 cannabis businesses or deposit funds from those clients into the existing client trust account.” And, if so, the lawyer “should so inform the client pursuant to rule 1.4(a)(3).” One issue we have with this language is that the requirements of Rule 1.15(a) do not impose a duty of disclosure. They impose an unconditional obligation to deposit certain funds in a client trust account. The lawyer does not avoid discipline for such failure by simply making disclosure to the client. Accordingly, we request that COPRAC reconsider how this issue is treated in the opinion.

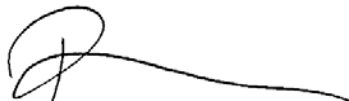
We agreed with the analysis on page 14, under the heading “Lawyer Investment in the Client’s Cannabis Business”: However, we recommend that an additional point should be made: a lawyer who engages in a cannabis business (i.e., not simply by acting as lawyer) enhances the risk of federal prosecution, and potentially the risk of state bar discipline if convicted.

The discussion regarding conflict of interest is such that there would always be a risk of prosecution, at least under federal law, such that a conflict waiver would always be required. We agree that in many cases there is a risk that a lawyer will cooperate, flip and plead. Nonetheless, a lawyer is ethically permitted to advise clients as to the interpretation of law and regarding the scope of laws. Giving such advice does not place the lawyer in a conflict with the client. We do not believe that a conflict waiver always would be required in every situation in which the client’s conduct violates federal law, and believe that some clarification on this point would be appropriate.

On page 13 and 14, it may be helpful to clarify this with a discussion regarding standard provisions in a malpractice insurance policy for criminal activity, such that the “no insurance” disclosure would be appropriate in all cases other than those in which an insurance carrier expressly covers the attorney’s services to cannabis clients. Without such express coverage, there is a significant risk that there will be no coverage, and the client should be so advised.

Thank you for the opportunity to comment on the Proposed Formal Opinion.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brandon Niles Krueger', with a long horizontal flourish extending to the right.

Brandon Niles Krueger  
Chair  
Professional Responsibility and Ethics Committee,  
Los Angeles County Bar Association



**Public Comment**  
**Proposed Formal Ethics Opinion 17-0001**

Submitted by:

Professor Francis J. Mootz III, McGeorge School of Law, University of the Pacific<sup>1</sup>  
Ashneil Singh Randhawa, J.D. Candidate, McGeorge School of Law

Submitted:

October 9, 2019

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. In response, the Board prepared a modification of the Supreme Court's proposal that attempted to clarify, sharpen, and enhance the changes made by the Supreme Court. Unfortunately, the modification did not clearly address the unique issues confronting lawyers who represent clients in the state-legal cannabis space. In a previous Public Comment on behalf of California law professors teaching cannabis law, Professor Mootz argued that Rule 1.2.1 was inadequate to permit the full range of lawyering activities necessary to serve state-legal cannabis clients, but supported the proposed amendments if the Board would quickly supplement the Rule and related Comments with a Formal Ethics Opinion.<sup>2</sup>

The Board proposed Formal Ethics Opinion No. 17-0001 in an effort to protect lawyers working for clients in the state-legal cannabis space, and has asked for public comment.

It is our opinion that this opinion does not go far enough to provide definitive guidance for lawyers in California who work for clients in the state-legal cannabis industry. Although we acknowledge that the Proposed Opinion provides some clarity, we urge the Supreme Court of California to revisit the rules governing cannabis lawyering and amend them to provide expressly that all traditional lawyering activities conducted on behalf of state-legal cannabis clients are ethically permissible.

We acknowledge that a Formal Ethics Opinion is a good tool to provide guidance, especially when the rules are too succinct to capture all the cases that might arise under the rule. However, a Formal Ethics Opinion is not binding or enforceable in cases where lawyers in California provide advice to clients in the state-legal cannabis industry in violation of federal law. The California State Bar clearly states that Formal Ethics Opinions are not binding and do not create a safe harbor for lawyers.<sup>3</sup> Case law in California has upheld that Formal Ethics Opinions are not

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<sup>1</sup> Affiliations are provided for identification purposes only. The authors do not speak on behalf of the University of the Pacific.

<sup>2</sup> The previous public comment is attached as Exhibit A for purposes of illustrating the problems with Rule 1.2.1 for lawyers representing state-legal cannabis businesses.

<sup>3</sup> See <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Opinions> ("These advisory opinions regarding the ethical propriety of hypothetical attorney conduct, although **not binding**, are often cited in the decisions of the Supreme Court, the State Bar Court Review Department and the Court of Appeal.") The nonbinding character of advisory opinions is expressly acknowledged at the end of the proposed Formal Ethics Opinion under discussion.

binding. Specifically, courts acknowledge that the “finding that an attorney has engaged in conduct contrary to an ABA formal opinion does not establish an obligatory standard of conduct imposed on California lawyers.”<sup>4</sup> This corresponds with other states that regard Formal Ethics Opinions as advisory and not binding.<sup>5</sup>

Our concern is particularly appropriate where the Formal Ethical Rule is not simply explaining or elaborating the meaning of the applicable rule. It is clear that the proposed opinion is attempting to amend Rule 1.2.1 without going through the formal requirements demanded of rulemaking procedures. The proposed opinion acknowledges that the plain meaning of the rules would only allow an attorney to *counsel* a client on matters where federal and state law conflict specifically in regards to cannabis. The proposed opinion expands the scope of the rule to “permit 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.”

Although the proposed Formal Opinion attempts to correct a problem with the Rules, we strongly urge the Supreme Court to formally change the rules surrounding state cannabis lawyering to implement the changes addressed in the proposed opinion through the appropriate rulemaking process.

## **Conclusion**

We urge the Board to adopt the proposed Formal Ethics Opinion as an (admittedly) ineffective stopgap measure, until such time as the Supreme Court can amend Rule 1.2.1 expressly to ensure that the rules provide 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:**

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<sup>4</sup> *State Compensation Ins. Fund v. WPS, Inc.*, Court of Appeal, Second District, Division 4, California. March 4, 1999

<sup>5</sup> See, e.g., *Abdel Hakim Labidi, v. Sydow*, 287 S.W.3d 922 (Tex. App.--Hous. [14th Dist.] 2009) (“Opinions of the Texas Ethics Commission are advisory, rather than binding, authority”); *Morris & Doherty, P.C. v. Lockwood*, 259 Mich. App. 38 (Mich. App. 2003) (“State Bar ethical opinions clearly are not binding on Court of Appeals and provide little, if any, precedential value, especially when statutory and judicial rules are completely dispositive with regard to issues”); *Watts v. Polaczyk*, 242 Mich. App. 600 (Mich. App. 2000) (“State Bar ethic committee opinions are not binding on Court of Appeals, though they are instructive”).

# **EXHIBIT A**

## **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 Comment<sup>6</sup>**

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

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<sup>6</sup> 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.

lawfully engage in the (regulated) cannabis trade under state law even though the business remains illegal under federal law.

We address the two changes in Alternative 2 that pertain to the substantive effect of the Rule.<sup>7</sup> 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

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<sup>7</sup> Several of the changes reflected in Alternative 2 improve readability and do not effect a substantive change. We concur with these changes.

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 state’s cannabis laws,<sup>8</sup> 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.<sup>9</sup>

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

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<sup>8</sup> 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].”)

<sup>9</sup> *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.”

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.<sup>10</sup> The Board should recognize and acknowledge that it is a positive social good that clients who seek to 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.<sup>11</sup>

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:**

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<sup>10</sup> CAL. CIV. CODE 1550.5(b)(1)-(3) (enacted in 2017 as AB 1159).

<sup>11</sup> THE BAR ASS'N OF SAN FRANCISCO, Op. 2015-1 (2015).

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October 17, 2019

Angela Marlaud

Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

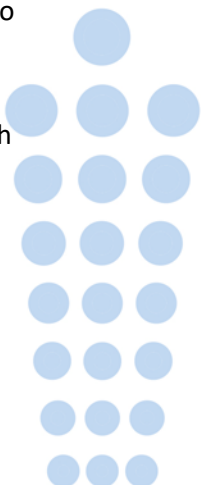
San Francisco, CA 94105

Re: COPRAC Proposed Formal Opinion Interim 17-0001 (Advising a Cannabis Business)

On behalf of the San Diego County Bar Association, we thank you for the opportunity to comment on Proposed Formal Opinion Interim No. 17-0001.

We have reviewed the proposed opinion, and have the following suggestions for revisions.

1. **Money laundering:** we note that the proposed opinion offers only a passing reference to money laundering which is an important issue that lawyers seeking guidance should take into consideration.
2. **Trust Account:** As to footnote 7, page 14, the issue raised is whether a marijuana-related practice would be feasible without a client trust account. We are not sure what is intended by this footnote. A client trust account is required in the event an attorney holds fees paid in advance and would not be necessary to establish a practice if advance fees are not taken by the lawyer.
3. **Conflicts of Interest:** we request further clarification on when a conflict waiver would be required when representing a cannabis business. The current language indicates that “to the extent there is a risk of criminal prosecution, either of the client or of the lawyer, such a conflict may be present...” However, given the fact that cannabis remains illegal under federal law, there is always some such risk. Does this mean that a conflict waiver would be required in every instance in which a lawyer represents a cannabis business? Further guidance would be appropriate on this point.
4. **Lawyer’s Investment in Cannabis Business:** the opinion states that “there can be no ethical objection to such an investment.” However, a lawyer has an obligation to uphold the law of the United States, and ownership of a cannabis business may involve the manufacture, sale and distribution of cannabis, which would violate such law. Further, Rule 1.2.1 addresses advising cannabis businesses, not investment in cannabis businesses. We disagree with the analysis of the opinion as to investment in a cannabis business and suggest that this section of the opinion be deleted.



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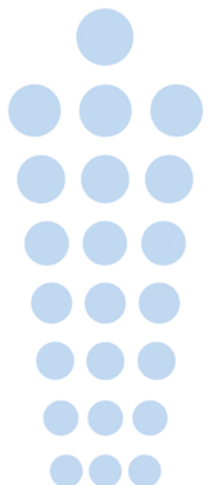
5. **Organizational Clients:** the discussion of organizational clients at page 14-15 seems to do nothing more than recite the provisions of the rule and could be deleted in the interest of streamlining what is a lengthy opinion.
6. Overall, we are concerned that, given the fact that lawyers have been prosecuted at both the State and Federal levels as a result of their involvement in cannabis related businesses, the proposed opinion relies too heavily on past policies that have been superseded (at page 5), and gives false comfort to attorneys seeking guidance.

Thank you for the opportunity to provide input on this opinion.

Sincerely,



Lilys D. McCoy, President  
San Diego County Bar Association





## Marlaud, Angela

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**From:** oi@bitsfit.com  
**Sent:** Thursday, October 17, 2019 12:28 AM  
**To:** Marlaud, Angela  
**Subject:** Proposed Formal Opinion Interim No. 17-0001 (Advising a Cannabis Business) PUBLIC COMMENT by openInvent®

My public comment for the Proposed Formal Opinion Interim No. 17-0001 (Advising a Cannabis Business) Cites a recent case:

<https://casetext.com/case/people-v-cappello-1>

Information/Indictment for Conspiracy to posses and sell cannabis  
A148470

My opinion

Lawyers are not protected from laws nor exempt. However, Law Enforcements' Advising under guise of Legal Professional should be banned as Entrapment.

Do Americans have any right to be protected or is the State and Country Against its own people for Treason wars like  
WAR ON CRIME WAR ON DRUGS WAR ON TERRORISM WAR ON TREASON? CA.PENAL§37 CA.PENAL§38

## People v. Cappello

Decided May 13, 2019

Miller, J.

### NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[California Rules of Court, rule 8.1115\(a\)](#), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115. (Sonoma County Super. Ct. No. SCR630974)

Defendant Mark William Cappello appeals his conviction for three counts of special circumstances murder, first degree burglary, conspiracy to possess marijuana for sale and transport, and first degree residential robbery. Cappello contends (1) the trial court erred by admitting interviews of codefendants Odin Dwyer and Francis Dwyer,<sup>1</sup> (2) a law enforcement witness improperly vouched for the Dwyers' credibility, (3) character evidence was improperly admitted, (4) a defense expert witness was improperly excluded, (5) evidence that a defense witness had been a "reliable confidential informant" was improperly excluded, and the prosecutor's discussion of this witness in rebuttal argument was misconduct, (6) cumulative error, and (7) a change in the law on firearm enhancements requires remand for resentencing.

<sup>1</sup> For brevity and clarity, we refer to Odin Dwyer and Francis Dwyer by first name only. We sometimes refer to them together as the Dwyers.

We will remand to allow the trial court to consider the firearm enhancements under the current sentencing scheme and otherwise affirm.

### 2 \*2 **FACTUAL AND PROCEDURAL BACKGROUND**

Around 3:00 p.m. on February 5, 2013, Dylan Butler drove to his mother's cabin on Ross Station Road in Forestville looking for his brother, Raleigh Butler. The front door was open, and inside Dylan discovered three bodies in the back bedroom, including the body of his brother. The other two victims were Richard Lewin and Todd Klarkowski. Each victim died from a single gunshot to the head. The scene suggested the victims were killed while processing large amounts of marijuana for sale or transport. The victims were wearing latex gloves; marijuana and a FoodSaver vacuum sealing machine were found nearby; a duffel bag at the front door of the cabin contained nine one-pound bags of marijuana packed in turkey baster bags; and Butler had \$8,600 in cash in his jacket pocket.

The Sonoma County District Attorney charged Cappello, along with father and son Francis and Odin Dwyer, with three counts of murder and additional offenses. Cappello was alleged to have been the shooter, and Odin and Francis were charged as accessories. The Dwyers reached plea agreements with the prosecution, agreeing to plead no contest to various charges and to testify against Cappello. In exchange, Odin was promised a sentence of 20 years, four months, and Francis was promised a sentence of eight years.

2 <sup>2</sup> Odin pleaded no contest to 15 counts—burglary, conspiracy to commit burglary, three counts of involuntary manslaughter, transportation of marijuana, processing marijuana, conspiracy to transport marijuana, possession of marijuana for sale, conspiracy to possess marijuana for sale, accessory to robbery, three counts of accessory to murder, and receipt of stolen property—and admitted firearm enhancement allegations. Francis pleaded no contest to transportation of marijuana, conspiracy to transport marijuana, possession of marijuana for sale, conspiracy to possess marijuana for sale, and accessory to murder and admitted firearm enhancements.

3 Cappello was tried before a jury on six charges: three counts of murder ([Pen. Code, § 187](#), subd. (a); counts 1-3) with special circumstances<sup>3</sup> and an allegation of \*3 personal discharge of a firearm (*id.*, § 12022.53, subd. (d)), first degree burglary (*id.*, § 459; count 4) with a firearm allegation (*id.*, § 12022.5, subd. (a)), conspiracy to commit possession of marijuana for sale and sale or transportation of marijuana (*id.*, § 182, subd. (a)(1), [Health & Saf. Code, §§ 11359](#) and 11360, subd. (a); count 5), and first degree residential robbery of Butler ([Pen. Code, § 211](#); count 6) with a firearm allegation (*id.*, § 12022.53, subd. (d)).

<sup>3</sup> The district attorney alleged the murders were committed during the attempted commission of robbery and burglary, for financial gain, and by means of lying in wait, and Cappello committed multiple murders. ([Pen. Code, § 190.2](#), subd. (a) (17), (1), (15), and (3).)

## The Prosecution's Case

### Cappello's Work Transporting Marijuana Interstate

Cappello lived in Central City, Colorado. Since about 2010, he worked for Jeffrey Dings, transporting marijuana from Arizona to the East Coast and sometimes carrying large amounts of cash, up to \$500,000, back from the East Coast.<sup>4</sup> Dings paid Cappello \$100 per pound of marijuana transported. Cappello used his white Ford Bronco and a couple of trailers, including a horse trailer, and was known for having an "enzyme" he sprayed on packaged marijuana, which he claimed neutralized the odor.

<sup>4</sup> Dings smuggled marijuana from Mexico and distributed it across the country. At the time of trial, Dings had two convictions for international smuggling and trafficking involving thousands of pounds of marijuana and another conviction for transportation or distribution of methamphetamine with a firearm, and he was serving a sentence in federal prison. He testified under a grant of immunity.

### Financial Troubles in 2012

In 2012, Dings's smuggling business suffered due to increased law enforcement interdiction. As a result, there was less transportation work for Cappello, and Dings had difficulty paying him for work he did do.

<sup>5</sup> <sup>5</sup> For a trip in January 2012, Dings owed Cappello \$75,000 but only paid him \$40,000 at first and asked Cappello to wait for the balance. Dings testified Cappello "was broke and he was angry" and needed money for bills. On one occasion, Cappello took 20 pounds of Dings's marijuana to recoup expenses he claimed Dings owed him.

4 Dings put together a deal to buy marijuana in California and transport it to Colorado in October 2012. The deal involved Morgan Kear, victim Todd Klarkowski, \*4 and Cappello. Dings was friends with Kear, and Kear knew Klarkowski, who was a small-time marijuana dealer from Colorado. Cappello met Klarkowski for the first time during this deal.

Dings agreed to pay Cappello \$40,000 to haul 400 pounds of marijuana from California to Denver. Klarkowski provided \$100,000 for the marijuana, and another person was supposed to bring \$180,000, but he did not show up. Cappello ended up transporting only 101 pounds of marijuana. Cappello still expected full payment plus \$5,000 for the time he waited in California, and Dings did not pay him immediately.

Cappello was very angry he was not paid on time. Dings, who had thought of Cappello as a friend, had never seen "greed" like this from him. Dings started to notice "some desperation" in Cappello. Dings described Cappello as angry, frustrated, and "making threats of violence."

#### Cappello Hires Odin Dwyer to Transport Marijuana for Failed October 2012 Deal

Odin met Cappello in October 2010 when he answered Cappello's ad looking for laborers to do landscaping work at his house in Central City. Odin did labor jobs for Cappello for \$10 per hour and also began working at Cappello's brother Michael's ranch. Cappello and Odin talked about Odin helping Cappello transport marijuana to the East Coast, but it never happened. In fall 2012, Michael Cappello let Odin go from working at his ranch, and Odin needed money.

Odin's first opportunity to work with Cappello in transporting marijuana came in October 2012. Dings put together a deal to procure 600 pounds of marijuana from California. Dings wanted Cappello to be the driver, and Cappello decided to use a rented recreational vehicle (RV) and have Odin drive the RV.

Odin, however, had a conviction for driving under the influence (DUI) and was unable to drive a rental car himself. So he asked his roommate Leslie Moffatt to go with him and drive the RV. Moffatt rented an RV in her name using Cappello's credit card. She and Odin drove to California in the RV and waited for Cappello to fly out and set up the deal. They met Cappello in the San Francisco Bay Area but were told the deal fell through.

- 5 Moffatt and Odin were told there was another pickup location, and they drove \*5 to Ventura and stayed there for about a week in the RV. Cappello met them in Ventura a couple times. On one occasion, Cappello appeared very agitated and was yelling on his phone. Moffatt heard him make comments "that somebody was going to die behind this." In the end, there was no deal and nothing to transport to Colorado.

Cappello was furious and told Dings he was out \$20,000 in expenses for the trip. Odin and Moffatt were supposed to receive \$5,000 each for the job, but Cappello paid Moffatt only \$800 and told her, "You got a free vacation. I don't know what the fuck your problem is." Cappello also told Moffatt that he was going to steal a car from the person he blamed for the failure of the deal. He asked her if she wanted the stolen car, and she declined. Cappello eventually paid Odin \$5,000 in installments. Dings never paid Cappello his full fee.

Odin had stopped doing odd jobs at Cappello's house by August or September 2012, but they continued to talk about doing another transportation job so Cappello could recoup his losses and Odin could make some money.

#### February 2013 Marijuana Deal with Lewin, Klarkowski, Butler

Richard Lewin was a stockbroker who lived in New York. Lewin also distributed marijuana in New York, some of which he purchased in Colorado. He would fly to Colorado with \$50,000 to \$100,000 in cash, buy marijuana, and have a driver deliver the marijuana to New York. Lewin met Klarkowski in Colorado through a mutual acquaintance.

In late January 2013, Lewin and Klarkowski met to discuss importing marijuana from California to New York.<sup>6</sup> Klarkowski planned to use Cappello as a driver.<sup>7</sup> Klarkowski told a friend he was going to California on

- 6 February 4 for a deal involving 80 \*6 pounds of marijuana. He said about \$150,000 to \$170,000 in cash would be driven to California for the deal.

<sup>6</sup> Further dates occurred in 2013 unless specified otherwise.

- 7 Klarkowski told a friend he had a transporter named Mark who had a horse trailer and was an expert in masking the smell of marijuana using an "enzyme." He told another friend his driver was Italian and lived in the mountains. (Central City is in the mountains.)

Raleigh Butler lived in Truckee; he worked as a ski instructor and lift operator and also sold marijuana. Butler met Lewin through a mutual friend, and Lewin later contacted Butler about buying marijuana in California. Lewin told Butler he had a driver who was a "pro" who would drive the marijuana from California to New York. Butler was a middleman for a supplier, and his fee was \$100 per pound of marijuana procured. Butler left Truckee for Sonoma County on February 4.

Cappello offered to pay Odin \$10,000 to help with the California marijuana deal. Odin understood that Cappello would haul the marijuana and he would act as a scout.

Francis, Odin's father, lived in Truth or Consequences, New Mexico, and drove a 1997 gold Ford Ranger pickup truck. He was visiting Odin in Colorado at the time and offered to drive Odin for the job.<sup>8</sup> Francis understood the trip involved acquiring marijuana in California and driving it to Long Island, New York. He knew Odin would be preparing the marijuana for transportation, and he thought of himself as giving Odin a ride.

- <sup>8</sup> Francis was 68 years old at the time of trial and was not working in February 2013. He had worked as a plumber and also worked as a professional bear hunting guide in Maine for a few years. Francis met Cappello about a year earlier when he helped Odin dig a ditch to run a water line to Cappello's house in Central City.

The morning of Sunday, February 3, Cappello, Odin, and Francis met at a Denny's restaurant in Denver. Francis drove his Ford Ranger with Odin, and Cappello drove his white Ford Bronco with his dog. They headed west and stayed the first night in a motel in Utah or Nevada. Odin and Francis shared a room, Cappello had his own room, and Cappello paid for both rooms.

The next day, Monday, February 4, Cappello, Odin, and Francis arrived in Santa Rosa, California. Cappello checked into a hotel on Santa Rosa Avenue, and Odin and Francis checked into a motel 10 blocks away.

- 7 \*7Lewin and Klarkowski flew into San Francisco the same day, and Lewin rented two rooms at the Sebastopol Inn. In the afternoon, Lewin and Klarkowski went to a restaurant/bar in Sebastopol. Cappello met them there and was introduced to Lewin. Cappello, Lewin, and Klarkowski sat and talked and drank at the bar for more than an hour. Then Butler arrived, and Lewin introduced Butler to Cappello. The Dwyers were not part of this meeting.

- <sup>9</sup> <sup>9</sup> The meeting among Lewin, Klarkowski, Cappello, and Butler was established by surveillance video taken at the restaurant/bar. Neither Odin nor Francis ever appears in the surveillance video.

### The Murders and the Getaway

On Tuesday, February 5, Odin and Francis checked out of their motel and went to a Denny's restaurant. Cappello met them there and told them he was waiting for a phone call. Cappello asked Odin to pick up a few bottles of rubbing alcohol. Odin and Francis bought the rubbing alcohol and went to Cappello's hotel room. Wearing gloves, Cappello used the rubbing alcohol and a rag or paper towel to clean a disassembled firearm, clips, and live rounds. Cappello told Francis the rounds "were special bullets that would . . . go through almost anything and traveled way faster than what a .45 bullet was supposed to."

After Cappello received a phone call, he said everyone was ready to go. Odin went with Cappello in Cappello's Bronco, and Francis stayed in the hotel room with Cappello's dog. On the ride, Cappello told Odin he wanted it to seem like he had another person working with him, "Vic," who was surveilling the area for security purposes.

10 <sup>10</sup> Previously, Cappello had mentioned to Odin that he was paid based on how many people were on his crew. He talked about "Vic," a fictional member of the crew who was supposed to be a security advisor. On the ride to the deal, Cappello said he wanted it to seem like "Vic" was in a van nearby scanning the area for electronic signals to make sure the police were not going to raid the deal.

Cappello and Odin met Lewin and Klarkowski and followed them to a little cabin on Ross Station Road. Before Cappello got out of the Bronco, he put the gun under his shirt behind his back. He pulled an ice pick out of the console and gave it to Odin.

8 \*8 At the cabin, Butler came out and greeted everyone. Everyone was in a good mood, and they started looking at the marijuana, which was in large bags. Cappello asked the men to take the batteries out of their phones and put them on the table, which they did. Odin did not do so because he was supposed to be in contact with "Vic."

Odin overheard Cappello say to one of the men he would pick up "40 something thousand" dollars at his hotel. Odin never saw any money in the cabin.

11 <sup>11</sup> Odin thought it was odd Cappello had to get money from his hotel because he was under the impression Cappello kept money in a lock box behind the seat in his Bronco. Cappello implied during the trip that he was bringing \$275,000 with him.

Butler said they should move to the back room. In the back room, they tore open trash bags and laid them down to keep the floor clean. Butler had a Seal-a-Meal machine set up to start resealing the marijuana in airtight plastic bags. Odin helped package the marijuana and spray it with the "enzyme" before it was sealed in another plastic bag. Everyone was wearing latex gloves. Cappello stood and watched while everyone else packaged the marijuana.

Cappello asked Odin to check in with "Vic," and Odin got up and pretended to make a call. Odin pretended to call "Vic" three times. For the third fake call to "Vic," Odin got up and left the back room. He walked into the living room and heard "three quick successive pops." He looked down the hallway and saw Cappello in the doorway with his arms extended and a gun in his hand.<sup>12</sup> Odin asked Cappello, " 'What . . . did you do that for?' " Cappello responded, " 'It was something that had to be done.' " Cappello told Odin to get the marijuana. Cappello said he couldn't find one of the bullet casings and asked Odin to look for the extra casing. Odin brought the marijuana into the living room as Cappello got his Bronco. Cappello said to leave some of the marijuana \*9 behind "so it would look like a weed deal that had gone bad." Cappello backed his Bronco up to the front door of the cabin, they loaded the marijuana, and drove away.

12 <sup>13</sup> Odin testified that each time he pretended to call "Vic," he dialed his friend. Evidence was presented that Odin's cell phone made three short outgoing calls to the same number at 9:59 a.m., 10:24 a.m., and 10:50 a.m. and, based on cell tower information, the calls could have been made from the Ross Station Road cabin. Thus, under the prosecution's theory, the shootings likely occurred during the third outgoing call at 10:50 a.m.

13 The cabin, which was rented by Butler's mother, was on a 10-acre parcel that also included a main house, another rental cottage, and a barn. The owners of the 10-acre property were a husband and wife who lived in the main house. The husband, a psychiatrist, saw patients at an office on the property. Around 10:10 a.m. on the morning of February 5, the

husband was in the kitchen of the main house when he saw a blue or black passenger vehicle followed by a white SUV drive down the driveway toward Butler's mother's cabin. His first patient was scheduled for 11:00 a.m. that day, and from the office, he would not have noticed vehicles leaving the property.

When Cappello and Odin returned to the hotel room, Francis thought Cappello "was kind of his normal self" but Odin was "pretty wound up." Cappello started disassembling his gun and cleaning it with rubbing alcohol while wearing gloves. Cappello gave Odin a pouch with the barrel and other small parts and bullets and told him to put it in a storm drain. Francis drove Odin to get rid of the gun parts. They drove toward Sonoma State University, and Odin tossed the parts and bullets in a creek.<sup>14</sup> The gun parts came from a black Springfield Armory model XD .45 caliber semiautomatic handgun, and the serial number was on the barrel. The registered owner of the gun testified he sold it to Cappello in 2009.

<sup>14</sup> Law enforcement later recovered the gun parts and some ammunition from the creek based on information provided by Odin after his arrest. A criminalist found that bullet jackets and a cartridge casing found at the crime scene could have been fired from the gun that the recovered parts came from.

When Francis and Odin returned to the hotel room, Cappello had showered, shaved his beard, and changed his clothes. Cappello checked out of the hotel. Francis and Odin followed him out to the interstate highway. After about an hour of driving, they pulled off the road and stopped underneath an overpass. Cappello said he couldn't drive with the smell of marijuana (they had not gotten very far in packaging the marijuana and spraying it with his "enzyme" when he killed Lewin, Klarkowski, and Butler), and he wanted to put it in Francis's truck. They transferred the marijuana to Francis's truck, and Odin and Cappello threw their gloves  
10 down a storm drain. They drove a short distance, \*10 Cappello pulled over again, and Francis and Odin followed. Cappello cut the black vinyl bra off the front of his Bronco and threw it down a small ravine. He took the tire cover off the back of his Bronco and put it inside his vehicle. Cappello had tied up his clothes in his jeans, and he threw the bundle over a fence. The gloves, the vinyl bra, and the bundle of clothes were later recovered when Odin rode with law enforcement and pointed out where these items had been disposed of. DNA matching Cappello's DNA was found on the gloves and clothes.

Cappello in his Bronco and Francis and Odin in the Ford Ranger returned to the interstate and headed to Colorado. Francis and Odin spent the night at a casino on the Utah border.

In Colorado, Cappello had Francis and Odin meet him at his girlfriend Jennifer Rogers's house in Central City. They unloaded the marijuana from Francis's truck and put it in the living room. There were 69 pounds of marijuana. Earlier, Cappello told Odin he wanted \$30,000 for each of the men he shot, so Odin owed him \$90,000. Now at Rogers's house, Cappello told Odin to sell the marijuana for the money he owed.

When Cappello returned from his trip to California on the evening of Wednesday, February 6, his girlfriend Rogers found him "very nervous" and "very agitated." Cappello packed up things from his house and went to Rogers's house. He told her things went terribly wrong, and he needed to make sure the money did not have any prints that might connect him to people in California. Cappello "stayed up all night washing the money that he brought back" by washing the bills in a sink full of hot soapy water. The bills were all \$100 bills, and Cappello alluded to the amount being around \$100,000. He said he was washing the money because it might have Klarkowski's prints on it.

The next day, Rogers went with Cappello to his brother Mike's ranch, and Cappello took the money into a garage unit at the ranch. (Rogers stayed in the truck and did not see what he did with the money.)



Another occasion, Cappello was driving on Highway 119 with Rogers, and he pulled a gun magazine out of a bag and told her to throw it. He pulled out two boxes of \*11 bullets and opened them. Rogers thought one box was missing four bullets and the other box was full. She threw some out the window, and he told her she wasn't throwing hard enough. Cappello threw the rest out the window and had her throw the boxes in a trash can on the road.

Around February 7 or 8, Cappello told Rogers he would be going to Brazil and he would contact her later.

### Arrests

Cappello was arrested on February 14 in Mobile, Alabama. Inside his Bronco, police found three passports, a Colorado driver's license, and a driver's license from Brazil. Odin and Francis were arrested on February 26. When Francis was arrested in New Mexico, he was found with about 12 pounds of marijuana and \$6,000. A gun laser sight was also found in his trailer. When Odin was arrested in Colorado, he had about six and a half pounds of marijuana, less than four grams of cocaine, and \$11,000 in his car. Law enforcement also found about 45 pounds of marijuana in a storage unit that Odin had access to.

### Defense

The defense theory was that the murders occurred around noon when gunshots were heard coming from the direction of the cabin, and Cappello could not have been the shooter because cell phone evidence placed him at his hotel room around then. In his opening statement, defense counsel argued the testimony of the Dwyers was inherently suspect because they were involved in the marijuana deal with the three victims, they were later found with cash and marijuana stolen from the cabin, they disposed of evidence and did not go to the police after the robbery and shootings, and they were initially charged with murder themselves. He suggested Francis was the shooter because an eyewitness saw a truck matching the description of his Ford Ranger close to the cabin within a few minutes of noon, and because Francis was "very skilled with a handgun," and he was in possession of a laser sight for a .45 caliber handgun when he was arrested. Defense counsel also criticized law enforcement's investigation of the case, arguing it "was flawed by a presumption of Mark Cappello's guilt."

12 \*12 Erin Ellis lived somewhat near the cabin on Ross Station Road where the murders occurred. The day of the murders, she heard popping noises that sounded like multiple gunshots as she entered her house. She looked out on her pasture and noticed her horses had turned their heads so their ears were in the direction of the Ross Station Road cabin. Ellis reported to law enforcement that she heard the popping sounds around noon.

15 <sup>15</sup> Recall that cell phone evidence and Odin's testimony suggested the shootings occurred at 10:50 a.m. (See fn. 12.)

The defense also called as a witness one of the owners of the 10-acre property on which the cabin was located. (Her husband testified for the prosecution that he saw two vehicles enter the property around 10:10 a.m. on the day of the shootings.) This witness testified she left the main house on February 5 around 10:50 a.m. and walked to Ross Station Road to meet a friend who was giving her a ride to a yoga class. She thought her friend picked her up around 11:00 a.m. During the time she waited for her ride, she did not see any cars leaving her property. Later, around 1:30 p.m., she was back in her kitchen when she heard a vehicle on the gravel. She saw a white vehicle leaving from the cabin area. This witness also testified she had "very poor vision" and the farther things are from her the less in focus they are.

Kimberly Crumb has a 1999 Ford Ranger in a color called Harvest Gold. On February 5, 2013, just after noon, Crumb observed a truck similar to his on Highway 116 headed toward Forestville near Ross Station Road. The truck had two occupants and an out-of-state license plate.



Charles Wyatt met Odin around February 2013 in the Sonoma County Jail when they were housed in the same module. According to Wyatt, Odin told him "he was the guy that, in his words, whacked the three victims." Odin said he and Francis planned to commit a robbery and Cappello did not know about their plan. Odin told Wyatt that Cappello was at the hotel at the time of the killings.

In late March or early April 2013, Wyatt sent a letter to the Sonoma County District Attorney's Office to the attention of Traci Carrillo, the deputy district attorney handling the case at the time, reporting that Odin told him details about the murders. He did not receive a response to his letter. No one from the district attorney's office or the Sheriff's Department ever interviewed Wyatt about Odin's jailhouse statements.

- 13 \*13 Roger Clark testified as an expert in police procedures. He reviewed police reports and interview transcripts from the criminal investigation of this case. He testified that taking more than one reading of the temperatures of victims' bodies can provide evidence about when they died. In this case, the internal body temperatures of the victims were never measured. Clark criticized law enforcement for failing to investigate further into Ellis's report that she heard gunshots at noon and Crumb's report of seeing a vehicle similar to Francis's near the crime scene around noon. He expressed concern about how law enforcement treated Francis, a coconspirator in the case, observing that he was interviewed rather than interrogated. Clark described as a typical investigative technique the practice of leaving coconspirators together and listening in on their conversation remotely, but apparently that was not done here with Odin and Francis. He testified that polygraph examinations are valuable, but apparently no polygraph testing was offered in this case. He criticized law enforcement for failing to test Cappello's clothing (recovered at the side of the road) for gunshot residue.

Clark noted that Odin and his attorney were allowed to watch Cappello's interview by law enforcement. Clark had never seen this before and could not "think of a single productive outcome for anything like that." He criticized law enforcement for failing to interview Wyatt to determine whether he had relevant information on Odin. Finally, he expected further "pursuit of the money trail" than occurred in this investigation.

## Jury Verdict and Sentence

The jury found Cappello guilty as charged and found all the special circumstances and firearm enhancement allegations true. The trial court sentenced Cappello to three consecutive terms of life without the possibility of parole (LWOP), plus 100 years to life in prison, plus a determinate sentence of six years, eight months.

## DISCUSSION

### *A. Admission of Odin's and Francis's Interviews*

- After Francis testified, the trial court allowed the prosecution to play, as a prior consistent statement, an audio-recording of Francis's interview with law enforcement conducted soon after he was arrested on February 26, 14 2013. Likewise, after Odin \*14 testified, the prosecution was allowed to play a video-recording of Odin's interview with law enforcement conducted the same day as a prior consistent statement.

Cappello contends the trial court abused its discretion in allowing Francis's and Odin's interviews to be played for the jury in their entirety. We agree with Cappello that those portions of the interviews that were not relevant to rehabilitate credibility should not have been played for the jury, but he has failed to show prejudice from the error.

### 1. Admissibility of the Entire Interviews

"To be admissible as an exception to the hearsay rule, a prior consistent statement must be offered (1) after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement, or (2) when there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive. (Evid. Code, §§ 791, 1236.)"<sup>16</sup> (*People v. Riccardi* (2012) 54 Cal.4th 758, 802 (*Riccardi*), abrogated on another point by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 (*Rangel*).)

<sup>16</sup> Further undesignated statutory references are to the Evidence Code. Section 1236 provides, "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."

Section 791 provides, "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

After a witness's credibility has been attacked, prior statements made by that witness are admissible to rehabilitate the witness's testimony to the extent those prior statements are *consistent* with the witness's trial testimony. (§§ 791 [prior statement "that is *consistent* with [the witness's] testimony at the hearing" is admissible under \*<sup>15</sup> certain circumstances (italics added)], 1236 [statement offered in compliance with section 791 is admissible as an exception the hearsay rule "if the statement is *consistent* with [the witness's] testimony," italics added].)

The facts of *Riccardi* are instructive. In that case, witness Marilyn Young testified about the defendant's behavior in the months before he killed his ex-girlfriend Connie and her friend. (*Riccardi, supra*, 54 Cal.4th at pp. 765-767, 769-770.) In cross-examining Young, defense counsel attempted to impeach her with her audio-recorded interview with the police, conducted the day after the murders. Following cross-examination, the prosecutor moved to admit the entire audiotape of Young's interview, arguing it was admissible because the defense implied she fabricated her testimony. The trial court allowed the jury to hear the entire police interview. (*Id.* at pp. 798-799.)

Our Supreme Court, however, held "the trial court erred in admitting those portions of the audio-recorded interview that did more than rehabilitate Young's testimony." (*Riccardi, supra*, 54 Cal.4th at pp. 799, 803.) The court found that defense counsel's cross-examination of Young suggested she fabricated her trial testimony because she failed to mention important facts in her police interview. "Specifically, defense counsel claimed, in cross-examining Young, that she had never told police that [murder victim] Connie reported hearing a loud bang from her patio the night before her death . . . . Defense counsel also claimed that Young had never told police that defendant threatened Connie that he could hurt her if he wanted to." (*Id.* at p. 803.) Thus, Young's prior consistent statements in her police interview were admissible to refute the defense's suggestion of recent fabrication. (*Ibid.*)

But Young's recorded interview included other statements "that were not part of her trial testimony." (*Riccardi, supra*, 54 Cal.4th at p. 799.) For example, in her police interview but not in her trial testimony, Young described the defendant as " 'psychotic' and 'berserk' " and "suggested defendant had 'connections' with 'bad guys' in the criminal 'underworld.' " (*Ibid.*) Young described an incident to the police that she did not mention at

trial. As to other incidents that she did testify about, Young provided additional details to the police that she did not mention at trial. (*Id.* at p. 800.) In her \*16 police interview, Young also described stalking incidents involving the defendant that she had not personally observed, and she speculated that the defendant might have followed the victims and "might have seen something that enraged him enough to kill both of them." (*Id.* at p. 801.) The court recognized that Young's prior statements conveying her beliefs about the defendant's criminal associations, her description of incidents she did not testify about at trial, and her speculation about the killings were not admissible to rehabilitate her credibility. (*Id.* at pp. 804-805.) The court explained, "Although portions of Young's audio-recorded statements to the detective were properly admitted to refute defendant's characterization of her testimony, this circumstance does not necessarily establish that the entire recording was admissible." (*Id.* at p. 803.)

In the present case, as in *Riccardi*, defense counsel's cross-examination of the witnesses suggested that they fabricated their testimony. Defense counsel asked Francis about prior statements he made that were inconsistent with his trial testimony. He asked Francis about his proffer to the district attorney's office, implying Francis had a motive to lie then so that he could settle his own criminal case. Defense counsel also elicited testimony from Francis that he and Odin were currently housed in the same module in jail and, in the previous six weeks, they had out-of-cell time at the same time every day, thereby hinting that he and Odin could have recently made up their trial testimony together in jail. Defense counsel took a similar tack in cross-examining Odin. Francis's and Odin's prior consistent statements regarding the crime made on February 26, 2013, were, therefore, admissible to refute the defense claim that they fabricated their testimony.

17 <sup>17</sup> Cappello argues the Dwyers also had motive to lie at the time of their February 26, 2013, interviews. As our high court responded to a similar argument, "This is no doubt true, but defendant also implied at trial that the plea agreement provided an *additional* improper motive. A prior consistent statement logically bolsters a witness's credibility whenever it predates *any* motive to lie, not just when it predates all possible motives." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 491-492 [rejecting claim that the witness's prior consistent statement was inadmissible because the witness already had a motive to minimize his role in the crime at the time he made the prior statement where prior statement was made before the witness reached a plea bargain]; see *People v. Jones* (2003) 30 Cal.4th 1084, 1107 [witness's prior statement to police properly admitted "because it was made before the [witness's] plea bargain was struck and thus before the existence of one of the grounds alleged in defendant's charge that [the witness's] trial testimony was biased" even though the defense argued the witness had another bias or motive to lie at the time he gave the police statement based on fear of prosecution].) Here, prior consistent statements made February 26, 2013, were admissible because they predated Francis's and Odin's plea agreements and predated Francis and Odin having out-of-cell time together in jail.

But, as in *Riccardi*, this does not necessarily establish that the entire recordings were admissible. (See *Riccardi*, *supra*, 54 Cal.4th at p. 803.) Only those prior consistent statements that were relevant to rehabilitate credibility were admissible.

The Attorney General claims that when cross-examination impugns the witness's overall credibility or alleges recent fabrication or bias, "an *entire* statement is admissible to rebut it." (Italics added.) He cites *People v. Crew* (2003) 31 Cal.4th 822, 843 for this proposition. But *Crew* does not hold an entire prior interview is admissible when there has been a claim of bias or motive to fabricate, regardless of whether the entire interview is consistent with the witness's current testimony. The hearsay exception at issue applies to prior *consistent* statements. (§§ 791, 1236.) The Attorney General offers no authority for the proposition that a witness's hearsay statements that are not consistent with her trial testimony become admissible merely because those statements were made during an interview in which the witness made *other* statements that are consistent with trial testimony.

Accordingly, we agree with Cappello that the trial court erred in admitting the entire interviews without considering which portions were relevant to rehabilitate credibility.

<sup>18</sup> <sup>18</sup> We note that the trial court ruled Francis's entire interview could be admitted, stating, "I'm just going to let that all in. And if—any 356 arguments I'll say under 352 it will be an undue waste of time . . . ." To the extent the trial court ruled the entire interviews were admissible under section 356, this was error. Section 356 provides that when part of a conversation or writing is given in evidence, another conversation or writing that is " 'necessary to make it understood may also be given in evidence.' " The purpose of this "rule of completeness" is to avoid creating a misleading impression. (*Riccardi, supra*, 54 Cal.4th at p. 803, fn. 22.) "It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced." (*People v. Samuels* (2005) 36 Cal.4th 96, 130.) But the prosecutor here did not argue Francis's and Odin's entire interviews were admissible under section 356, the Attorney General does not make the argument on appeal, and we do not see how the portions of Francis's and Odin's recorded interviews relevant to rehabilitate them would have created a misleading impression.

## 2. Lack of Prejudice

Nonetheless, we need not reverse because Cappello has not shown prejudice. Again, *Riccardi* is helpful to our analysis. There, our high court concluded any error in admitting Young's entire recorded interview with the police—"and not only those statements that refuted defense counsel's characterization of Young's testimony"—was harmless. (*Riccardi, supra*, 54 Cal.4th at p. 804 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836-837, the "reasonable probability standard" to the state law error].) The court explained, "Any prejudice from Young's beliefs about defendant's criminal associations, her fear of defendant, and her speculation that the killings were not premeditated, was substantially mitigated by other admissible evidence." (*Ibid.*) "Overall, although Young's audio-recorded statements to Detective Purcell recounted not only additional details concerning defendant's stalking but also included incidents she had not described during her testimony, her statements, viewed in context of the entire guilt phase, *added nothing that was prejudicial to defendant.*" (*Id.* at p. 805, italics added.) The additional details in Young's police interview "were cumulative to the enormity of evidence showing that [murder victim] Connie was increasingly afraid of defendant in the week before she was killed." (*Ibid.*)

Here, Cappello claims the interviews contain significant inadmissible hearsay, speculation, and factual assertions that differed from the Dwyers' trial testimony. We conclude the additional details in Odin's and Francis's interviews added nothing that was prejudicial to Cappello.

### a. *Odin's Interview*

<sup>19</sup> In his interview, Odin told detectives that after he saw the three victims "dead on the floor," he asked Cappello what happened and Cappello "was like, 'Well, it had to be \*<sup>19</sup> done.' " Asked about Cappello's demeanor, Odin said, "His thing was it had to be done. And it seemed like he came prepared to do that, you know, 'cause, you know, a lot of things clicked in to place for me right there. Like, no, maybe we weren't just here moving weed, like I think we to [*sic*] *steal that weed*. . . ." (Italics added.)<sup>19</sup> Later, Odin said the gunshots he heard were "fast" and "it sounded muffled, but it didn't have a silencer or anything. So, I mean, maybe it was just, uh, way [*sic*] the door was to the room that made it sound muffled. . . ." Odin continued, "Maybe he had it *right up against the back of their heads*—I don't know." (Italics added.)

<sup>19</sup> The phrases in Odin's interview that Cappello identifies on appeal as inadmissible and prejudicial are in italics.

Cappello argues that Odin's interview statements that Cappello was there to "steal that weed" and that he might have put the gun "right up against the back of their heads" were not consistent with Odin's testimony. We discern no prejudice from these statements. Odin may not have testified at trial that he realized after the shootings that Cappello was there to "steal that weed," but this statement adds nothing prejudicial that was not implied by his trial testimony. Odin testified that after the shootings, he said they needed to get out of there, Cappello said, " 'No. Let's get the marijuana,' " and Odin collected the marijuana and put it in Cappello's Bronco. In other words, they stole the weed. Odin's comment that the gunshots may have sounded muffled because the gun was "up against the back of their heads" would not have prejudiced Cappello because his testimony at trial was that Cappello shot the three victims in quick succession and when asked why he did it, Cappello said, " 'It was something that had to be done.' " In this context, Odin's added speculation on *how* Cappello shot the victims would not have affected the verdict. (See *Riccardi, supra*, 54 Cal.4th at p. 828 [no reversal where the defendant "fails to demonstrate that it is reasonably probable his verdict was affected by any evidentiary error"].)

20 In his interview, Odin said when he and Cappello arrived at the cabin, everyone (presumably referring to Cappello, Klarkowski, Lewin, and Butler) shook hands. But \*20 Odin did not shake hands with anyone. He continued, "I was the worker. That's why I said I think that probably [Cappello] told me a different story than really what was going on, and *he was supposed to have money, not just be a transporter. I think he was supposed to be in on the purchase.*" (Italics added.) Later, Odin told the detectives, "So what I think happened is that *the night* before [Lewin] gave them a *bunch of money*—[Butler] a bunch of money and so, well, after they looking [*sic*] at all the product, I think [Cappello] *was supposed to bring other money with him* and pay, because the way it seem [*sic*]. . . . While I was packaging, showing [Butler] and [Klarkowski] how to package, [Cappello] and [Lewin] were talking . . . about some other logistics about the next run and . . . but there's still like forty eight hundred, or forty eight thousand or something that needs to be on this and that was . . . (unintelligible) . . . very fast by [Cappello] who was like, 'Yeah, yeah, yeah, well we just gotta set this up with Vic and then we'll go back to the hotel room and we'll take care of everything.' So I was under the impression . . . [*¶*] . . . [*¶*] . . . is that we *were leaving to go get money to come back to finish paying for the product.*" (Italics added.) He said he did not see any money at the cabin at all. Later in the interview, Odin said, "[Cappello] wanted me to sell all, all the pot to pay him for doing that for me. 'Cause that's what he said, he said he did that for me *so I could, you know, earn some money.*" (Italics added.)

Cappello maintains that Odin's surmise (1) that Cappello was supposed to be in on the purchase and not just the transportation and (2) that Cappello wanted Odin to sell the marijuana to make some money was inadmissible speculation. But Odin similarly testified without objection that Cappello and one of the men in the cabin discussed money Cappello still had to bring to the cabin. Odin testified, "Sounded like—they were discussing some money that it seemed like Mr. Cappello still had to bring to the table. He said that he had some money back in the motel room, and he could go and get that real quick." Odin further testified that heard the amount "40 something thousand" discussed, but he did not see any money at the cabin. Odin also testified about Cappello wanting him (Odin) to make money. Odin testified without objection, "[Cappello] said right after the 21 shooting that he wanted \$30,000 for each one of those people that he shot \*21 like he was a hitman or something. He didn't say he was a hitman. But he was like—he was like, 'I need 30 grand for each of these people. That's what the normal payment is for something like that. And *I'm doing this to help you and your dad out.*' He knew that we didn't have very much money. He made it seem like even though those people were dead, this was a big payday and we could get wealthy." (Italics added.) Because Odin's complained-of interview



statements largely duplicated his trial testimony, their admission was harmless. (See *Riccardi, supra*, 54 Cal.4th at pp. 803-804 [where inadmissible portions of witness's interview "merely duplicated much of her trial testimony," court found error harmless].)

In his interview, Odin told the detectives it was his understanding that Cappello was "ex-military." Odin mentioned "the *black ops thing* that [Cappello] talked about. . . ." (Italics added.) Later, Odin commented that talking to the police (as he was) "doesn't make me safe from, you know, the Hell's Angels . . . ." Odin said he was scared of going to jail "for a shit-load of years" and he was also scared of not going to jail "and having somebody from [Cappello's] family *do a hit on me*." (Italics added.) Odin said Cappello told him he was an Oakland chapter member of the Hells Angels and he had tattoos that looked like club tattoos. Odin told the detectives it seemed like Cappello's family had "got some connections." Odin worked for Mike Cappello and "that's a tight knit family. It's an Italian family. They may have made a shit load of money in like twenty years. They made like *hundreds of millions of dollars*. You *have to know people* to make that money. You, you're not just startin' out of college and goin' and open a business and not having connections and . . . [¶] . . . [¶] . . . people in the pipeline . . . ." (Italics added.) Odin said he had seen Cappello with handguns before. Then he said, "*He's got a hundred semi automatic hand guns* [¶] . . . [¶] . . . the gun safe at his brother's house is fairly large. I, I don't know if they were his guns in there or not, you know. I mean, I just know that *those guys are wealthy and he was in the military and pretty much wealthy military guys usually have a shitload of guns laying around everywhere*. And, that's my experience."

- 22 \*22 Cappello argues these statements were inadmissible because there was no evidence Odin had personal knowledge about these things. This may be true, but again we fail to see how this could have prejudiced Cappello "viewed in context of" the evidence presented at trial. (See *Riccardi, supra*, 54 Cal.4th at p. 805.) Rogers testified that Cappello talked about being in the military. He told her he was special forces and he had killed 11 people in combat. Odin testified that Cappello talked about his military experience. He testified that Cappello implied he was in special forces and showed him an assault weapon, saying it was "his favorite weapon for storming into buildings and stuff." Another witness testified that Cappello told her he served in the marines and learned to make explosives. Rogers testified Cappello talked about being a member of the Hells Angels, and this scared her. She testified Cappello had two Hells Angels rings, he had shown her photographs of himself with other Hells Angels members, and she mentioned a tattoo that caused her to believe he was in the Hells Angels. Odin testified that Cappello mentioned he was involved with the Hells Angels more than once. Francis testified the Hells Angels "have rather long reach if you get them mad at you." Rogers testified that Cappello often spoke about how his family was connected with the Italian Mafia, and this scared her. She testified Cappello told her his family was from Sicily and they owned restaurants that were fronts for the Mafia. Rogers testified she was afraid Cappello's family would come after her and she "went into hiding." Evidence at trial established that Cappello went target shooting with a handgun at his brother's ranch and that an AR-15 rifle, a Saiga semiautomatic shotgun, magazines and ammunition, and a DVD on advanced pistol handling were found in his house. As we explain below (see section C.), all of this evidence was relevant and admissible. Thus, any potential prejudice from Odin's inadmissible interview comments on Cappello's claimed military experience, his association with the Hells Angels, and his claimed family or Mafia connections "was substantially mitigated by other admissible evidence." (*Id.* at p. 804.) Odin's comment that Cappello's family made hundreds of millions of dollars, though inadmissible, is not reasonably likely to have affected the verdict.
- 23 Nor do we see how Odin's statement that Cappello had "a hundred semi automatic hand guns," followed by \*23 his speculation that Cappello had a lot of guns because it was Odin's "experience" that "wealthy military guys usually have a shitload of guns laying around" would have affected the verdict. The jury would have understood in context that Odin was exaggerating or speculating, and in any event, there is no reasonable

probability the jury would have reached a more favorable verdict had it not heard this comment in light of evidence that Cappello was the owner of the Springfield .45 caliber semiautomatic handgun that was the likely murder weapon.

Finally, Cappello notes that Odin said in his interview that the victims "seemed like really nice guys," and defense counsel argued this was "a gratuitous statement that is designed to elicit favorable impressions of the witness." To the extent Cappello now argues this comment was likely to have prejudiced him, we are not convinced. Odin also said of Cappello in his interview, "I mean, I just worked for the guy for two years. I just thought he was a really nice guy." So Odin's initial impression of the victims was no more positive than his view of Cappello after knowing him for two years. Cappello argues the key issue at trial was "the extent to which the jury believed [Odin and Francis], and how they perceived Cappello, who did not testify." Here, the jury observed Odin testify for many hours, and he was subjected to vigorous cross-examination. It is not disputed that at least parts of his interview were admissible, and so the jury permissibly heard those parts of Odin's interview that were consistent with his trial testimony and relevant to his credibility, while also observing his demeanor during the videotaped police interview. We do not see how Odin's comment that the victims seemed nice, or indeed any of his complained-of interviews statements, would have served to prejudicially establish Odin's credibility.

#### b. *Francis's Interview*

Likewise, any potential prejudice from Francis's inadmissible interview comments "was substantially mitigated by other admissible evidence." (*Riccardi, supra*, 54 Cal.4th at p. 804.) Cappello points out that Francis's interview contained hearsay from Odin about what happened at the cabin. This evidence was mitigated by  
 24 Odin's trial testimony about what happened at the cabin. Similarly, Francis's interview statements about \*24 Cappello's association with the Hells Angels was mitigated by admissible evidence showing Cappello claimed to be a member of the Hells Angels.

Cappello also complains that Francis's interview contained rampant speculation, but heard in context, the jury would have recognized those comments that were speculation and, in any event, we cannot say on balance Francis's comments were prejudicial to Cappello.<sup>20</sup> Francis, like Odin, testified at trial and was subjected to vigorous cross-examination. The jury permissibly heard those parts of his interview that were consistent with his trial testimony and relevant to his credibility. Cappello does not explain how the admission of Francis's entire interview caused him prejudice.

<sup>20</sup> For example, Francis said in his interview, "I expect that [Cappello] was paid to shoot this gangster guy. You know, 'cause he kept rambling on, 'Oh, he's a fuckin' rapist,' and all this. Well, I don't care if the guy is a rapist. He probably should a been killed then, but not by me." This comment attacked the victim, not Cappello.

#### c. *Conclusion*

We agree with Cappello that a crucial issue at trial was whether Odin and Francis were credible, but Cappello has failed to demonstrate the admission of the inadmissible portions of the police interviews could have affected the jury's assessment of the Dwyers' credibility to his prejudice. The Attorney General notes that, after a two-month trial, the jury deliberated for just one day, suggesting "the jury had little trouble deciding who to believe." If, after observing Odin's and Francis's trial testimony and considering the corroborating evidence<sup>21</sup> (including the admissible portions of their police interviews), the jury was unsure of Odin's and Francis's  
 25 credibility, we cannot discern \*25 how the inadmissible portions of their police interviews would have caused

the jury to find Odin and Francis credible. Therefore, we conclude it is not reasonably probable that the trial court's error in admitting the Dwyers' entire interviews affected the verdict. B. *Detective Cutting's Testimony on the Dwyers' Credibility*

- <sup>21</sup> Odin's testimony about Cappello disposing of the gloves, the vinyl bra on his Bronco, and his clothes was corroborated by physical evidence of those items recovered by the law enforcement. His testimony that he and Cappello followed Lewin and Klarkowski to the cabin was corroborated by the property owner's testimony that he saw a dark colored passenger vehicle followed by a white SUV driving to the cabin on the morning of the killings. His testimony that the gun parts he threw in the creek belonged to Cappello was corroborated by testimony from the registered owner of the gun that he sold it to Cappello in 2009. His testimony that Cappello shaved his beard after the killings was corroborated by testimony from other witnesses that Cappello had a beard on February 4 and was clean shaven when he returned to Colorado on February 6.

Cappello contends the lead detective on the case, Brandon Cutting, improperly vouched for the credibility of Odin and Francis and defense counsel denied him effective assistance of counsel in failing to object to this testimony.

### 1. Background

As we have seen, part of the defense was criticizing the investigation of the case. In his opening statement, defense counsel suggested detectives were unjustifiably credulous of the Dwyers' version of events. He told the jury, "Instead of considering the possibility Francis Dwyer and Odin Dwyer were involved in shooting the victims and instead of investigating whether the Dwyers had any credibility, detectives in this case began to instead build the Dwyers' credibility or attempt to do so."

The defense called Cutting as a witness, focusing on how he determines a witness's credibility in general and how he investigated the Dwyers' statements in particular. Defense counsel asked Cutting who he had interviewed "to determine whether or not Odin Dwyer was credible." Cutting responded that he began with Odin's statement that they left Colorado for California at a certain time. Cutting reviewed evidence that showed Odin was telling the truth about the time. Defense counsel repeated his question, and Cutting answered, "Everybody I interviewed in this case goes to the credibility of everybody else. That was sort of the totality of what we did." Cutting explained that he talked to people who knew Odin "[t]o determine whether he was telling me the truth about his statements."

- Given the drift of direct examination, the prosecutor in cross-examination tried to show that Cutting reasonably investigated the case based on the evidence and that law enforcement did not rush to believe Odin and Francis as suggested by defense counsel. The prosecutor asked what it meant when a suspect's statement was
- <sup>26</sup> corroborated by physical evidence. Cutting answered, "Well, it *lends credibility to the statement*. It's one <sup>\*26</sup> tool to determine that what they're telling me is the truth. When you're piecing things together, you are trying to create a total package picture and understand it. Everybody's statements and everything that you can corroborate or put truth to or put a fact to, those are pieces that help build credibility." (Italics added.)

<sup>22</sup> <sup>22</sup> The parts of Cutting's testimony that Cappello now claims amount to improper vouching are in italics.

The prosecutor asked if Cutting immediately accepted as true what Odin said on February 26, 2013. Cutting responded, "Absolutely not. But I did test it. We continued to ask questions. . . . [¶] I'm in a business where you don't believe people typically. It's a skeptical business being in law enforcement. So you typically don't believe



people first, and then you have to sort of start to develop belief in what they're saying either based on the facts that they've just given you, based on time lines that you can prove, something. There needs to be something there. And *ultimately we got to that point*. But not initially." (Italics added.)

Cutting further explained that corroborating a witness's statement is "[v]ery important." "Like I said, . . . being in law enforcement, you tend to not believe people. People generally give you a misstatement because they're hiding something. The more statements that are the same, or consistently the same, you begin to understand that those are the parts of that that are the truth. It's the corroborated truth versus the statement of, 'I did this.' Somebody else say, 'He did this at this time.' You know, it makes sense. And *it becomes believable*. And then you have to use other tools to prove those believable statements to be the truth. It goes step by step." (Italics added.)

Cutting testified he was able to find physical evidence to corroborate Odin's version of events such as surveillance video tape, a Target receipt for the rubbing alcohol purchased on the day of the murders, and the evidence found when he and Odin drove around looking for items Odin said Cappello got rid of after the  
 27 shootings (vehicle bra, clothes, nitrile gloves). The prosecutor asked whether Cutting found any physical \*27 evidence that was inconsistent with what Odin told him, and Cutting said no.<sup>23</sup> The questioning continued.

<sup>23</sup> There were some facts provided by the Dwyers that law enforcement could not corroborate or disprove. For example, Cutting tried to obtain surveillance video or other evidence from the hotel in Santa Rosa where Cappello stayed to corroborate or disprove the Dwyers' claim that Francis was in the hotel room during the shootings, but no such evidence was available.

"Q *So all the physical evidence that you collected corroborated him. Is that what you're saying?*

"A *Yes*.

"Q *And the same with Francis?*

"A *Yes*.

"Q So you were trying to prove or disprove Francis's statement as well?

"A Everybody's statement. Yes."

Asked about percipient witnesses in this case, Cutting testified, "So I don't have a lot of people that provided perception into what was taking place other than—my interviews with Odin were very specific about what took place in that house. *Odin provided me statements that I could prove to be truthful in all other aspects of this incident*, from the time they left Colorado, actually prior to, from the time they left Colorado to the time that he was caught. The statements that he made to us we were able to prove to be, based on the—I don't know if we broke down every little piece of what he said, but the ones relevant to this case, we were able to identify and show some form of evidence towards that. [¶] . . . [T]he statements he made I was able to put facts to at least some reasonable evidence towards that to say that is a truthful statement." (Italics added.)

The prosecutor followed up on defense counsel's question about investigating the backgrounds of the Dwyers such as where they lived when Odin was a child. Cutting responded that the Dwyers' family history was not relevant to the case. He continued, "We did have some evidence. He stated where he lived. I didn't have  
 28 anything to \*28 disbelieve what he said. So did it go to his credibility? He told me about some places that he

lived that I knew he had been based on records reviews of him. So that in and of itself was a credibility builder. *I didn't hear anything that made me say not truthful or something that made me skeptical about what he was saying.*" (Italics added.)

## 2. Analysis

Cappello claims the italicized testimony from Cutting was impermissible "vouching." He relies on the rule, "Lay opinion about the veracity of particular statements by another is inadmissible on that issue." (*People v. Melton* (1988) 44 Cal.3d 713, 744 (*Melton*).) This claim is forfeited because defense counsel failed to object during Cutting's cross-examination (§ 353), and, in any event, we conclude there was no prejudicial error.

First, we agree with the Attorney General that defense counsel opened the door to the prosecutor's questions about the reasons Cutting found the Dwyers credible. The implication of defense counsel's questioning was that Cutting failed to investigate the Dwyers and simply accepted their statements as true. The prosecutor's questions and Cutting's responses were, therefore, relevant to an issue raised by the defense, that is, whether the investigation was thorough and fair.<sup>24</sup> (See *People v. Wharton* (1991) 53 Cal.3d 522, 595 ["the prosecutor was allowed to explore implications raised by defendant on direct questioning"].) Further, while a witness's lay opinion of another's credibility is generally inadmissible because it is irrelevant (*Melton, supra*, 44 Cal.3d at p. 744), evidence of specific instances of a witness's past reliability is relevant to the witness's credibility and is, therefore, admissible (*People v. Harris* (1989) 47 Cal.3d 1047, 1081 \*29 (*Harris*)). Here, the prosecutor did not solicit Cutting's unsupported opinion that the Dwyers were generally credible witnesses. Rather, he asked about Cutting's investigation, and Cutting reasonably explained that the discovery of corroborating evidence led him to believe Odin and Francis were telling the truth more generally.

<sup>24</sup> This is distinguishable from cases that have held opinion testimony on the credibility of another witness is inadmissible because it is not relevant to any issue at trial. (Cf. *People v. Sergill* (1982) 138 Cal.App.3d 34, 40 ["officers' opinions on the child's truthfulness during their limited contacts with her did not have a *reasonable* tendency to prove or disprove her credibility and were therefore not relevant"].) Given the defense theory of a flawed investigation, Cutting's testimony was relevant to explain his investigation steps and to rebut the defense's suggestion that he believed the Dwyers without reason.

Second, even assuming Cutting's testimony in cross-examination was inadmissible, there was no prejudice because defense counsel elicited from Cutting similar testimony in direct examination that he assessed the credibility of every witness based on whether the witness's statement was consistent with other evidence, and that evidence in this case corroborated Odin's statements, making him seem truthful.<sup>25</sup> We fail to see how the complained-of cross-examination testimony could have harmed Cappello since it merely elaborated on a theme introduced by defense counsel, namely, that the Dwyers became more credible to Cutting as he found more evidence corroborating their statements.

<sup>25</sup> For example, defense counsel elicited Cutting's response that he reviewed evidence showing Odin "*was telling me the truth* about when he left [Colorado]." (Italics added.) He further testified he talked to people who knew Odin "[t]o determine whether he was telling me the truth about his statements." Cutting explained, "Everybody I interviewed in this case goes to the credibility of everybody else. That was sort of the totality of what we did."

Moreover, Cutting's testimony indicating that he generally believed the Dwyers' version of events "did not present any evidence to the jury that it would not have already inferred from the fact that [Cutting] had investigated the case and that [Cappello] had been charged with the crimes." (*People v. Riggs* (2008) 44 Cal.4th 248, 300 (*Riggs*).) There was no implication from the prosecutor's questions or Cutting's answers that Cutting's determination that the Dwyers were generally truthful about the crime was based on evidence not presented to

the jury. (See *ibid.*) "The jury's exposure to the unsurprising opinions of the investigating officer that he believed the person charged with the crimes had committed them . . . could not have influenced the verdict." (*Id.* at pp. 300-301.)

- 30 \*30 Because Cutting's cross-examination testimony was harmless, Cappello's claim of ineffective assistance of counsel for failing to object to the testimony also fails. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 414-415 (*Ochoa*)). C. *Admission of Assertedly Improper Character Evidence*

Cappello contends the trial court improperly admitted evidence showing (1) he associated with the Hells Angels, (2) he possessed guns, firearm and military paraphernalia, and other weapons, and he claimed to have specialized military experience and training, (3) he was involved in the drug trade beyond transporting marijuana, and (4) he made threats or behaved boorishly in the past. We find no prejudicial error.

## 1. Hells Angels

### a. *Background*

In a motion in limine, the prosecution sought admission of evidence that Cappello claimed association with the Hells Angels, asserting the evidence showed Cappello "used his association to intimidate others . . . and to cause them to do things they wouldn't normally do and to refrain from implicating him in these and other crimes." The prosecution argued the evidence was not intended as character evidence but was relevant for its effect on the listeners to explain their behavior and bolster their credibility. Cappello argued there was insufficient evidence he was associated with the Hells Angels, and the evidence was more prejudicial than probative. The trial court ruled witnesses would be permitted to testify they were fearful "based on their belief that Mr. Cappello is a Hells Angel" because this information was relevant and not unduly prejudicial.

When Rogers testified on direct examination, she admitted she did not tell the truth in her first interview with the police on February 13, 2013. Cappello had not been arrested then, and Rogers testified she lied because she "really was more afraid of [Cappello] at that point than . . . of the police." Later, she "completely came clean" in an interview with district attorney investigator Tim Dempsey conducted October 15, 2015.

- Before the prosecutor asked Rogers why she was afraid of Cappello, the trial court gave the jury a limiting instruction as follows: "The testimony that you hear, if you hear about certain groups, is not offered to prove  
31 that Mr. Cappello actually belonged to those \*31 groups but only to explain the state of mind and the conduct of the witness. It's not to prove that he belonged to those groups. It's just to explain the state of mind and conduct of the witness in this case."

Rogers then testified that when she began dating Cappello, he talked about being a member of the Hells Angels and showed her some Hells Angels jewelry and this caused her concern or fear.<sup>26</sup> Rogers received financial assistance from the Sonoma County District Attorney's Office for relocation and living expenses and she had received \$12,900 so far.

<sup>26</sup> In addition, when Rogers first met Cappello, he often spoke about his family's affiliation with the Italian Mafia and how his family was from Sicily, and this scared her. Even after Cappello was arrested, Rogers was afraid his family would come after her and she eventually "went into hiding."

In cross-examination of Rogers, defense counsel attacked her credibility in various ways. For example, defense counsel implied Rogers changed her story to receive a financial benefit by eliciting testimony that she was not completely truthful with law enforcement on three separate occasions before she finally "came clean" with

Dempsey in October 2015, which was also the first time witness relocation reimbursement was ever discussed. Rogers testified in direct examination that she stopped writing Cappello letters in May 2013, but in cross-examination, she conceded that she continued to send him letters and cards into February 2014.

The prosecutor sought to rehabilitate Rogers's credibility and "the reasonableness of her fear" with additional questions about the basis for her belief that Cappello was associated with the Hells Angels. Asked what caused her to believe Cappello was associated with the Hells Angels, Rogers responded that she had seen several pictures at his house showing him with friends with leather jackets on and Hells Angels patches. In further redirect, Rogers identified four photographs that Cappello had shown her in either late December 2012 or early January 2013. The photos apparently showed Cappello with others in Hells Angels shirts or jackets. Cappello told Rogers he belonged to a Brazilian \*32 chapter of Hells Angels, and as to one of the photographs, he told her it was taken at the clubhouse in Brazil.

#### b. Analysis

Section 1101, subdivision (a), "prohibits the admission of character evidence *if offered to prove conduct* in conformity with that character trait, sometimes described as a propensity to act in a certain way." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 405-406, italics added.) In this case, however, the evidence Rogers believed Cappello was affiliated with the Hells Angels was not offered to prove he was a member of the Hells Angels and therefore had a propensity to act in a certain way on February 5, 2013. Instead, the evidence was offered and admitted for the purpose of supporting Rogers's credibility by showing a reasonable basis for her fear of Cappello. (See *People v. Stern* (2003) 111 Cal.App.4th 283, 296-299 (*Stern*) [evidence of uncharged conduct by the defendant was admissible as relevant to the credibility of a witness; section 1101 did not apply].)

"Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact or consequence, including evidence relevant to the credibility of a witness. [Citations.] Thus, ' "[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court. ' ' " (*People v. Abel* (2012) 53 Cal.4th 891, 924-925 (*Abel*).)

In *People v. Hayes* (1999) 21 Cal.4th 1211, 1262 (*Hayes*), for example, one prosecution witness testified the defendant told her he was connected with the Mafia, Teamsters, and CIA, and another witness testified the defendant said the Mafia would watch her and kill her if she used drugs or drank alcohol. Our Supreme Court explained this evidence—that the defendant "claimed to have underworld connections and other relationships to powerful persons"—was not character evidence; it was evidence relevant "to establish the effect of the statements on [the witnesses], not to suggest that appellant \*33 was actually a member of or had connections to the Mafia, CIA, or Teamsters. The jury would have understood this." (*Id.* at p. 1263.)

The defendant in *Hayes* argued the probative value of the evidence was outweighed by its prejudicial impact, but our high court found no abuse of discretion in the trial court admitting the evidence over the defendant's objection under section 352. The court concluded, "Absent an understanding of the relationship between [the two prosecution witnesses] and [the defendant], and the women's reasons for continuing the relationship, a jury might well have considered the testimony of [the witnesses] about the murders . . . and the testimony about [defendant's] planning for and participation in those murders incredible. The evidence was relevant and did not threaten undue prejudice to [the defendant] on the grounds now asserted." (*Hayes, supra*, 21 Cal.4th at p. 1263.)

Similarly, in the present case, evidence that Cappello told Rogers he was a member of the Hells Angels and she believed him because he had indicia of association with Hells Angels was admissible as relevant to explain her fear and support her credibility (*Abel, supra*, 53 Cal.4th at pp. 924-925) and to explain why she would have lied to the police initially (*Hayes, supra*, 21 Cal.4th at p. 1263). The jury would have understood the limited purpose of the evidence because the trial court specifically instructed that the evidence was *not* offered to prove Cappello belonged to the Hells Angels; it was offered "*only* to explain the state of mind and the conduct of the witness." (Italics added.) "We presume the jury followed the trial court's instructions." (*People v. Edwards* (2013) 57 Cal.4th 658, 723.)

Finally, we see no abuse of discretion in the trial court overruling Cappello's objection under section 352. The evidence was relevant to Rogers's credibility and to explain her conduct, and the limiting instruction mitigated any potential prejudice.

<sup>27</sup> <sup>27</sup> The parties' motions in limine mentioned affiliation with the Hells Angels, not the Mafia, and in Cappello's opening brief discussion of asserted improper character evidence, he challenges only the admission of evidence about the Hells Angels, not the Mafia. We observe that the same analysis applies to Rogers's testimony that Cappello said his family was in the Mafia and that she was afraid of him for that reason. This was relevant to support her credibility, not as character evidence.

## 2. Firearms, Paraphernalia, Knives, and Claims of Military Experience

Next, Cappello challenges the admission of evidence of Cappello's ownership of guns, knives, and gun and military paraphernalia and his reference to military service.

### a. *Procedural Background*

In motions in limine, the prosecution sought admission of (1) evidence of all items found in Cappello's house, including a hunting knife, a bag containing AR 15 accessories, a tactical vest, a "Saiga 12 gauge shotgun with loaded 12 shot magazine attached," a .223 rifle, a .30 rifle, various ammunition and magazines, a silencer, and a rifle sight (Motion in Limine No. 56), and (2) evidence that Cappello talked to Odin and Francis about his military experience, intimating he was a Navy Seal and had special military training, and that he showed them a Saiga 12 gauge assault-type shotgun (Motion in Limine No. 51). The prosecution argued the evidence regarding the Saiga shotgun and claimed military service was relevant to establish Cappello "sought to intimidate and impress" Odin and Francis.

<sup>28</sup> <sup>28</sup> The prosecutor argued that, together with evidence that Cappello, as their employer, "exercised control over their daily work and income," evidence about the assault shotgun and military experience helped explain Odin's and Francis's behavior before and after the murders.

At a hearing on the motions, the prosecutor further argued, "the sophistication of the items found at his house" was "highly probative as to whether he was physically and mentally capable of actively shooting three individuals in rapid succession without a miss with one bullet to a person's head from a distance of maybe 10 or at most 15 feet. It's hard to do and these . . . items indicate an interest in and a level of sophistication with firearms of all kinds."

Over defense counsel's objection, the trial court granted the prosecution's Motion in Limine No. 51, explaining, "This goes to the basis for credibility of the witnesses and their testimony and if they worked for him and why."

<sup>35</sup> The court also allowed the prosecution to introduce evidence of the items seized from Cappello's house (Motion in <sup>35</sup> Limine No. 56). The court found the evidence more probative than unduly prejudicial but did not state its reasoning.



b. *Trial Testimony and Evidence*

At trial, Odin testified that Cappello showed him a Saiga shotgun and a PS9 rifle. Odin testified the Saiga shotgun was an assault weapon and the other rifle looked like a "military issued weapon." Odin found Cappello's possession of these weapons "concerning a little bit" because "you can't buy those weapons at a regular gun show." Odin testified Cappello would talk about his military experience and implied he was in special forces and when Cappello "brought that shotgun out, he said he liked it specially because it was a close combat, close quarters weapon. It was his favorite weapon for storming into buildings and stuff."

Francis testified that Cappello showed him the Saiga shotgun when he was at Cappello's house digging a ditch with Odin. Cappello told them "he had a lot of ammunition for it, different kinds of ammunition."

Rogers testified that Cappello kept a handgun in his Bronco underneath the driver's seat and he kept a knife on the driver's side seatbelt clasp. Cappello's ex-girlfriend Donna Leonardi also testified Cappello carried a handgun. Leonardi recalled target shooting with Cappello at his brother's ranch using the handgun. Cappello was "[w]ay more accurate" than she was, and he showed her how to hold the gun and focus on the target. Cappello told Leonardi he had served in the marines, he learned to make explosives, and he was "special trained."

A Boulder Colorado police officer testified about items found in a search of Cappello's house conducted February 13, 2013. He found a knife on top of a gun safe, AR-15 accessories (a pistol grip and foregrip), a tactical vest, a ballistic vest, tactical webbing, loaded AR-15 rifle magazines, a drum magazine for a shotgun, shotgun shells, 12-shot shotgun magazines, boxes of shotgun cartridges, rifle slugs for a 12 gauge shotgun, .223 ammunition, an AR-15 rifle, Hornady brand .223 caliber rounds that could be fired through the rifle, a Saiga  
 36 semiautomatic shotgun with a holographic sight, a \*36 suppressor (often referred to as a silencer) for an AR-15 rifle, and a DVD called "American Rifleman" "Advanced Pistol Handling"

c. *Analysis*

Cappello argues the evidence about Cappello's weapons and claimed military experience was inadmissible character evidence. He relies on *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056, in which the California Supreme Court observed, "When the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons." In *Barnwell*, the trial court ruled that evidence that the defendant had "possessed another handgun similar to the murder weapon" was relevant because it "demonstrated his 'propensity to own or carry that type of weapon.'" (*Id.* at pp. 1055-1056.) This was error because propensity evidence is generally inadmissible under section 1101, subdivision (a). (*Id.* at p. 1056.)

*Barnwell* is easily distinguished from this case because the challenged evidence here was not admitted to show Cappello had a propensity to carry weapons. The question then is whether the challenged evidence was admissible for some other purpose. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1249 ["'when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible'"].)

As we have seen, uncharged conduct may be admitted if it is relevant to the credibility of a witness. (*Stern, supra*, 111 Cal.App.4th at pp. 298-299.) The trial court ruled the evidence that Cappello talked to the Dwyers about his military experience and showed them a Saiga 12 gauge shotgun was relevant to the Dwyers' credibility, presumably agreeing with the prosecutor's position that the evidence was relevant to show the

power dynamic between Cappello and the Dwyers, who worked for him as day laborers. We see no abuse of discretion in this finding. (See *id.* at p. 299 [reviewing trial court's finding of relevance of evidence for abuse of discretion].) The evidence was <sup>37</sup> relevant to show fear from Odin (who found the shotgun "concerning") and to explain why Odin and Francis would have done what Cappello told them after the shootings.

<sup>29</sup> And Leonardi's testimony that Cappello talked about being in the military and having special training was relevant because it tended to corroborate the Dwyers' testimony on this point.

At trial, the prosecutor asked a detective about the "level of difficulty that is involved in shooting three shots at three live individuals and hitting each in the head" as happened in this case. The detective responded it could be done, but "[i]n real life, . . . to make accurate shots in a very stressful situation, those types of shots can become very difficult. And you have to have some level of training to be able to accurately shoot three head shots." He further testified that any firearms training, "whether it's rifle training or pistol training," "is going to increase your odds of being able to make those [shots]."

In light of the detective's testimony, evidence about target shooting was admissible because it was relevant to show Cappello was more likely to have the skills and ability necessary to commit the triple murder in this case. (See § 1101, subd. (b) [other acts evidence admissible when relevant to show some fact such as opportunity, plan, knowledge, identity].) Similarly, the DVD on "Advanced Pistol Handling" was relevant and admissible because it suggested Cappello studied handling a pistol. And we conclude it was not an abuse of discretion for the trial court to find the other firearms, ammunition, and paraphernalia found in Cappello's house relevant, too. As the Attorney General argues, this evidence "made it more likely [Cappello] had a wide range of shooting experience" and, thus, was more likely to "belong[] to that small category of people skilled enough to carry out the shooting." (Cf. *People v. Jablonski* (2006) 37 Cal.4th 774, 822 (*Jablonski*) [no abuse of discretion in admitting evidence that the defendant possessed a stun gun, which "was not admitted to prove disposition but to prove preparation"].)

We also find no abuse of discretion in the trial court ruling the foregoing evidence was not inadmissible under section 352. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 144-146 [applying an abuse of discretion standard to review a trial court ruling on the <sup>38</sup> admissibility of evidence under section 352].) "Evidence is substantially more prejudicial than probative . . . [citation] [only] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." [Citation.] "The prejudice which . . . Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." [Citations.] The potential for such prejudice is 'decreased' when testimony describing the defendant's uncharged acts is 'no stronger and no more inflammatory than the testimony concerning the charged offenses.' " (*Id.* at p. 144.) Here, the evidence that Cappello possessed firearms, ammunition, and paraphernalia was not so inflammatory that jurors would be inclined to punish him with three convictions of first degree murder regardless of whether he was proven guilty beyond a reasonable doubt. Accordingly, the trial court was not required to exclude the evidence under section 352.

We are left to consider Rogers's testimony that Cappello kept a handgun and knife in his Bronco, Leonardi's testimony that Cappello carried a handgun, and evidence that a knife was found in Cappello's house. Arguably, given that the murder weapon was a handgun, Roger's and Leonardi's testimony that Cappello possessed a handgun of unidentified type and caliber was evidence he "possessed a gun that might have been the murder weapon." (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052) Even if Cappello's prior possession of a handgun

were deemed irrelevant, however, admission of the handgun and knife evidence was harmless.<sup>30</sup> Cappello argues the evidence risked tempting jurors to punish him for his criminal proclivities, but Cappello does not claim possession of a handgun or knife was illegal in Colorado, and Rogers testified that the handgun and knife didn't strike her as odd "because up in the mountains, just about everybody does carry weapons in their vehicles." And, as we have seen, evidence that \*<sup>39</sup> Cappello engaged in target shooting with a handgun was properly admitted.<sup>31</sup> Moreover, the jury heard evidence that Cappello bought a Springfield .45 caliber semiautomatic handgun in 2009. Under these circumstances, it is not reasonably probable the verdict was affected by the admission of evidence that Cappello possessed a handgun and a knife.

<sup>30</sup> The Attorney General does not explain how the knife evidence was relevant, and since Rogers did not testify the knife in Cappello's Bronco caused her fear, we assume the knife evidence was not relevant and was therefore inadmissible.

<sup>31</sup> Further, evidence was presented that Francis, whom the defense suggested may have been the actual shooter, possessed firearms (a .22 pistol, a .22 rifle) at the time of his arrest and previously owned a .44 magnum handgun, a Charles Daly shotgun, and an M1 Garand rifle. We see little risk the jury would have determined that Cappello (and not Odin or Francis) was the shooter based on evidence Cappello possessed firearms that were not the murder weapon when the evidence showed Francis also possessed firearms.

### 3. Unlawful Drug-related Activity

The prosecution sought admission of evidence of drug dealing by Cappello other than transportation of marijuana. The prosecution argued the evidence of Cappello's other drug activities was relevant to counter the defense that Cappello was merely an "enzymizer" or "transporter" (not a drug dealer) and to show motive and intent to possess marijuana for sale or transport. Over defense counsel's objection that it was irrelevant and designed to smear Cappello's reputation, the trial court allowed the evidence, finding its probative value outweighed the risk of undue prejudice without further explanation.

At trial, Kear testified Cappello sold him between 100 and 500 Valium pills. He also testified that Cappello and Klarkowski mentioned something about heroin and cocaine but they never followed through. Leonardi testified Cappello once told her he was going to Cuba to talk to people about selling heroin and also at some point told her he was talking to Dings about selling pain medicine that he (Cappello) brought from New Mexico. In addition, the jury heard testimony that a large number of hydrocodone and Ambien pills were found in the search of Cappello's house and that these medications are sold illegally.

Cappello argues the trial court abused its discretion in admitting this evidence because its impact "was simply to portray Cappello as a large scale criminal drug dealer, who was likely to commit other crimes." We are not persuaded.

<sup>40</sup> \*<sup>40</sup> "In prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under [Evidence Code section 1101](#), subdivision (b), to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs." (*People v. Williams* (2009) 170 Cal.App.4th 587, 607.) The evidence of Cappello's drug dealing, therefore, was admissible here to establish motive and intent for count 5, conspiracy to commit possession of marijuana for sale and sale or transportation of marijuana.

We find no abuse of discretion in the trial court finding the evidence more probative than unduly prejudicial under section 352. The evidence that Cappello sold prescription pills and was interested in selling other illegal drugs was not inflammatory compared to the three special circumstances first degree murders he was charged with. And given that all the victims, many of the witnesses, and codefendants Francis and Odin (whom the



defense argued were the true culprits) were also involved in the illegal drug trade, the possibility that evidence of Cappello's involvement in additional illegal drug dealing would evoke an emotional bias in the jury is greatly diminished.

And, assuming it was error to admit evidence of Cappello's other non-marijuana drug activity and interests, we conclude the error was harmless. It is not reasonably likely the challenged evidence affected the verdict in light of the fact the victims and primary prosecution witnesses were also involved in the illegal drug trade.

#### 4. Threatening Incidents and Boorish Behavior

##### a. *Threatening Dings's Girlfriend*

The prosecution moved in limine to admit evidence that Cappello threatened to drown Dings's girlfriend.<sup>32</sup>

41 Defense counsel objected that this was inadmissible \*41 character evidence. The trial court ruled the evidence was relevant and not inadmissible under section 352.

32 The prosecutor argued this evidence was relevant and admissible to show (1) Cappello was actively engaged as a drug trafficker and dealer for several years, (2) the extent of Cappello's relationship with long-time drug dealer Dings, and (3) "motive and intent to kill if necessary to successfully carry out his drug deals." He argued it was also relevant to explain witnesses' fear of Cappello (referring to Rogers, Odin, and Francis). And he argued the evidence was relevant to rebut the likely defense that Cappello was not involved in drug deals, that he would just show up after a transaction was complete to spray his enzyme.

At trial, Kear testified that Cappello told him about an incident in Arizona with Dings and his girlfriend Samantha. Cappello told Kear that he said "if Samantha didn't shut her mouth, he was going to drown her in the pool." That was the extent of Kear's testimony on the incident.

Dings testified about the same incident. He said that Cappello gave Samantha 15 or 20 Valium pills and she became "out of control" and "[l]ike a monster." According to Dings, Cappello had loaded his trailer with marijuana for transport when Samantha "start[ed] yelling about telling the border patrol about our vehicle." Dings testified that Cappello said, " 'Listen, man, you know what, I'm going to drown your girlfriend in the swimming pool.' " Dings took this as Cappello "just posturing in front of his girlfriend," and Dings also thought Cappello "voiced something that we all . . . to one degree or another felt."

We are not convinced the evidence of this incident was relevant for the reasons suggested by the prosecutor and the Attorney General. At best, the fact that Cappello told this story to Kear might be relevant to Kear's fear of Cappello. But Kear's testimony was not relevant to Rogers's, Odin's, or Francis's fear because there does not appear to be any evidence that any of them knew about this incident. And we do not understand how the evidence could have been relevant to Cappello's motive and intent in the current charges either.

Nonetheless, we discern no prejudice from Kear's testimony. Cappello argues the "only real effect of this evidence was to try to paint Cappello as a dangerous, violent person capable of killing." But Kear was not present when Cappello "threatened" Samantha. Dings, who was present, explained Samantha was generally in the wrong, Cappello only said something everyone was thinking, and Dings understood Cappello's \*42 words as posturing, not a serious threat. Given Dings's testimony on the incident, there is no reasonable probability this evidence affected the verdict.

##### b. *Threatening Dings*

Kear testified Cappello told him Dings owed him a lot of money, Cappello threatened to "take everything [Dings] had," and this kind of talk from Cappello scared Kear. Defense counsel did not object to this testimony.

Asked why he was scared, Kear responded, "Because I never saw that side of him. He was always a nice, you know, person, and you know, seemed—seemed like a decent—decent person to me." Kear continued, "But then when he wasn't getting paid, it was like . . . something trigger switched [*sic*] or something. I'm not really sure." At this point, defense counsel objected and moved to strike based on section 1101, and the trial court overruled the objection.

Kear then testified that Cappello told him "he smashed [Dings's] window in, his driver's side, with a crowbar. [¶] And then I called [Dings] and I said, 'What's going on?' [¶] And he said, 'No, he came up and gave me a hug.' [¶] I thought that was very odd too. So these things started happening. And it really kind of triggered in my head that—that something is not—something is not right."

The Attorney General argues Cappello has forfeited his appellate claim because he failed to object to Kear's testimony about smashing Dings's window. But even assuming the claim was preserved, Kear's testimony appears relevant to explain why Cappello scared Kear. It would not have been abuse of discretion for the trial court to find the evidence more probative than unduly prejudicial.

In any event, the evidence was harmless. Dings testified that Cappello did not break his windshield and did not smash his truck. He testified, "I actually remember the time when I saw [Cappello] at that point. . . . We actually had like a friendly exchange as we usually did." There is no reasonable probability evidence that Cappello made an empty threat against Dings affected the verdict.

43 \*43 c. *Cappello's Driving Trip with Leonardi*

Leonardi worked as a driver for Dings transporting marijuana across state lines. She dated Cappello from March 2010 to January 2011, and Cappello met Dings through her. Leonardi testified that in January 2011, she and Cappello drove to New York in Cappello's white Bronco with a "horse trailer full of weed." She testified that he never let her drive.

Leonardi testified that Cappello would not stop when she asked to stop for coffee and for a bathroom. After they arrived in New York, Leonardi refused to ride back with Cappello and flew home instead. She testified Cappello "was a very different person on that trip. He—he was very controlling, bossy, didn't ask for my opinion on anything and—and took control over the whole situation."

Cappello argues this evidence was irrelevant, and the Attorney General responds it was relevant evidence of modus operandi under section 1101, subdivision (b), and was relevant "to rebut his defense theory that Odin and Francis hatched a secret plot to steal the marijuana and kill the victims."

We have some difficulty understanding how Cappello's controlling behavior with Leonardi would be relevant to rebut a defense theory that the Dwyers planned to steal marijuana without Cappello's knowledge. But any error in admitting this testimony was harmless. We agree with the Attorney General "there is no possibility that the jury convicted Cappello of multiple murders because he was a boor." D. *Exclusion of a Defense Psychological Expert*

Months before trial started, the defense retained Randall Smith, Ph.D., as a psychological expert. Smith interviewed Cappello and administered tests. The defense wanted Smith to testify that, based on his evaluation and testing, it was his expert opinion that Cappello lacked a propensity for violence. Despite the requirement of reciprocal discovery in criminal cases (Cal. Const., art. I, § 30, subd. (c); [Pen. Code, § 1054](#) et seq.; *Izazaga v.*

44 *Superior Court* (1991) 54 Cal.3d 356, 364) and two trial court orders instructing the defense to provide the prosecution any reports of expert witnesses, however, defense counsel withheld Smith's test results until after the prosecution rested \*44 its case. The prosecution moved to exclude Smith's testimony, and the trial court granted the motion, finding the defense had intentionally violated its statutory obligations and a court order and that no lesser sanction could remedy the prejudice to the prosecution caused by the discovery violation.

Cappello claims the trial court erred in excluding Smith's testimony. We disagree.

### 1. Discovery Obligations

Penal Code section 1054.3, subdivision (a)(1) requires the defense to disclose to the prosecution "[t]he names and addresses of persons, . . . [the defendant] intends to call as witnesses at trial, *together with* any relevant written or recorded statements of those persons, or reports of the statements of those persons, including *any reports or statements of experts made in connection with the case*, and *including the results of* physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." (Italics added.)

"The requirement that the defense timely disclose persons whom it 'intends to call as witnesses at trial' applies to 'all witnesses it reasonably anticipates it is likely to call.' " (*Riggs, supra*, 44 Cal.4th at p. 305.)

The requirement to disclose reports and statements of expert witnesses "impos[es] an obligation to report *any* relevant statements made by those intended witnesses, including oral statements they have made directly to defense counsel." (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 166-167 (*Roland*).) The defense must also disclose "the raw results of standardized psychological and intelligence tests administered by a defense expert upon which the expert intends to rely." (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1233 (*Hajek and Vo*), abrogated on another point by *Rangel, supra*, 62 Cal.4th at p. 1216.)

45 We review a trial court's finding that a discovery violation occurred for substantial evidence. (See *Riggs, supra*, 44 Cal.4th at p. 306 [finding substantial evidence supported trial court's finding that the defendant violated a discovery disclosure requirement].) We review discovery rulings for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, \*45 299.) "In particular, 'a trial court may, in the exercise of its discretion, "consider a wide range of sanctions" in response to [a] violation of a discovery order.' " (*Ibid.*)

### 2. Procedural Background

The prosecution first moved to compel the defense to provide discovery in July 2015. By then, the prosecution had provided 4,593 pages of discovery to the defense and requested informal reciprocal discovery, but it had received nothing in response. Among other things, the prosecution sought "all reports, notes, writings, and computer generate[d] results of any scientific tests performed by any witness for the defense."

33 <sup>33</sup> The same day, Cappello moved to continue the trial. Later that month, the trial court granted Cappello's motion to continue (setting a trial start date of January 4, 2016) and took the prosecution's discovery motion under submission. Cappello subsequently filed a response to the discovery motion, stating he would be prepared to provide discovery by November 20, 2015.

On October 30, 2015, the trial court ruled on the prosecution's motion to compel, ordering the defense to provide statutory discovery "as soon as defense counsel determines who he intends to call as witness[es]" and "in no event later than November 20th, unless good cause is shown." The court warned defense counsel that if it later appeared he unreasonably or intentionally delayed discovery, the court would consider appropriate sanctions such as prohibiting "testimony of a witness whose identity or paperwork was unreasonably withheld."

On November 20, 2015, Cappello filed his trial witness list, identifying Smith as an expert witness. Although Smith had interviewed Cappello and administered a number of tests, including "an MMPI examination," more than a month earlier, Cappello did not provide any report or notes regarding Smith's testimony.

On December 2, 2015, defense counsel provided the prosecution a one-paragraph "Summary of interview" with Smith. The concluding sentence was that Cappello's character traits "as revealed by the evaluation and testing are that he lacks a propensity for violence, whether premeditated or resulting from impulsivity."

46 \*46 The next day, the prosecution filed motions in limine, including requests for reports and statements of defense witnesses, including experts.

On January 4, 2016, the trial court granted the motions. Defense counsel told the court there were no reports by any of the expert witnesses.

On February 1, 2016, the jury heard opening statements and the first witnesses testified.

On March 2, 2016, Cappello filed a motion in limine to limit the scope of cross-examination of prospective defense expert witness Smith.

34 <sup>34</sup> Cappello wrote that the purpose of the motion was "to establish the parameters of permissible cross examination so that counsel can make an informed decision whether to call Dr. Smith, and if so, to avoid protective and distracting evidentiary objections during cross-examination." He also wrote that defense counsel was concerned the prosecution would "attempt to parlay the psychological testing testimony into a vehicle to improperly and prejudicially expose the jury to every scurrilous and scandalous statement about defendant" that the trial court had excluded. At the same time, defense counsel sought a court order to preserve the confidentiality of psychological test results Smith obtained from administering "the standard MMPI test" to Cappello.

The prosecution opposed Cappello's motion and filed a separate motion to exclude proposed defense witnesses "for whom discovery has been withheld," including Smith.

On March 10, 2016, the prosecution rested. Outside the presence of the jury, the court discussed the competing motions regarding defense expert Smith. The prosecutor told the court he had not yet received "a complete report that has the test itself and any test results." Defense counsel responded that there was no report, "only the results of the test which, as we indicated in our moving papers, are protected from disclosure by certain requirements, statutory requirements," although he did not identify any such statutory requirements. The trial court ordered the defense to provide the test results to the prosecution that day, and ordered the prosecution not to disclose the results to any person outside the prosecution team.

47 The next day, the court heard argument on the motions regarding Smith. The prosecutor stated he received a stack of documents related to Smith's testimony ("about an inch thick"), which he had not had time to review in depth, but which indicated that \*47 Smith had administered as many as 24 tests in September 2015. The documents included raw scores and percentages that the prosecutor did not know how to interpret, and he had no opportunity to discuss the results with any experts.

Asked why the documents were provided so late, defense counsel argued it was "appropriate and necessary" that he withheld the documents for three reasons. First, "the specifics of what the witness would testify to were disclosed" on December 2, 2015, in the summary of Smith's testimony. Second, the decision to have Smith testify was not made "until after important rulings by the Court were made during the trial itself and after testimony from a number of witnesses that cast aspersions . . . on Mr. Cappello, vis-a-vis his involvement with

the Hells Angels or Mafia or Mob connection or statements that he made about the military and the like."

Third, "the documents are subject to protection by statute and are not to be disseminated without Court order or at least a protective order because of the nature of their contents."

The trial court found that defense counsel would have known Smith was a likely defense witness once the court issued its pretrial evidentiary rulings allowing witness testimony on Cappello's asserted connections to the military and the Hells Angels and these rulings were made before the prosecution presented its case.

The trial court found discovery violations and ruled Smith would not be allowed to testify as a sanction for those violations.

The trial court found, based on evidence in the record, that defense counsel met with Smith in September and October 2015 and, thus, it appeared defense "counsel knew of the test results well before December" 2015. The court "d[id] not believe that defense counsel ever disclosed a report to this date of Dr. Smith's oral statements that complies with *Roland*," *supra*, 124 Cal.App.4th 154. It further noted that the 136-page report of Smith's test results (which was turned over to the prosecution on March 10, 2016) was "technical in nature and not readily understandable to a nonexpert" and did "not contain any summary of doctor's conclusions or opinions or description of how the raw test results lead him to the conclusions and opinions."

- 48 \*48 The court found the defense violated [Penal Code section 1054.3](#) and the court's discovery order of January 4, 2016, and defense "counsel intentionally withheld the required disclosures." The court considered less severe sanctions and determined the remedy of witness preclusion was the only remedy that could adequately remediate the prejudice to the prosecution from the discovery violations.

### 3. The Finding of a Discovery Violation

Cappello argues there was no discovery violation because defense counsel had no obligation to provide the test results until he decided he was going to call Smith as a witness, and defense counsel did not make that decision until after he heard the prosecution's evidence.

As we have seen, however, this is not the correct standard for when the disclosure requirement arises. The defense's discovery obligations apply to " 'all witnesses it reasonably anticipates it is likely to call.' " (*Riggs*, *supra*, 44 Cal.4th at p. 305.) And, when the defense reasonably anticipates it is likely to call an expert witness, the concomitant "reports or statements . . . including the results of . . . mental examinations" of that potential expert witness must be disclosed along with the expert's name and address. ([Pen. Code, § 1054.3](#), subd. (a)(1).)

Thus, the obligation to disclose relevant Smith-related documents (including test results) arose when defense counsel reasonably anticipated he was likely to call Smith as a defense expert. The record shows defense retained Smith as a psychological expert for this case; Smith interviewed and tested Cappello on September 5, 2015; defense counsel subsequently met with Smith for two case conferences in September and October 2015, which together lasted over three hours; defense counsel identified Smith as an expert witness in Cappello's witness list filed November 20, 2015; and defense counsel produced a one-paragraph summary of Smith's testimony on December 2, 2015, which referenced test results. These are circumstances from which the trial court could reasonably find that, by around November 20, 2015, and certainly no later than December 2, 2015, defense counsel "would reasonably anticipate that it was likely he would call" Smith as an expert witness. (See

- 49 *Riggs*, *supra*, 44 Cal.4th at p. 306 [substantial evidence \*49 supported the trial court's finding that the defense reasonably would have anticipated the likelihood of calling certain family members as alibi witnesses].) The



trial court further could reasonably find defense "counsel knew of the test results well before December" 2015 and, therefore, his obligation to provide the prosecution the test results and other relevant Smith-related documents arose no later than December 2, 2015.

Cappello relies on *Sandeff v. Superior Court* (1993) 18 Cal.App.4th 672 in arguing the trial court erred because it substituted its own belief regarding how and when defense counsel should have made strategic and tactical decisions for defense counsel's. We are not persuaded. In *Sandeff*, the defense attorney told the trial court before trial that he had not decided whether to call a certain expert witness, but the court did not believe him and ordered the defense to provide information and documents related to that witness. (*Id.* at pp. 675-676.) On a petition for writ of mandate, the Court of Appeal held the trial court did not have the authority to make such an order. (*Id.* at p. 675.) The *Sandeff* court explained, "[T]he determination of whether to call a witness is peculiarly within the discretion of counsel. Even when counsel appears to the court to be unreasonably delaying the publication of his decision to call a witness, it cannot be within the province of the trial judge to step into his shoes. While the court may suffer understandable annoyance at perceived violation by defense counsel of the discovery provisions of the act, it is limited to the remedies provided in the act for such stonewalling. The court may delay or prohibit the testimony of a witness whose identity or paperwork was unreasonably withheld. ([Pen. Code,] § 1054.5, subd. (b).) Accordingly, an attorney who flagrantly violates the act and the court's orders (as the court conceived to be the conduct of defense counsel in this case) takes a calculated risk that severe sanctions during trial may be imposed." (*Id.* at p. 678.)

This case does not help Cappello because the trial court here did not overstep its authority as the lower court did in *Sandeff*. The trial court acknowledged that defense counsel may not have firmly decided to call Smith until well into the prosecution's case, but it explained, "it is irrelevant whether defense counsel had lingering doubts about calling Dr. Smith after placing his name on the witness list. Once Dr. Smith's name was \*50 placed on the witness list, the statutory disclosure obligations were triggered." Thus, the court considered defense counsel's actions (listing Smith as a witness) in determining counsel's intentions; the court did not substitute its own judgment for how the defense case should be conducted.

#### 4. The Sanction of Excluding Smith

Cappello next argues, assuming there was a discovery violation, that the trial court erred in imposing the sanction of precluding Smith from testifying.

"Upon a showing that a party has not complied with [Penal Code] Section 1054.1<sup>35</sup> or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or *prohibiting the testimony of a witness* or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." (Pen. Code, § 1054.5, subd. (b), italics added.) A trial court "may prohibit the testimony of a witness . . . only if all other sanctions have been exhausted." (*Id.*, subd. (c).)

<sup>35</sup> Penal Code section 1054.1 governs the discovery the prosecution must provide to the defense.

If a party willfully fails to provide discovery to obtain a tactical advantage, the court may exclude the relevant witness's testimony. (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203 (*Jackson*).) And it has been observed that, in some instances, alternative sanctions short of exclusion "would perpetuate 'prejudice to the State and . . . harm to the adversary process.'" (*Ibid.*, quoting *Taylor v. Illinois* (1988) 484 U.S. 400, 413.)

Courts have also recognized, however, that exclusion of testimony is not an appropriate sanction unless there is a showing of significant prejudice and willful conduct. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358; *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.)

- 51 \*51 Cappello argues there is no evidence to support the trial court's findings that the failure to disclose was willful or motivated by a desire to obtain tactical advantage, and that lesser sanctions would be ineffective. We disagree.

First, we find substantial evidence to support the court's implicit finding that defense counsel's discovery violation was willful or motivated by a desire to obtain tactical advantage.<sup>36</sup> The trial court could infer from evidence in the record that defense "counsel knew of the test results well before December" 2015. Yet, the defense did not disclose the test results as required by [Penal Code section 1054.3](#) and the court's orders of October 30, 2015, and January 4, 2016. When asked (on March 10, 2016, after the prosecution rested) to explain his conduct, defense counsel argued that providing the one-paragraph summary of Smith's testimony was sufficient and that unexplained "statutory requirements" justified withholding the test results. The trial court could reasonably find that defense counsel was being disingenuous in offering such meritless justifications for his conduct, and from that finding, it could infer defense counsel violated the discovery obligations willfully. Discussing willful discovery violations, an appellate court observed, "It is not unreasonable to suspect testimony from 'a defense witness who is not identified until after the 11th hour has passed.' " (*Jackson, supra*, 15 Cal.App.4th at p. 1203.) Here, it was not unreasonable for the trial court to suspect a willful discovery violation based on defense counsel's failure to provide more than a hundred pages of discovery documents until after the prosecution finished its case in chief.

<sup>36</sup> By imposing the sanction of exclusion, the trial court implicitly found that defense counsel's discovery violation was willful or motivated by a desire to obtain tactical advantage. The court also expressly found defense counsel's violation was intentional, a strong indication that the court found his conduct willful.

- Second, the trial court reasonably could find that lesser sanctions would not be adequate to remedy the prejudice to the prosecution caused by the willful discovery violation. The prosecution argued, "[G]iven the lateness of the discovery . . . , and the complexity of this case, no remedy short of exclusion will preserve the
- 52 People's right to due process and a fair trial. It is simply not possible for the prosecution to prepare to \*52 cross examine an expert on 136 pages of technical psychological data without the assistance of a qualified expert. The People cannot hire and prepare an expert to rebut Mr. Smith's conclusions while the prosecution is in trial." Agreeing with the prosecution, the trial court found that a continuance was not reasonably practical so late in the trial and after the prosecution had rested its case.

Cappello asserts the trial court could have addressed any perceived prejudice by granting a short continuance if truly necessary. But we see no error in the trial court's reaching a contrary finding. The trial court reasonably could have found, as the Attorney General suggests, that granting a sufficiently long continuance to allow the prosecution to find and retain an expert to review the evidence in preparation for cross-examination of Smith would have prejudiced the prosecution by making the case in chief "seem more remote than the defense" and "would have been a hardship on the jury that late in a very long trial."

In sum, we conclude there was sufficient evidence to support the trial court's findings that the failure to disclose test results was willful or motivated by a desire to obtain tactical advantage and that no sanction short of exclusion would remedy the prejudice to prosecution caused by the discovery violation. We find no abuse of discretion by the trial court and no violation of Cappello's right to present a defense. (See *Hajek and Vo, supra*, 58 Cal.4th at p. 1233 [finding no abuse of discretion in trial court's order precluding a defense expert's

testimony as a sanction for a discovery violation that adversely affected the prosecutor's ability to cross-examine the expert, and concluding the defendant failed to demonstrate the application of the discovery statutes violated his right to present a defense].) E. *Exclusion of Evidence that Wyatt Previously Testified for the Prosecution*

Wyatt testified for the defense that Odin admitted to him in jailhouse conversations that he (Odin), not Cappello, was the killer. Wyatt also testified that he wrote a letter to the district attorney's office in 2013 about Odin's jailhouse statements. In Wyatt's 2013 letter, he wrote that he previously testified for the district attorney's \*53 office in 2008. The trial court allowed Wyatt's 2013 letter in evidence, but redacted the sentence about Wyatt having testified for the district attorney's office in 2008.

Cappello contends the trial court erred in excluding evidence that Wyatt was a "reliable confidential informant." This claim lacks merit because the trial court never excluded evidence that Wyatt was a "reliable confidential informant" as defense counsel never attempted to present such evidence. Cappello also claims the prosecutor committed misconduct in his closing argument in attacking Wyatt's credibility. We find no prejudicial misconduct.

### 1. Background

In direct examination, defense counsel elicited testimony that Wyatt had written him (defense counsel) in January 2016. Wyatt had asked for defense counsel's help on a writ of habeas corpus and told him he had information on a case. Wyatt testified that he was not testifying in Cappello's case in the hope of receiving legal help from defense counsel. Defense counsel also brought out in direct examination that Wyatt was convicted of felony possession for sale of marijuana in 1998, felony rape of an unconscious person in 2002, and felony infliction of traumatic condition on a cohabitant or spouse in 2005 and 2014.

In cross-examination, the prosecutor elicited testimony that, at the time Wyatt tried to contact the district attorney's office in 2013 about Odin's jailhouse statements, Wyatt was in custody for felony domestic violence, felony assault with great bodily injury and a prior strike, "a bunch of misdemeanors," including five restraining order violations, and a DUI. The bail for some of the felony charges was set at \$1.5 million. Wyatt was convicted of numerous offenses and sentenced to eight years. The prosecutor did not ask Wyatt whether, when he wrote the letter to the district attorney's office in 2013, he was hoping to receive some consideration from the district attorney's office in exchange for testimony about what Odin said to him.

In discussions outside the presence of the jury, defense counsel stated he wanted to ask Wyatt "a couple quick questions" on redirect about Wyatt having testified as a witness for the prosecution in a criminal trial in 2008. He argued the prosecutor's \*54 questions about Wyatt's convictions and bail related to his credibility, opening the door to this line of questioning. Defense counsel also sought to admit Wyatt's 2013 letter to the district attorney's office and requested to call district attorney investigator Dempsey to show that the district attorney's office *received* Wyatt's letter in 2013 and to establish that Wyatt testified for the prosecution in 2008.

The trial court held a hearing on defense counsel's requests the next court day. The court ruled Wyatt's 2013 letter was generally admissible. Following this ruling, the prosecutor stipulated to the fact that the letter was received by the district attorney's office on April 13, 2013.

But the trial court ruled defense counsel would not be permitted to ask Wyatt on redirect examination about having testified for the prosecution in a criminal case in 2008, finding the prosecution's cross-examination did not open the door to defense counsel's proposed line of questioning. The court redacted from Wyatt's 2013



letter the sentence, "I have testified for the district attorney's office in 2008." Defense counsel asked to reopen direct examination of Wyatt, and the trial court denied the request.

The redacted version of Wyatt's letter admitted in evidence read in relevant part, "My name is Charles Martin Wyatt. I am presently housed at the Sonoma County Main Adult Detention facility. [redacted] I am willing [to] cooperate and testify to what Mr. Dwyer has told me, without any promises, consideration or other inducements. [¶] Please feel free to contact me with any questions or if I can be of further service."

## 2. Analysis

Cappello claims the trial court erred in excluding "evidence that Wyatt was a reliable confidential informant." This argument fails because defense counsel never attempted to present evidence that Wyatt was a "reliable confidential informant."

Cappello relies on *Harris*, *supra*, 47 Cal.3d at pages 1080-1082, in which our high court held evidence of a witness's past reliability as an informant was admissible to support that witness's credibility. In *Harris*, a sheriff's sergeant testified that a trial witness had provided reliable information in the past. (*Id.* at p. 1080.) The officer's testimony was, in effect, character evidence for honesty—"evidence of specific instances \*55 of the informant's past reliability as relevant to the informant's [current] credibility." (*People v. Lankford* (1989) 210 Cal.App.3d 227, 239.)

Cappello argues, "Evidence that Wyatt was a reliable confidential informant was relevant to his credibility." But defense counsel in this case did not offer evidence that Wyatt was a "reliable confidential informant" or that he had provided law enforcement reliable information in the past. He sought to establish only that Wyatt was a prosecution witness in a criminal case in 2008. Cappello cites no authority for the proposition that merely testifying for the prosecution in the past is relevant to current credibility, and we are not aware of any. Evidence that Wyatt testified in a criminal trial would not establish that he testified truthfully at that trial and, therefore, would not be relevant to his credibility under *Harris*. Accordingly, the trial court did not abuse its discretion in ruling defense counsel could not ask about the prior testimony on redirect examination. Likewise, the trial court did not abuse its discretion in denying Cappello's request to reopen Wyatt's testimony. (See *People v. Homick* (2012) 55 Cal.4th 816, 881-882 [no abuse of discretion in denying motion to reopen where the proffered evidence was not sufficiently significant to warrant reopening]; *People v. Cooks* (1983) 141 Cal.App.3d 224, 327-328 [no abuse of discretion in denying motion to recall witness where further questioning was not relevant to the issues in the case].)

## 3. Asserted Prosecutorial Misconduct

Cappello also asserts the prosecutor engaged in misconduct in discussing Wyatt in rebuttal. We find no prejudicial error.

<sup>37</sup> <sup>37</sup> We address the merits of the claim even though defense counsel failed to object and request admonition. (See *Ochoa*, *supra*, 19 Cal.4th at p. 431 [addressing forfeited claim of prosecutorial misconduct].)

### a. *Relevant Closing Arguments*

The prosecutor did not discuss Wyatt in his closing argument. In defense counsel's closing argument, he urged the jury to credit Wyatt's testimony. Defense counsel acknowledged an inference could be made that Wyatt's initial motive for contacting the district attorney's office was to trade claimed information about Odin for a \*56

"deal" in his own pending criminal case. But defense counsel tried to refute this inference with Wyatt's own words in his 2013 letter, pointing out that Wyatt wrote he was willing to cooperate and testify about what Odin told him " 'without any promises, consideration, or other inducements.' "

In rebuttal, the prosecutor responded to defense counsel's defense of Wyatt's credibility as follows. (The phrases Cappello now objects to are in italics.)

"Let's talk about Charles Wyatt for a minute. . . . He came up with a lie about what happened. He shopped that lie to the DA's office. The DA's office didn't bite. The DA's office made that known to the defense . . . . So nobody's hiding anything with regard to Charles Wyatt.

He continued, "*The DA did not work with Charles Wyatt in this case at all. Why? Think about that. . . . First of all, he is a bit of a monster, honestly, if you think about it. Rape of an unconscious person. Repeated domestic violence. Strike prior. Bail over a million dollars. He's a career criminal. A very dangerous guy. And he gives advice to people in jail on how to work the Court or work the system. Do you remember that testimony? He was telling Odin about how to handle himself in the courtroom and the court process . . . . So he's a sophisticated criminal.*

38 38 Wyatt testified his initial conversations with Odin were about their charges, court dates, and the like. Odin did not seem to know a lot about the court system and, Wyatt said, "unfortunately, I do." Odin had a lot of questions about the court process and extradition. Wyatt testified, "[H]e would ask me questions about the legal process. And I—I wouldn't give him legal advice, but I would help to kind of guide him through about what to expect in court, that—that sort of thing."

"So he writes a letter to the DA when he's got I don't remember how many charges pending. A lot. Is he one of those unbiased citizen informants that [defense counsel] talked to you about with no agenda of his own out of the goodness of his heart? . . . [N]o, of course not. And of course he's looking for a quid pro quo, a this for that. . . .

57 ". . . If he wrote a letter and said, 'I'll tell you something about one of your murder defendants if you cut my sentence in half or if you dismiss half of my charges or on \*57 conditions that you do something.' [*sic*] But because he's a career criminal, *because he's sophisticated*, he knows how the system works. *He knows . . . the DA's office . . . is going to say, 'No, thank you. That's crazy. We're not interested in doing that.'* [¶] . . . So in the letter in order to get the DA to bite, he says, 'Hey, I'll talk to you no expectations.'

"Of course he wanted a deal. When the DA's office didn't bite, he sent the same information to the defense where they followed up and talked to him about it. . . . He did ask them, 'Hey, help me on my appeal of this sentence.' So he's looking for something whether it's the DA's office or it's the defense attorney. . . . [¶] . . . [Wyatt] definitely has an agenda. And the fact that he's saying something in the letter to the contrary is not very persuasive, especially given what he's all about and how sophisticated he is."

After responding to defense counsel's position that Wyatt had no "agenda," the prosecution attempted to explain the basis for Wyatt's testimony. He argued Wyatt didn't realize he "picked the wrong defendant." That is, Wyatt did not know that Odin had already given a detailed statement to law enforcement and that the sheriff's department had already found evidence corroborating Odin's version of events. The prosecutor told the jury there was no way Odin would tell the truth to law enforcement on February 26, 2013, and then a month later say "all of that crazy stuff" to Wyatt. The prosecutor then said, "So how did Charles Martin Wyatt come up with that information? . . . The news. . . . The facts of this crime were not limited to the sheriff's department crime reports. They were actively being published in the *Press Democrat*. That's how Kim Crumb found out

and called in about it. . . . So the public at large, including *people in the jail, have access to the media* and to the facts as they were known at the time or as they were believed to be at the time. So he was able to *pick and choose all kinds of information from facts that were widely disseminated in the public and certainly in the jail*. You don't think in the jail people talk about what they're in for or 'Did you hear about that big triple homicide?' Things like that. [Wyatt] just picked the defendant thinking he would be able to get a benefit from the DA's office based on information that he received from public sources or from rumors. And it's not consistent \*58 with anything Odin has ever said, and it's not consistent with what you know to be the facts. [¶] So he was just taking a shot in the dark to get out from underneath some serious charges." (Italics added.)

b. *Analysis*

"A criminal prosecutor has much latitude when making a closing argument. Her argument may be strongly worded and vigorous so long as it fairly comments on the evidence admitted at trial or asks the jury to draw reasonable inferences and deductions from that evidence." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1330.) A prosecutor "has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.)

" 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' [Citation.] . . . ' "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' " (*Jablonski, supra*, 37 Cal.4th at p. 835.)

Cappello first claims the prosecutor improperly told the jury that "the DA would not work with someone like Wyatt." We reject this claim because the prosecutor did not make this assertion. Instead, the prosecutor accurately told the jury that the district attorney's office did not work with Wyatt "in this case." The prosecutor then reminded the jury that Wyatt had been convicted of domestic violence and rape of an unconscious person, and the jury was entitled to infer that these felony convictions "affected the veracity and persuasive value of" Wyatt's testimony. (*People v. Shazier* (2014) 60 Cal.4th 109, 147 [conviction of rape relevant to witness's credibility]; *People v. Burton* \*59 (2015) 243 Cal.App.4th 129, 136 [conviction of willful infliction of corporal injury on cohabitant or spouse admissible for impeachment purposes].) That the prosecutor called Wyatt "a bit of a monster" and a "very dangerous guy" based on these convictions does not establish misconduct. (See *People v. Shazier, supra*, at p. 146 ["Harsh and colorful attacks on the credibility of opposing witnesses are permissible if fairly based on the evidence."].)

<sup>39</sup> <sup>39</sup> Also that Wyatt is a "career criminal" could be inferred from his many convictions and his own testimony that he "unfortunately" knew a lot about the court system.

Cappello next argues that the prosecutor implied he "simply did not believe" Wyatt and "raised the possibility the jury would assume the prosecutor had undisclosed knowledge regarding Wyatt's information." He argues that the prosecutor, in effect, "vouched" for the *lack* of credibility of Wyatt.

"It is misconduct for prosecutors to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.' [Citation.] Similarly, it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' [Citation.] . . . However, these limits do not preclude all comment regarding a witness's credibility." (*People v. Bonilla* (2007) 41 Cal.4th 313, 336 (*Bonilla*)). "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching." (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, the prosecutor did not improperly "vouch" for Wyatt's dishonesty. He relied on Wyatt's felony convictions to impeach his credibility. He suggested that Wyatt's motive for contacting the district attorney's office was to obtain a more favorable result in his own pending criminal case, which was a reasonable  
60 inference from the \*60 evidence.<sup>40</sup> He argued that Odin's version of events as told to law enforcement was corroborated by physical evidence, but Wyatt's version of events (that Odin was the killer) was not so corroborated. (Cf. *Bonilla*, *supra*, 41 Cal.4th at p. 337 [permissible to argue witness should be believed because other evidence corroborated his testimony].) But the prosecutor did not state that the district attorney's office had never worked with Wyatt or that it would never work with Wyatt. Nor did he state that he personally did not believe Wyatt.

<sup>40</sup> Recall that when Wyatt contacted defense counsel and told him about his information on Odin, he asked for help on his writ of habeas corpus.

Cappello complains that the prosecutor's comments shown in italics above were problematic because he knew Cappello had evidence that he was precluded from presenting from which the jury could infer that Wyatt was credible. This claim fails because evidence that Wyatt testified for the prosecution in a criminal trial in 2008 was not relevant to Wyatt's credibility.

<sup>41</sup> <sup>41</sup> Because there was no prosecutorial misconduct, we also reject Cappello's claim of ineffective assistance of counsel based on failure to object to the comments. "Representation does not become deficient for failing to make meritless objections." (*Ochoa*, *supra*, 19 Cal.4th at p. 463.)

Finally, Cappello argues the prosecutor improperly went beyond the evidence in arguing Wyatt must have gotten information about the triple homicide from news media. "While counsel is accorded 'great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation],' counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence." (*People v. Valdez* (2004) 32 Cal.4th 73, 133.)

The Attorney General responds that the prosecutor's argument was a reasonable inference from the facts that  
61 news is widely available,<sup>42</sup> the murders took place only a \*61 few miles from the jail, and "Wyatt was in local custody where rules and restrictions were far more relaxed."

<sup>42</sup> Here, Crumb testified he read about the case in the Press Democrat. And there was evidence that Cappello viewed news articles on the murders on his laptop computer while he was in Colorado and Alabama.

We think it reasonable for the prosecutor to argue Wyatt could have learned about the crime from other jail inmates. Wyatt testified that he could talk to Odin because their cells were connected by a vent through which they could hear each other, and there were four cells connected in this way. He also talked to Odin in the day room area when they were let out of their cells along with four or six groups of inmates (and this occurred once

or twice a day). Wyatt testified they had normal "jailhouse conversation, what are you here for, court dates." This was testimony from which the jury could infer Wyatt had the opportunity to talk to many inmates, and he could have learned about the details of the crime from any inmate who entered custody after the details of the crime were covered by news media.

On the other hand, we agree with Cappello that it was a stretch for the prosecutor to argue Wyatt had access to media reports in jail when there was no evidence presented on that issue. To prevail on a claim of a prosecutorial error, however, Cappello must show prejudice. " 'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) Here, given that the jury reasonably could have inferred that Wyatt learned about the details of the crime from others, we fail to see how the prosecutor's improper comment about access to news media in jail could have harmed Cappello. Finally, because there was no prejudice, Cappello's claim of ineffective assistance of counsel for failing to object also fails. (*Ochoa, supra*, 19 Cal.4th at pp. 414-415.) F. *Cumulative Error*

Cappello argues that the various errors he has raised are cumulatively prejudicial. We have rejected many of his claims. We have concluded it was error to admit Odin's and Francis's entire police interviews without regard to which portions were relevant to rehabilitate credibility, but we have found the error harmless because Cappello  
62 has failed \*62 to demonstrate how the inadmissible portions of the interviews could have affected the jury's credibility assessments of Odin and Francis to Cappello's harm. We have assumed for the sake of argument that the prosecutor's cross-examination of Cutting regarding assessing the credibility of the Dwyers was inadmissible and that the issue has been preserved for appeal, but we have found no possible prejudice because defense counsel elicited testimony from Cutting that was similar to the testimony elicited in cross-examination that Cappello now challenges. We have assumed it was error to allow evidence that Cappello possessed a hunting knife and sometimes kept a knife in his Bronco and that he sometimes carried a handgun, but we discern no prejudice given the properly admitted evidence that Cappello owned a Springfield .45 caliber semiautomatic handgun and possessed a DVD on advanced pistol training. We have assumed for the sake of argument that it was error to admit evidence of Cappello's unlawful drug-related activity that was not connected to the marijuana trade, but we have found any error harmless because the victims and primary prosecution witnesses were also involved in the illegal drug trade. We have concluded that the evidence of Cappello's empty threats and boorish behavior was irrelevant and inadmissible, but we have found this error harmless because the conduct was so minor compared to the charged crimes there is no risk this evidence affected the verdict. And we have assumed it was improper for the prosecutor to argue that Wyatt had access to news media in jail (and, for the sake of argument, further assumed the issue was preserved for appeal), but we have found the claimed prosecutorial misconduct harmless in the context of his overall argument.

Even considering these errors and assumed errors together, we conclude they were harmless. "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice." (*People v. Hill* (1998) 17 Cal.4th 800, 844; see *People v. Poletti* (2015) 240 Cal.App.4th 1191, 1217 [finding no cumulative prejudice where there was an evidentiary error and three incidents of prosecutorial misconduct].) The jury had ample opportunity to assess Odin's and Francis's credibility based on their trial testimony and admissible evidence. Corroborating physical evidence and witness testimony established that the  
63 gun parts the \*63 Dwyers disposed of near the crime scene belonged to Cappello; that Cappello's clothes, the vinyl bra to his Bronco, and nitrile gloves were disposed of in the area; that, in Colorado, Cappello washed a large amount of cash for the stated purpose of getting rid of Klarkowski's fingerprints; and that Cappello fled Colorado and was found in Mobile, Alabama, with three passports and a Brazilian driver's license. As we have



mentioned, after a long trial (including 22 days of witness testimony), the jury reached its verdict in one day. There is no reasonable probability the jury would have reached a result more favorable to Cappello absent the errors and assumed errors. *G. Senate Bill No. 620*

The jury found Cappello personally and intentionally discharged a firearm, proximately causing great bodily injury in the commission of counts 1 through 3 (murder) and count 6 (robbery). As a result, the trial court imposed four enhancements of 25 years under [Penal Code section 12022.53](#), subdivision (d). At the time of sentencing, the firearm enhancements were mandatory. (See former [Pen. Code, § 12022.53](#), added by Stats. 2010, ch. 711, § 5.)

Effective January 1, 2018, however, Senate Bill No. 620 amended [Penal Code section 12022.53](#), providing trial courts with discretion "in the interest of justice pursuant to [Penal Code] Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section." (Stats. 2017, ch. 682, § 2; [Pen. Code, § 12022.53](#), subd. (h).)

The parties agree the current version of [Penal Code section 12022.53](#) applies retroactively to Cappello's case. (*People v. McDaniels* (2018) [22 Cal.App.5th 420, 424](#) [the discretion conferred by section 12022.53 applies retroactively to nonfinal judgments] (*McDaniels*).) Cappello asks us to remand the matter to the trial court to decide whether to strike any or all of the firearm enhancements, but the Attorney General argues remand is unnecessary because there is no possibility the trial court would exercise its discretion to strike any of the  
64 firearm enhancements given that the court departed upward from the \*64 probation officer's recommendation and did not exercise its discretion to reduce the sentence where it could.

43 <sup>43</sup> The probation officer recommended six years for count 6 (robbery), plus the mandatory 100 years to life for the four firearm enhancements, plus three *concurrent* LWOPs for counts 1 through 3 (special circumstances first degree murder). He recommended staying punishment for counts 4 (burglary) and 5 (conspiracy to possess marijuana) under [Penal Code section 654](#). The prosecutor agreed that the burglary conviction (count 4) merged with the robbery (count 6), but he argued the conspiracy (count 5) was a different type of crime, and [Penal Code section 654](#) should not apply, so Cappello should receive an additional 8 months (one-third the midterm) for count 5. He also asked for three *consecutive* LWOP terms. The trial court followed the prosecutor's recommendations. The prosecutor suggested three consecutive LWOP terms would recognize there were three murder victims in this case. -----

Although the trial court agreed with the prosecutor's recommendation in sentencing Cappello, it did not state that its intent was to impose the maximum possible sentence nor did it state it would never consider striking one of the mandatory firearm enhancements if it had discretion to do so. Therefore, in an abundance of caution, we conclude "a remand is proper because the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements." (*McDaniels, supra*, [22 Cal.App.5th at pp. 427-428](#).) We express no opinion on how the court should exercise its discretion on remand.

## DISPOSITION

The convictions are affirmed, but the case is remanded for the trial court to consider whether to strike any or all the firearm enhancements imposed under [Penal Code section 12022.53](#).

65 \*65 /s/\_\_\_\_\_

Miller, J. We concur: /s/\_\_\_\_\_

Kline, P.J. /s/\_\_\_\_\_

Stewart, J.

October 18, 2019

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

Re: Public Comment on Proposed Formal Opinion 17-0001 Advising a Cannabis Business

To Whom it May Concern:

I respectfully submit these comments to Proposed Formal Opinion 17-0001 regarding advising a cannabis business. The first comment pertains to lawyer investment in a client's cannabis business. The second comment addresses a new issue, state and federal trademarks. While [the proposed formal opinion addresses](#) advice and assistance with respect to related business activities, including business formation, financing, supply chain contracts, real estate, employment law, and taxation, it does not address advice and assistance specific to service and trademarks. This guidance is needed to address current ongoing conduct among members of the Bar.

## **I. LAWYER INVESTMENT IN THE CLIENT'S CANNABIS BUSINESS**

I respectfully disagree with the conclusion that a lawyer may accept payment from a client in the form of an interest in their cannabis business. First, owning a cannabis business is illegal criminal conduct prohibited by the rules because it does not promote the objectives of rule 1.2.1 and is therefore not worthy of the protections it provides from disciplinary conduct under rule 8.4. It is self-serving intentional law-breaking that goes beyond any indirect violations that may be a corollary of ethical representation. Additionally, such a payment arrangement creates conditions of unfair business practices and competition for lawyers who are unwilling to break federal law and engage in ongoing criminal conduct to accept payment from a client. Such conduct harms the reputation of the cannabis bar and degrades the integrity of lawyers and the legal profession.

## **II. TRADEMARKS**

This next comment pertains to a new subject matter, advising and assisting a cannabis business with state and federal trademarks. Specifically, what are a lawyer's obligations and restrictions when advising and assisting with state and federal trademarks for cannabis goods and services?

### **A. STATEMENT OF FACTS**

Client, a licensed business that cultivates, manufactures, and/or distributes cannabis goods and/or offers services in compliance with California law, asks Lawyer to advise and assist

them with trademarking their “touch-the-plant” cannabis goods and/or services under both Federal and California law. Client reports that despite federal restrictions on cannabis trademarks, they have heard of businesses using workarounds that result in a successful federal trademark registration, namely applying under a generic category that does not indicate the good or service involves illicit cannabis. Additionally, they report that they have heard companies are taking token actions to substantiate the categorization. Client has asked lawyer to advise and assist with such work-arounds to obtain a federal trademark for their cannabis good or service.

## **B. ETHICAL ISSUES**

What ethical obligations arise when a lawyer advises and assists a client with filing a federal trademark for a cannabis touch-the-plant product or service?

What ethical obligations arise when a lawyer advises and assists a client with filing a state trademark for a cannabis touch-the-plant product or service?

If a client refuses to follow a lawyer’s advice regarding the viability of a federal or state cannabis touch-the-plant trademark or service mark, may a lawyer refer them to another lawyer for a second opinion about these services?

## **C. BACKGROUND: FEDERAL TRADEMARKS**

Many newly licensed and legal California cannabis businesses are seeking state and federal trademark protection. Lawyers practicing in the cannabis industry nationwide have coined the term “touch-the-plant” to refer to those cannabis goods and services that physically handle cannabis. Pursuant to various federal laws including the Controlled Substances Act, touch-the-plant goods and services should be off limits for federal trademark registration. However, some lawyers in the cannabis industry offer this service and regularly advise and assist clients with filing federal trademark applications for touch-the-plant cannabis goods and services.

It is said that the standard practice for these lawyers is to advise clients to file for a mark in a general category without indicating it is a cannabis good or service. In addition, some lawyers are said to advise their clients to take token actions to defend the categorization. For example, they will advise a client to put their company name and logo on t-shirts so that the brand and logo can be trademarked as an apparel company rather than a cannabis company (while there are a few companies with names and logos so popular that they sell their apparel worldwide to buyers who don’t necessarily connect it to cannabis, this is the rare exception and not the rule). A similar strategy is to advise businesses to add an education section to their website and then register their mark as a cannabis education service.

Now that federal law allows for hemp-based CBD products, it is anticipated that some lawyers will continue along these lines and advise businesses to register their marks for federally illegal cannabis goods and services as legal hemp goods and services.



There are other cautious lawyers that do not offer this service. They are said to advise clients that these types of federal marks will not be approved and if somehow a mark is registered it is most likely unenforceable because the product is not legally in commerce and cannabis is not a category of goods or services that can be protected. They also inform these clients that the lawyer's assistance is not permitted by the Rules of Professional Conduct. Not all clients follow advice and might seek outside lawyers for a second opinion. They might request referrals for those outside lawyers. Those outside lawyers may offer advice and assistance with federal trademarks and cause the cautious lawyer to lose business due to their strict adherence to the rules.

These strategies walk a fine line between creative lawyering and unethical misconduct and thus an opinion from the Committee is necessary to make clear what is and what is not allowed by the Rules of Professional Conduct on this matter. The matter is extremely urgent as inquiries are coming in daily from both current and potential clients who are anxiously standing by waiting for this advice and assistance.

#### **D. BACKGROUND: STATE TRADEMARKS**

Until recently California trademark and service mark registrations conformed to that of federal law. Accordingly, the California Secretary of State denied registrations for touch-the-plant cannabis goods and services because they did not meet the federal requirement that the product or service be legally in commerce. (See attached Secretary of State Response to Trademark Registration). This is despite California law at the time that allowed nonprofit collectives and cooperatives to cultivate, manufacture, and distribute cannabis products.

Then in November 2016, California voters passed Prop 64 the Adult Use of Marijuana Act and in January 2017 the state governing agencies began drafting regulations for cannabis businesses. Shortly thereafter, the Secretary of State published updated information for registering a "cannabis-related" trademark to its website. (See attached Secretary of State Trademark FAQ Screenshot and Cannabiz File FAQ Handout page 4). It stated a cannabis-related trademark or service mark could be registered if the mark is lawfully in use in commerce in California and if it matches the USPTO classification of goods and services. It included the note "Not all cannabis-related products can be registered under current law due to the inability to meet federal classifications." Thus there was no actual change to state law or policy allowing for touch-the-plant trademark and service marks. Despite the note, word-of-mouth spread in the cannabis industry that the state would register touch-the-plant trademarks and service marks and some lawyers offered these services.

Later in 2018 the state began issuing cannabis licenses to qualified businesses. Subsequently in April 2019, the Secretary of State updated their website and issued a memo explaining how to register a state trademark or service mark for a touch-the-plant cannabis product or service. (See attached Registering Cannabis-Related Trademarks in California 4/13/19 Handout and 4/29/19 Memo). It instructed applicants to "choose the [USPTO] code(s) which best categorize the good or service associated with their Trademark in the same manner as if these goods or services did not involve cannabis." The Secretary of State did not indicate the

authority for this change in law or policy. Lawyers are now relying on this go-ahead from the Secretary of State to advise and assist clients with state touch-the-plant cannabis service and trademark registrations.

Based on the Secretary of State's publications and statements prior to April 2019, touch-the-plant cannabis goods and services could not obtain a state or federal trademark registration. Based on the April 2019 memo and subsequent publications on the Secretary of State website, touch-the-plant cannabis goods and services may now obtain a state registration but remain ineligible for federal registration.

Due to the change of statements from the Secretary of State, if possible, it is requested that the Committee address the ethical implications regarding state trademark and service mark registrations both before and after the issuance of the first state cannabis business licenses in 2018 and also before and after the April 2019 Secretary of State Memo.

### **III. A NOTE ON UNFAIR BUSINESS COMPETITION AND PRACTICES**

Allowing lawyer investment in a client's cannabis business creates conditions of unfair competition and business practices. Although federal authorities have sparingly used their power to enforce federal criminal cannabis laws in recent years, some cautious lawyers will decline the risk and refuse to provide legal services in exchange for an interest in a client's cannabis business. They may wish to avoid any notion of impropriety and misrepresentations inherent in operating a cannabis business.

To the cautious lawyer's detriment, potential clients may prefer to hire another lawyer who is willing to break the law and give them the option of paying with an interest in their cannabis business, even if they are otherwise able to pay for legal services.

Further, these clients may see this as an indication that the lawyer has other flexible practices. Conversely, it may cause them to question the competence and practices of the cautious lawyer who refuses the interest as payment. This gives an unfair advantage to lawyers willing to break federal drug laws.

Similarly, unethical conduct by lawyers who advise and assist with illicit federal trademarks can also create conditions of unfair business competition and practices. Although some lawyers are currently advertising and offering cannabis businesses advice and assistance with federal trademark registrations, again there are cautious lawyers that read the rules to prohibit the misrepresentations they see as inherent in the course of registering an illicit cannabis good or service. Accordingly, they have chosen not to provide clients with this advice and assistance.

This poses various problems with both potential and current clients. There may be potential clients that need a range of services but choose a lawyer primarily for their willingness to provide advice and assistance with federal trademarks. Some base this on investor demands that the business have a federal trademark. For the cautious lawyer's current clients, they may seek a second-opinion or they may already have concurrent representation with another

lawyer. If the other lawyers offer the client the services, the conflicting advice will lead them to question the competency and candor of at least one of the lawyers. The cautious lawyer could lose all business with the client as a result of declining to offer federal trademark services. A lawyer's strict adherence to the rules should not unfairly disadvantage them in their practice of law.

I hope the Committee takes these important concerns into consideration in its opinion on lawyers advising cannabis businesses.

Respectfully Submitted,

Anonymous Member of the Bar

# **Suggested Additions, Changes, and Modifications to Proposed Opinion 17-0001**

*Indicated in Italic Underline and strikethrough*

## **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 the sale of cannabis within the State of California. The client seeks advice and assistance that will enable her to comply with California laws, which permit, regulate and tax such activities, including obtaining any required permits and dealing with state and local regulatory authorities. She would also like advice and assistance with respect to related business activities, including business formation, trademarks, financing, supply chain contracts, real estate, employment law, and taxation.

On the issue of federal trademarks, the client reported to the lawyer that they have heard that even though illicit products are not eligible for protection, there are workarounds that have resulted in successful federal trademark registrations for illicit cannabis goods and services. Namely, applying under a generic category that does not indicate the good or service involves illicit cannabis. Additionally, they report that they have heard businesses are undertaking token actions to substantiate the categorization. Client has asked lawyer to advise and assist with such work-arounds to obtain a federal trademark for their cannabis good or service.

[...]

## **Discussion**

### **II. Legal Background**

[...]

In addition to criminal prosecution, persons engaged in the production, distribution or sale of cannabis in violation of federal law are subject to forfeiture of both the assets used in operating that business and the 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.

## **Legal Background: Federal Trademarks**

For goods or services to be eligible for federal trademark and service mark protection they must legally be in commerce. The federal Trademark Trial and Appeals Board has consistently upheld rejections of marks for illicit cannabis goods or services.<sup>1</sup>

However, hemp is a type of cannabis that is legal under federal law so long as it has less than .3% THC content. The 2018 Federal Farm Bill expanded the definition of legal hemp to add extracts including the ubiquitous CBD. In response, the USPTO published an examination guide specific to legal hemp and illegal cannabis. It extensively details the application of federal trademark law to cannabis and makes it clear that illicit goods and services are not eligible for registration.<sup>2</sup>

There are serious legal consequences if a registrant misrepresents their illicit cannabis goods or services to the USPTO. According to its website, filing an application with the USPTO starts a legal proceeding and requires that assurances or other statements made in the application be truthful and made with knowledge of the penalty of perjury under the laws of the United States. It is a statement that is sworn to, made under oath or in a notarized affidavit, or with a written and signed declaration that states that the signatory has been warned about the legal consequences of making willful false statements in any document filed with the USPTO. Either the applicant or their lawyer may sign and both are subject to the same penalties for perjury.<sup>3</sup>

## **Legal Background: State Trademarks**

Pursuant to Business and Professions Code section 14235, state classifications of goods and services for trademark registrations must conform to the classifications of the USPTO. Until recently, the Secretary of State used this as a basis to deny trademark registrations for cannabis goods and services. This is despite California laws including Health & Safety Code section 11362.775 that allowed nonprofit collectives and cooperatives to cultivate, manufacture, and distribute cannabis products.

In November 2016 voters passed Prop 64, the Adult Use of Marijuana Act. Within a few months the state governing agencies began drafting regulations for cannabis businesses. Since then there have been inconsistent statements from the Secretary of State's Office. First the Secretary of State published updated information for registering a "cannabis-related" trademark to its

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<sup>1</sup> In re JJ206, LLC, dba JuJu Joints;

<http://ttabvue.uspto.gov/ttabvue/ttabvue-86474701-EXA-11.pdf>

<sup>2</sup> <https://www.uspto.gov/sites/default/files/documents/Exam%20Guide%201-19.pdf>

<sup>3</sup> <https://www.uspto.gov/trademark/laws-regulations/verified-statement#verified>

website.<sup>4</sup> It stated a cannabis-related service or trademark could be registered if the mark is lawfully in use in commerce in California and if it matches the USPTO classification of goods and services. It included the note “Not all cannabis-related products can be registered under current law due to the inability to meet federal classifications.” Thus federally illicit cannabis goods and services remained ineligible for state trademark registration.

Later in 2018 the state began issuing cannabis licenses to qualified businesses. Subsequently, in April 2019, the Secretary of State updated their website and issued a memo explaining how to register a state service or trademark for cannabis goods and services.<sup>5</sup> It instructed applicants to “choose the [USPTO] code(s) which best categorize the good or service associated with their Trademark in the same manner as if these goods or services did not involve cannabis.” Since then, the Secretary of State has accepted trademark registrations for cannabis goods and services that are lawfully in commerce in California, despite their illegal status under federal law.

Similar to federal law, there are consequences for misleading the Secretary of State’s office when registering a trademark. According to its website, trademark “[a]pplicants are required to state a declaration of accuracy that the material facts in the application are true. A willfully inaccurate statement is subject to a civil penalty of up to \$10,000 to be enforced by a public prosecutor.”<sup>6</sup>

### **III. Counseling and Assisting with Respect to California and Federal Cannabis Law**

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

##### **Permitted Advice.**

Under rule 1.2.1 and Comment [6], [...] 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.” Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 9.  
Accordingly a lawyer may ethically provide advice or assistance with filing a state service or

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<sup>4</sup> See attached Secretary of State Trademark FAQ Screenshot and Cannabiz File FAQ Handout page 4

<sup>5</sup> See attached Registering Cannabis-Related Trademarks in California 4/13/19 Handout and 4/29/19 Memo

<sup>6</sup> <https://www.sos.ca.gov/business-programs/ts/>

trademark registration for cannabis goods or services that are lawfully in commerce under the laws of the state of California even if those goods and services are federally illegal.

[...]

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 law. This conclusion is reinforced by Comment [1] to the rule 1.2.1, which notes, "there is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." See also, Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 12 ("advice and assistance directed to violating federal law is not permitted").

Under this analysis, advising intentional misrepresentations of a cannabis good or service to avoid detection and rejection by the USPTO violates rule 1.2.1. It is improper advice that does not promote the objectives of state law, candid advice, and non-deceptive conduct under federal law. Publications from the Secretary of State's Office imply that the objective of state law is to promote the registration of legitimate state trademarks for cannabis goods and services rather than illegitimate federal marks. Thus such improper advice inhibits fulfillment of this important goal of California's comprehensive cannabis regulatory scheme.

#### **Permitted Assistance.**

[...]

Moreover, the lawyer's 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. Rule 1.2.1 Comment [1]; Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 12.4. 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 1.4.5. Specifically, rule 1.4(a)(4) provides 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. Therefore, a lawyer assisting a client with a federal trademark registration must inform the client of the federal restrictions on cannabis goods and services and the limitations on assistance imposed by rule 1.2.1.

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

[...]

Rule 8.4 (Misconduct) 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.” Section (c) adds that it is misconduct to “engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.” The rule potentially applies because there could be circumstances where a lawyer’s counseling or assistance in conduct permitted by California cannabis law could be prosecuted as a criminal act under federal law. Additionally, there could be circumstances where the lawyer’s conduct amounts to dishonesty and reckless or intentional misrepresentations to the federal government and third parties. Our conclusion is that so long as the lawyer’s 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 state and federal law, any resulting crime should not be viewed for disciplinary purposes as “reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” However, dishonest conduct that amounts to reckless or intentional misrepresentations in the course of representing a cannabis business does not promote the objective of non-deceptive conduct and is prohibited by rules 1.2.1 and 8.4

In the case of cannabis trademarks, advising or assisting a client in misrepresenting a cannabis good or service to the USPTO amounts to the criminal act of perjury under federal law. If the lawyer signs and submits the trademark registration, as is common practice, any misrepresentations are direct acts of perjury. Advising, assisting, or personally engaging in perjury does not comply with Rule 1.2.1 and therefore misrepresentations committed in the course of advising, assisting, and filing federal service and trademarks is dishonest conduct and may be viewed for disciplinary purposes as “reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects” and in such a case would be prohibited by Rule 8.4(b) and (c).

Further, trademark registrations are unique in that they are considered a legal action. According to the USPTO website, “engaging in the trademark application process or bringing matters before the Trademark Trial and Appeal Board (TTAB), starts a legal proceeding.”<sup>7</sup> The website further states that the “Trademark Trial and Appeal Board is a USPTO administrative tribunal.” Rule 3.3 requires lawyers to maintain candor toward the tribunal. “Tribunal” means: a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved.” The Trademark Trial and Appeal Board qualifies as a tribunal, therefore any misrepresentations of illicit cannabis goods and services to the TTAB violate rule 3.3.

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<sup>7</sup> <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf> Accessed 10/17/19



Rule 3.3 also prohibits knowingly misquoting the language of an authority or offering evidence that the lawyer knows to be false. It requires lawyers to correct a false statement of material fact or law previously made to the tribunal and to disclose any legal authority directly adverse to the position of the client. Therefore prior misrepresentations about a cannabis good or service must be disclosed to the TTAB. Such disclosures can prejudice a client and may implicate them in the misrepresentations with serious consequences. Lawyers must avoid this by refraining from making any misrepresentations to the TTAB.

Business and Professions Code section 6068(a) provides that it is the duty of an attorney “to 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. As previously discussed, advising, assisting, or committing an act of federal perjury by submitting an intentional misrepresentation of cannabis goods or services to the USPTO does not comply with rule 1.2.1. This conduct obstructs rather than supports federal and state law and is therefore prohibited by Business and Professions Code section 6068(a).

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 assistance that complies with rule 1.2.1 can be properly viewed as involving “moral turpitude, dishonesty, or corruption” for purposes of discipline under California law. Counseling that does not comply with rule 1.2.1 including advising or assisting a client with a federal trademark registration that intentionally misrepresents the nature of their cannabis goods or service, is conduct that can be properly 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 faith effort to comply with state or local law regulating the medicinal or adult-recreational use of cannabis. The lawyer may also provide such advice and assistance in interpreting any other relevant California law, including generally applicable laws relating to entity formation, trademarks, 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 cannabis business, drafting documents and negotiating transactions, and 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. In this statement of facts, the client's request for advice and assistance with federal service and trademark registrations for illicit cannabis goods and services falls into this forbidden category. In such a case, the lawyer must inform the client of the federal restrictions and may not advise or assist with misrepresentations to the USPTO. Additionally, the client's request that the lawyer permit the client to create a "rainy day fund," and keep it 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 offshore 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 cannabis business requires specialized learning: notably, mastering a novel, complex, and rapidly evolving body of state and local statutes and regulations. A lawyer who is unable to acquire the full range of required learning and skill through study, or through consulting or associating with another attorney, should limit the representation to those issues that she has or can acquire the requisite learning and skill and advise the client to obtain separate counsel with sufficient learning and skill to represent the client on other issues presented. Rule 1.1.

In addition, the scope of competent representation will always encompass providing basic information on conflicting federal law to comply with rule 1.2.1 and may often require additional advice going beyond such information. Such additional advice is required when advising and assisting a cannabis business with service or trademarks. To competently advise on state and federal trademark laws, a lawyer must advise a client regarding the restrictions on service and trademark registrations for federally illicit cannabis goods and services. A lawyer may not advise or assist with misrepresentations to the USPTO as this is outside the scope of competent representation.

**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 cannabis 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. This may arise when advising and assisting with federal service and trademark registrations because the lawyer must disclose all material facts to the USPTO. Therefore rule 4.1(b) forbids a lawyer from misrepresenting cannabis goods and services to the USPTO.

Similarly, for state trademarks, any misrepresentations made to the Secretary of State's Office prior to the 2019 policy change, were prohibited by the rules and law.

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. (BAJI No. 1901 (2017).) For all these reasons, lawyers representing cannabis 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 disclosure is prohibited or the client declines to permit disclosure, the lawyer must inform the client of the relevant limitations on the lawyer's conduct and should consider withdrawal from the matter. Rule 1.4(a)(4) and 4.1, Comment [5].

**Assisting Violations of the Rules.** It is possible, perhaps even likely, that after the lawyer explains the restrictions on federal trademarks and the ethical limitations them, the client requests a second opinion. In this scenario, the lawyer is allowed to refer the client to another lawyer who will be subject to the same ethical limitations and required disclosures outlined above. Rule 8.4(a) states that it is misconduct for a lawyer to violate the rules by knowingly assisting, soliciting, or inducing another to do so, or do so through the acts of another. Therefore, if the referring lawyer has reason to know that the second-opinion will offer assistance and advice prohibited by the rules, they may not refer the client to that lawyer.

**Lawyer Investment in the Client's Cannabis Business.** The facts presented in this opinion raise 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 on a conflict between state and federal law, so long as the arrangement is not intended to evade detection or prosecution under California or 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 the client to pay for those services.

While there can be no ethical objection to payment in the form of the an interest in the cannabis business based on a conflict between state and federal law, there is an objection based on actual violations of federal laws. By investing in a cannabis business, either their own or a client's, lawyers themselves directly violate various federal narcotics laws, conspiracy laws, securities laws, and more.

Additionally, when a lawyer invests in a cannabis business it is inevitable that misrepresentations will arise. They face the same federal obstacles as their clients. They must file federal taxes and report the illegal income. Their property and income derived from the investments is subject to civil asset forfeiture. The lawyer's investment may be a security subject to federal investment laws. These are just a few of the obstacles for cannabis business owners and faced with them, lawyers will either have to incriminate themselves under federal law or commit misrepresentations. By investing in a cannabis business lawyers would be putting themselves in a position where they engage in deceptive conduct that they may not advise clients to do.

As previously discussed, the rules prohibit these misrepresentations that are part and parcel of the cannabis industry. While clients may accept the risks and choose this course of conduct, lawyers may not ethically engage in this type of deceptive criminal activity.

Further, to comply with rule 1.2.1 the advice and assistance must support the objectives of promoting state law, candid advice, and non-deceptive conduct. Violating federal law by accepting payment for legal services in the form of an interest in an illegal cannabis business does not support these objectives. One could say that this form of payment increases access to legal services and thus promotes the objectives of California's complex cannabis regulatory scheme, however there is no overriding policy to ensure legal services to businesses that justifies criminal conduct by lawyers. There is no right to counsel for business legal advice. The choice to start a cannabis business does not guarantee one legal services regardless of the ability to pay. While California residents are entitled, as a matter of fairness, to understand "their rights, duties and liabilities" under state law, they are expected to pay for these services without asking a lawyer to violate federal law. A client's need for business legal advice does not outweigh the prohibition of criminal conduct by lawyers. Arranging for payment of legal services in a manner that violates federal law is not advice or assistance encompassed by the objectives of rule 1.2.1

Accepting payment in the form of an interest in the client's cannabis business also amounts to assisting a client with the violation of federal law. If the client claims they cannot operate their cannabis business without legal services and the only way to pay is to give the lawyer an illegal investment in their business, accepting the payment amounts to aiding and abetting. It is intentional law-breaking that goes beyond any indirect violations that may be a corollary of

ethical representation. Such conduct harms the reputation of the cannabis bar, degrades the integrity of lawyers and the legal system, and erodes confidence in the legal profession. Rule 1.0.

[...]

and for the lawyer to receive payment in the form of an interest in that business. However, in making such an investment 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. Additionally, the lawyer's investment will constitute a business transaction with the client, subject to the requirements of rule 1.8.1. Therefore, the terms of the transaction must be fair and reasonable to the client, full disclosure of its terms and of the lawyer's role in the transaction must be in writing in a manner that should reasonably be understood by the client, the client must be represented or advised in writing to seek representation by an independent counsel, and the client must give informed written consent to the terms of the transaction and the lawyer's role in it. Finally, the fact that the lawyer is taking a financial stake in the client's business will ordinarily give rise to a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest which requires compliance with rules 1.7(b) and (d), including obtaining the client's informed written consent.

[...]

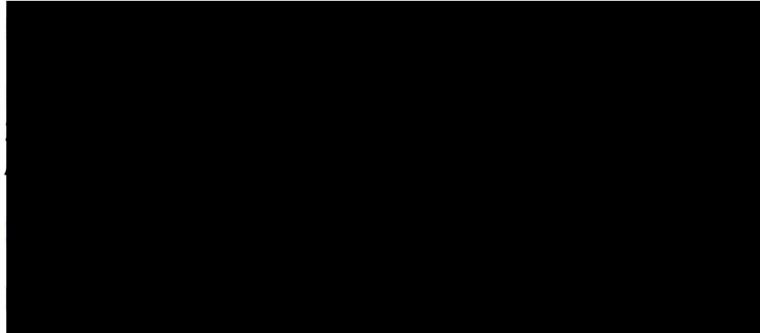
**Lawyer Investment or Ownership of Any Cannabis Business.** The misrepresentations inherent in investing and owning a cannabis business not only disqualify lawyers from investing in a client's cannabis business under the rules, they also disqualify them from personally investing in or owning a cannabis business. While clients may choose to engage in deceptive and criminal conduct inherent in the cannabis industry, lawyers are held to a higher professional standard. So long as federal prohibition stands, ethical lawyering is incompatible with owning a cannabis business.

Additionally, rule 1.2.1 prohibits this breaking of federal law outside the scope of providing competent representation to a client. Without a client to protect, the balance struck between promoting the objectives of state law and candid advice and non-deceptive conduct evaporates. For all the foregoing reasons, owning or investing in a cannabis business in direct violation of federal law is the commission of dishonest conduct and is a criminal act reflecting adversely on the lawyer's fitness and honesty and may be grounds for discipline under the rules and state law.



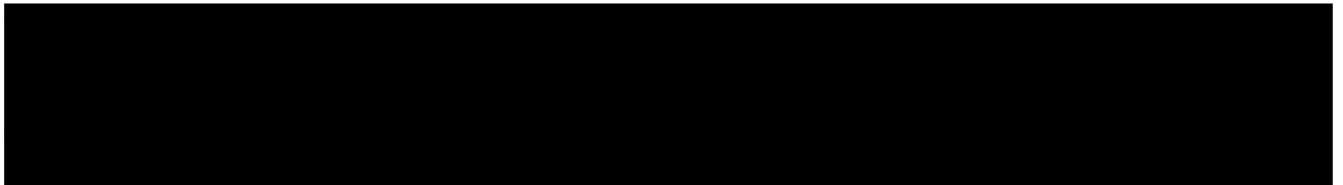
**Secretary of State  
Business Programs Division**

Special Filings, P.O. Box 942877, Sacramento, CA 94277-0001

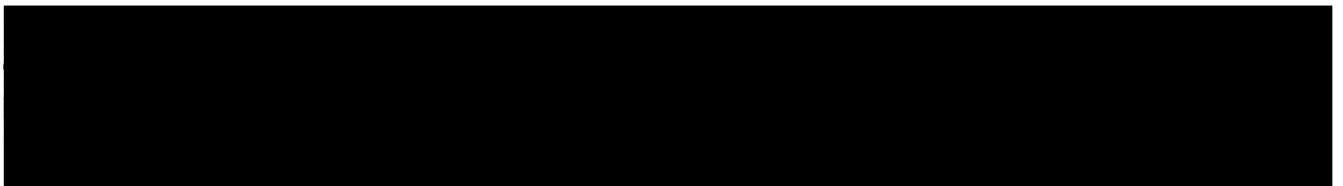


We are returning, unfiled, the Registration of Trademark or Service Mark application form (Application) and payment, if any, for the following reason(s):

California Business and Professions Code sections 14200-14272 comprise California's Model State Trademark Law. Unless otherwise noted, all Code sections cited below are found in the California Business and Professions Code. Section 14272 provides that the construction given the federal system of trademark registration should be examined as nonbinding authority for interpreting and construing California's Model State Trademark Law. For this reason, certain portions of the United States Patent and Trademark Office's Trademark Manual of Examining Procedure (TMEP) – October 2014 may be cited below.



You have further indicated in Item 8a that the proposed mark is: "Medicinal herb extracts; medicinal drinks, vitamins, nutritional supplements, foods, snacks, and confections, all for use in the treatment of serious medical conditions; Smokers' Articles; Clothing, headgear". Finally, in Item 8b you have indicated that the class numbers are: 5, 25, 34.



Regarding your application to the California Secretary of State, the California Attorney General issued *Guidelines for the Security and Non-Diversion of Marijuana Grown For Medical Use* in August 2008 pursuant to California Health and Safety Code section 11362.81(d). The *Guidelines* recommend that a group collectively or cooperatively cultivating and distributing marijuana for medical purposes organize as some form of business, but does not recommend any specific statutory business entity. (*Guidelines*, 8.) To prevent diversion of marijuana to illegal purposes, collective/cooperative entities must be non-profit (*Guidelines*, 9), limit the entity's role to facilitating or coordinating the collaborative efforts of patients and "primary



caregivers" (*Guidelines*, 8) and may not distribute medical marijuana to non-members (*Guidelines*, 10).

Pursuant to the Attorney General's *Guidelines*, any entity formed to collectively or cooperatively cultivate and/or distribute marijuana for medical purposes under California's "Medical Marijuana Program Act" effective January 1, 2004, codified in California Health and Safety Code sections 11362.7 to 11362.83 or California's Compassionate Use Act of 1996 (hereafter "Compassionate Use Act"), codified in California Health and Safety Code section 11362.5 may not be a for-profit entity.

#### **Additional Information Required**

To permit proper examination of the application, applicant must submit additional information about the goods and/or services. See TMEP section 814. The requested information should include fact sheets, brochures, advertisements, and/or similar materials relating to the goods and/or services. If such materials are not available, applicant must provide a detailed factual description of the goods and/or services. Any information submitted in response to this requirement must clearly and accurately indicate the nature of the goods and/or services identified in the application.

In addition, applicant must submit a written statement indicating whether the goods and/or services identified in the application comply with the Controlled Substances Act, 21 U.S.C. sections 801-971. See TMEP section 907. The Controlled Substances Act prohibits, among other things, manufacturing, distributing, dispensing, or possessing certain controlled substances, including marijuana and marijuana-based preparations. 21 U.S.C. sections 812, 841(a)(1), 844(a); see also 21 U.S.C. section 802(16) (defining "[marijuana]").

The Controlled Substances Act also makes it unlawful to sell, offer for sale, or use any facility of interstate commerce to transport drug paraphernalia, i.e., "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under [the Controlled Substances Act]." 21 U.S.C. section 863.

Finally, applicant must provide written responses to the following questions:

1. Is applicant a patient or primary caregiver as defined by the California Compassionate Use Act and the California Medical Marijuana Program Act?
2. Do applicant's identified horticultural products/services include the growing of marijuana, marijuana based preparations, or marijuana extracts or derivatives?
3. Do applicant's identified information services include instructions on how to grow marijuana, marijuana based preparations, or marijuana extracts or derivatives?

4. Are the applicant's products/services lawful pursuant to the federal Controlled Substances Act?

Failure to satisfactorily respond to a requirement for information is a ground for refusing registration. TMEP section 814.

Please note that merely stating that information about the goods and services is available on applicant's website is an inappropriate response to the above requirement and is insufficient to make the relevant information properly of record.

Applicant is advised that, upon consideration of the information provided by applicant in response to the above requirement, registration of the applied-for mark may be refused on the ground that the mark, as used in connection with the identified goods and/or services, is not in lawful use in commerce. California Business and Professions Code section 14202(h); Trademark Act Sections 1 and 45, 15 U.S.C. sections 1051, 1127

Item 5 (Section 14209(b))

- Please submit the required black and white drawing of the mark on an 8 1/2" x 11" sheet of paper. For word only marks type/print the words onto a blank sheet of paper.

Item 5 - If this mark is a standard character claim (word mark only), please submit the statement, "The mark is presented in standard character format without claim to any particular font style, size, or color". TMEP 807.03(a)

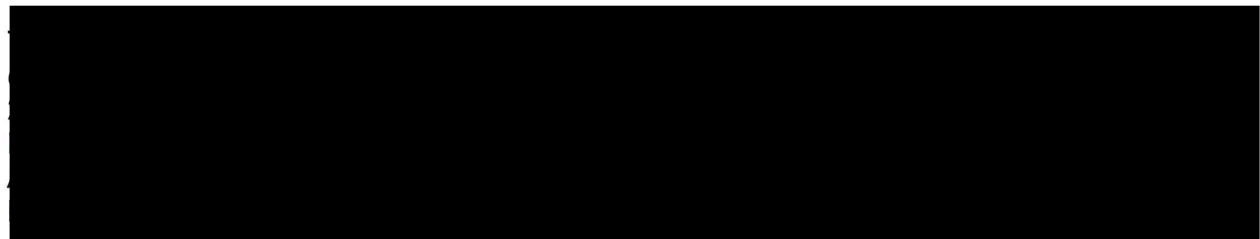
Item 8a - Please be more specific about your goods/services because they fall under multiple class numbers.

Item 8b - Please verify your classification codes by doing a term search at <http://tess2.uspto.gov/netahtml/tidm.html>

Please note that class numbers 5, 25, 34 do not include marijuana or cannabis. California Business and Professions Code section 14235 requires that the classification conform to the classifications established by the United States Patent and Trademark Office.

Item 12 - Please provide three identical (meaning three of the same) original specimens that show how the mark is used on the goods listed in Item 8a for each class number listed in Item 8b.

Please re-evaluate Items 8a and 8b to determine the proper filing fee and submit with amended Application. (Sections 14207(f) and 14235; Government Code section 12193(a).)



Sincerely,

A. Sittrop



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Contact Information

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1. What is a Drawing Page?	+
2. Who may be listed as the owner of a Trademark or Service Mark?	+
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6. What is a Classification Code?	+
7. What if my attorney is filing on my behalf?	+
8. What is the difference between a Trademark and Service Mark?	+
9. How long is a Trademark or Service Mark registration active?	+
10. Can a Trademark and Service Mark be filed on the same application?	+
11. How much is the filing fee to register a Trademark or Service Mark with the California Secretary of State's Office?	+
12. Does registering a Trademark or Service Mark give exclusive rights to the mark?	+
13. Can I register a cannabis-related Service Mark or Trademark with the California Secretary of State's Office?	-

Beginning January 1, 2018, customers may register their cannabis-related Trademark or Service Mark with the California Secretary of State's office so long as:

1. The mark is lawfully in use in commerce within California; and
2. Matches the classification of goods and services adopted by the [United States Patent and Trademark Office](#).

If the application submitted to register a Trademark or Service Mark is found deficient, the application will be returned to the registrant for correction.

Note: Not all cannabis-related products can be registered under current law due to the inability to meet federal classifications.

For further information including forms, fees and registration instructions, please visit the California Secretary of State's [Trademarks and Service Marks](#) webpage.

14. How will priority be determined for a Trademark or Service Mark application for identical marks received at the same time?
15. How can I view Trademark registrations and modifications of record with the Secretary of State?

View Content: [Open All](#) [Close All](#)



Questions? [New](#)

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CALIFORNIA SECRETARY OF STATE

# cannab<sup>\*</sup>izfile

## Cannabis Business Entity Information Frequently Asked Questions

### **What cannabis-related business filings will be accepted by the Secretary of State?**

**Nonprofit Corporations:** The Secretary of State's office presently accepts filings submitted for nonprofit mutual benefit corporations, cooperative corporations formed under the Corporations Code and nonprofit cooperative associations formed under the Food and Agricultural Code for qualified patients and primary caregivers that wish to engage in medical cannabis activities currently under the restrictions of the Compassionate Use Act, Medical Marijuana Program Act and the 2008 Attorney General Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use.

**Other Corporations and Other Entity Types:** Additionally, filing submissions on behalf of any for profit entity types (e.g. general stock corporations, limited liability companies, and limited partnerships), other than cannabis cooperative associations, that are formed for the purpose of engaging in future commercial medical and/or adult-use cannabis-related activities after seeking the appropriate licenses are accepted at this time. These customers may wish to form their entity in order to prepare to apply for necessary license(s) as applications become available.

**Cannabis Cooperative Associations:** The Secretary of State will begin accepting filings for cannabis cooperative associations formed under the Business and Professions Code after January 1, 2018.

**Start Up Checklist & Online Help:** For a checklist of necessary steps to start a cannabis business in California please visit [cannabizfile.sos.ca.gov/brochure](https://cannabizfile.sos.ca.gov/brochure). If you are ready to start a cannabis-related business in California and want additional information regarding online filings, forms, samples and fee information, please visit bizfile California Portal at [bizfile.sos.ca.gov](https://bizfile.sos.ca.gov).

For information regarding licensing requirements, please contact the California city and/or county where the physical location of the commercial cannabis-related activities will take place and the state agency, bureau, or board with jurisdiction over the cannabis-related activities to be conducted in California. Additional information is available through the California Cannabis Portal at [cannabis.ca.gov](https://cannabis.ca.gov).

### **Do organizational documents filed with the Secretary of State constitute a license to engage in cannabis-related activities under MAUCRSA?**

No. The Secretary of State does not issue licenses for cannabis related activity. State licensing agencies (see below) anticipate issuing licenses beginning January 1, 2018. However, customers should be aware that commercial cannabis activities cannot be conducted prior to obtaining any appropriate local license, permit or other authorization, as well as any necessary state license. Filing organizational documents with the Secretary of State's office alone does not provide business entities with the legal authority to conduct commercial cannabis activities pursuant to MAUCRSA.

For information regarding licensing requirements, please contact the California city and/or county where the physical location of the commercial cannabis-related activities will take place and the state agency, bureau, or board with jurisdiction over the cannabis-related activities to be conducted in California. Additional information is available through the California Cannabis Portal at [cannabis.ca.gov](https://cannabis.ca.gov).

## Does my business need a license to conduct commercial cannabis-related activities in California?

Yes. California has a dual licensing system for commercial medical and adult-use cannabis. Businesses engaging in cannabis-related activities that are required to be licensed must obtain a city, county or city and county license, permit or other authorization as well as any required state license. Lawful cannabis cultivation, transportation, distribution, testing, dispensing, and manufacturing under California law are highly regulated and licensed by California State and local government entities. It is anticipated that state licenses for medical and adult-use cannabis-related activities will begin being issued January 1, 2018. The Secretary of State does not issue licenses. State licensing agencies are as follows:

<p>Bureau of Cannabis Control Department of Consumer Affairs</p>  <p><b>BUREAU OF CANNABIS CONTROL</b> CALIFORNIA</p> <p>The Bureau licenses Testing Laboratories, Distributors, Retailers, and Micro-Businesses.</p> <p>Website: <a href="http://bcc.ca.gov">bcc.ca.gov</a> Email: <a href="mailto:bcc@dca.ca.gov">bcc@dca.ca.gov</a> Phone: (800) 952-5210</p>	<p>CalCannabis Cultivation Licensing Program Department of Food &amp; Agriculture</p>  <p><b>cdfa</b> CALIFORNIA DEPARTMENT OF FOOD &amp; AGRICULTURE</p> <p>CalCannabis licenses cannabis cultivators and administers the Track-and-Trace system.</p> <p>Website: <a href="http://cannabis.cdffa.ca.gov">cannabis.cdffa.ca.gov</a> Email: <a href="mailto:cannabis@cdffa.ca.gov">cannabis@cdffa.ca.gov</a> Phone: (916) 263-0801</p>	<p>Manufactured Cannabis Safety Branch (MCSB) Department of Public Health</p>  <p><b>CDPH</b> California Department of Public Health</p> <p>MCSB licenses Manufacturers of cannabis products, such as edibles.</p> <p>Website: <a href="http://cdph.ca.gov/mcsb">cdph.ca.gov/mcsb</a> Email: <a href="mailto:mcsb@cdph.ca.gov">mcsb@cdph.ca.gov</a> Phone: (916) 440-7861</p>
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For further information about cannabis licensing and regulation, please visit the California [Cannabis Portal](#). The California Cannabis Portal is intended to be a valuable resource and a one-stop shop for all things related to the state's effort to regulate the cannabis industry and is updated frequently with information from all affected state agencies.

## My business is currently incorporated as a nonprofit mutual benefit corporation or cooperative corporation but I would like to change the business structure to a general stock corporation. What do I need to file with the Secretary of State?

To change the status of an existing nonprofit corporation, such as a mutual benefit corporation or cooperative corporation to a for profit corporation, you may file either a Certificate of Amendment or Restated Articles of Incorporation.

Since you will need to change several provisions listed in your nonprofit Articles of Incorporation, filing Restated Articles of Incorporation may be the preferred method of making these changes. Samples of Restated Articles of Incorporation and a Certificate of Amendment may be found on our [bizfile California Portal](#) under Forms and Filing Tips. You should use the sample that is designated as either "Certificate of Amendment – Nonprofit" or "Restated Articles of Incorporation – Nonprofit" since your entity will not change to a for profit stock corporation until the document is filed with the Secretary of State.

Restated article provisions will need to include at least the following: (1) the name of the corporation; (2) the purpose statement for a general stock corporation; and (3) the number of shares authorized to be issued. If there are outstanding membership interests for the nonprofit corporation, the articles also will need to include a statement of the effect of the amendment/restatement on those interests (e.g. a statement indicating that upon the filing of the Restated Articles of Incorporation).

ration, each outstanding membership interest shall be converted into one common share or a statement that each outstanding membership interest shall be canceled without consideration upon the filing of the Restated Articles of Incorporation with the Secretary of State).

While you may include additional article provisions, any article provisions that previously appeared in the nonprofit Articles of Incorporation that are specific to a nonprofit entity type must be omitted from the restated article provisions (e.g. statements referencing members or the purpose statement for a nonprofit mutual benefit corporation and tax exemption provisions).

Finally, if the nonprofit corporation has not yet filed a Statement of Information with the Secretary of State, the Restated Articles of Incorporation will need to include the name and address of the agent for service of process and the initial street and mailing address of the corporation exactly as it appeared in the original nonprofit Articles of Incorporation.

Alternatively, if the nonprofit corporation has already filed a Statement of Information, the name and address of the agent for service of process and the street and mailing address of the corporation must be omitted. Once the Restated Articles of Incorporation are filed, you should file an updated Statement of Information – Stock (Form SI-550) within 90 days.

**My business currently is incorporated as a nonprofit mutual benefit corporation or cooperative corporation but I would like to change the business structure to a limited liability company, limited partnership or general partnership. What do I need to file with the Secretary of State?**

Under California law, California nonprofit corporations cannot “convert” (change the entity type from a nonprofit corporation to a limited liability company, limited partnership, or general partnership). However, nonprofit corporations can amend or restate their Articles of Incorporation to become a stock corporation (please see the previous response for information on how to do this) and once the corporation is a stock corporation the corporation can follow the procedures outlined in Corporations Code sections 1150 through 1160 to convert to a limited liability company, limited partnership or general partnership.

To convert from a stock corporation to a limited liability company, limited partnership or general partnership, you can use the applicable conversion form provided by the Secretary of State. For further information, forms and instructions relating to conversion filings with the Secretary of State’s office please see [Conversion Filings](#). You may wish to consult your legal and financial advisors, along with the licensing agencies prior to submitting filings to the Secretary of State.

**I already formed a business. The local or state licensing application is now requiring me to provide business documents that I filed with the Secretary of State. How can I obtain this information from the Secretary of State?**

Information for corporations, limited liability companies, and limited partnerships, including most filings for those entities, are available online. bizfile California Portal, is the Secretary of State’s new online business portal to help businesses file, search, and order business records. Within bizfile California Portal, you will find the California Business Search which provides online access to information for corporations, limited liability companies, and limited partnerships of record with the California Secretary of State including FREE copies of more than 10.9 million PDF images relating to business registrations, amendments, terminations, and the most recent Statements of Information for corporations and limited liability companies. Instructions and fees for ordering certified copies of filed documents for all types of business entities of record are available on the [Business Entities Records – Order Form \(PDF\)](#).

## **Can I register a cannabis-related service mark or trademark with the California Secretary of State's Office?**

Beginning January 1, 2018, customers may register their cannabis-related trademark or service mark with the California Secretary of State's office so long as: **(1) the mark is lawfully in use in commerce within California; and (2) matches the classification of goods and services adopted by the [United States Patent and Trademark Office](#)**. If the application submitted to register a trademark or service mark is found deficient, the application will be returned to the registrant for correction. Note: Not all cannabis-related products can be registered under current law due to the inability to meet federal classifications. For further information including forms, fees and registration instructions, please visit the California Secretary of State's Trademark and Service Mark webpage.

## **How will priority be determined for a trademark or service mark application for identical marks received at the same time?**

In the instance of separate applicants concurrently seeking registration of the same or confusingly similar marks, priority will be given to the application received in the following order:

1. Applications received by mail will be labeled received at 5:00 p.m. on the date received.
2. Applications received in person over the counter in Sacramento will be labeled received at the actual time and date received.



## Registering Cannabis-Related Trademarks in California

Author: California Secretary of State's Office

Published: Apr 29, 2019  
Sacramento, California

The Secretary of State's Office has created a new brochure with information regarding registering cannabis-related trademarks in California. The contents of this document has been posted to the California Cannabis Portal's [Business Resources page](#). A text-only version has also been posted below:

### What is a Trademark or Service Mark?

**"Trademark"** means any word, name, symbol, or device, or any combination thereof, used in commerce by a person to identify and distinguish the goods of that person from those manufactured or sold by others.

**"Service Mark"** means any word, name, symbol, or device, or any combination thereof, used in commerce by a person to identify and distinguish the services of that person from the services of others.

(In this guide, the term "Trademark" refers to both trademarks and service marks.)

### How Do I Register a Cannabis-Related Trademark in California?

The fastest way to register or update your trademark is online at [tmbizfile.sos.ca.gov](http://tmbizfile.sos.ca.gov). You may also complete an Application for Registration (Form TM-100) and submit the form in person at the Secretary of State's office or by mail.

### Are There any Pre-Registration Requirements?

Yes, to register a Trademark in California, it must be lawfully in use in commerce. For cannabis businesses, this means that the cannabis-related goods or services associated with the Mark are authorized under California law.

Applicants should ensure that any local and state licenses required to conduct the cannabis activities in California have been obtained prior to seeking registration of a Trademark.

Applicants should ensure that they are in compliance with labeling and packaging requirements for cannabis products (e.g. product labels include the Universal Symbol).

Trademarks associated with prohibited cannabis products cannot be registered (e.g. cannabis products that are attractive to children).

Detailed information on licensing, labeling and packaging requirements can be found online at [cannabis.ca.gov](http://cannabis.ca.gov).

### What Classification Codes Are Commonly Used for Cannabis-Related Trademarks?

To register your Trademark, you must choose one or more classification codes from the list adopted by the United States Patent and Trademark Office (USPTO), which can be found online by visiting [uspto.gov](http://uspto.gov).

These classification codes do not include specific categories for cannabis goods or services; therefore, applicants should choose the code(s) which best categorize the good(s) or service(s) associated with their Trademark as if these goods or services did not involve cannabis.

Examples of common classification codes used for cannabis-related Trademarks include the following:

- **Classification Code 5:** Pharmaceuticals: trademarks for medicinal products containing cannabis extracts
- **Classification Code 31:** Natural Agricultural Products: trademarks for live cannabis plants
- **Classification Code 34:** Smokers Articles: trademarks for cannabis products intended for smoking
- **Classification Code 35:** Advertising and Business: service marks for retail stores selling cannabis products
- **Classification Code 39:** Transportation and Storage: service marks for delivery of cannabis products

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Have Questions?  
Contact Us!

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Sacramento, CA 94277-2870

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Phone Number: (916) 653-3984  
Website: [cannabizfile.sos.ca.gov](https://cannabizfile.sos.ca.gov)



I'm Eureka, the  
chatbot helper!

Look for me online  
to help with your  
Trademark questions.





October 16, 2019

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

Re: Proposed Formal Opinion Interim No. 17-0001 (Advising a Cannabis Business)

Dear Angela:

On behalf of the California Lawyers Association Ethics Committee and in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing Proposed Formal Opinion No. 17-0001. The Ethics Committee was recently formed by the California Lawyers Association. While our Committee is new in the ethics community, our members are not. Of our 12 founding members: nine are former COPRAC members, including five former COPRAC chairs; two were members of the Commission for the Revision of the Rules of Professional Conduct; all are or were members of local bar association ethics committees, including five current or former officers; and one is a Special Deputy Trial Counsel on behalf of the State Bar Office of Chief Trial Counsel.

The Committee appreciates the opportunity to comment on Proposed Formal Opinion No. 17-0001. In the Committee's view, this proposed opinion will provide useful guidance to California lawyers advising clients engaged in the expanding business of cannabis production, distribution and sale. An increasing number of California lawyers find themselves asked to provide such advice and assistance, and may have questions about the ethical propriety of providing such services. In an effort to enhance the clarity of the Proposed Opinion, the Committee offers the following comments (our comments are generally in the order that they appear in the opinion).

First, the Statement of Facts assigns a gender to both client and lawyer. In light of the Supreme Court's preference for gender neutrality, we recommend that "client" or "lawyer" be substituted for the pronouns "she" and "her" where appropriate.

Second, the Proposed Opinion contains a sentence in the section entitled "Scope of the Opinion" (p. 3) that reads: "This opinion is not binding on state or federal law

enforcement authorities.” Since, as the standard opinion language notes at the end of the opinion, any Formal Opinion is not binding in *any* respect, including this language is at best superfluous and at worst misleading, by conveying an impression that in fact it is binding in some other way. We suggest that it be removed.

Third, the “Scope” section also states that the Proposed Opinion “does not address the effect of a criminal conviction of a lawyer in a subsequent disciplinary proceeding against the lawyer.” That of course is the case: when would a COPRAC opinion specifically address disciplinary proceedings and their outcome? Perhaps more useful for lawyers reading the opinion would be to remove that statement and instead include a statement (perhaps contained in a footnote) noting that conviction of a federal crime would likely have disciplinary consequences, citing Rule 8.4(b), Bus. & Prof. Code section 6068(a), and any other applicable statutes. The same footnote could be referenced in the section entitled “Counseling and Assisting Under Other Relevant Provisions of California Law” (p. 11).

Fourth, the discussion of the history of the development of cannabis law in California and the inconsistency with federal law contained in the “Legal Background” section (pp. 3-4) is thorough and clear, and therefore useful. As a small point, however, the Proposed Opinion’s characterization of case law concerning the interaction between state and federal laws governing cannabis as “recent authority” (p. 4) is inapt: the case immediately cited after that statement is from 2005; the other cases cited in that section date from 2001, 2007, 2008 and 2010. None of these can fairly be characterized as “recent,” and that is important: we do not have recent California cases that examine these issues, and we do not have any that post-date the implementation of the 2017 statute, the Medicinal and Adult-Use Cannabis Regulation and Safety Act of 2017. As the court noted in *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 734, 736, issues of the relationship of state and federal laws governing cannabis are “*terra incognita*” for courts. The passage of time has yielded more definitive guidance, and it is important that lawyers understand the evolving nature of this jurisprudence.

Fifth, the first sentence of the section titled “Permitted Advice” on page 7, states “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 cannabis*, 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.” (Emphasis added.) We believe that it might be helpful to emphasize for lawyers practicing in California that Comment [6] is not solely a “marijuana” or “cannabis” comment but is more generally applicable to any conflict between California and federal law (e.g., the current conflict concerning sanctuary laws). In addition, we believe that the editorial insertion of the adverb “clearly” is unnecessary and inappropriate here. The comment merely refers to the possibility that

“the client’s actions *might violate* the conflicting federal or tribal law.” (Emphasis added.)

Sixth, the second paragraph of the “Permitted Advice” section on page 7 states that “any advice” the lawyer provides “must be accompanied by *clear and explicit* information about any conflict with related federal law and policy” and that “common sense suggests that . . . the lawyer must *at a minimum explain clearly* that the client’s contemplated conduct violates federal criminal law ....” (Emphasis added.) We commend COPRAC for attempting to flesh out a rule comment that is not a model of clarity in an attempt to provide useful guidance to lawyers. However, we believe that this short paragraph is misleading. The comment itself does not impose any duties; no comment independently adds duties. See rule 1.0(c) (“The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the rules.”). The language of the comment itself merely provides that if there is a conflict between California and federal law, the lawyer “must inform” or “advise” the client, not that “any advice” has to be given with “clear and explicit information” or that a lawyer “must a minimum explain clearly.” Those mandates derive from the black letter of rules 1.1 and 1.4, not from any regulatory dictate internal to the comment. We recommend that the opinion discuss in detail, by reference to the language of rules 1.1 and 1.4 (particularly paragraphs (a)(2), (a)(4) and (b)) that permitted the opinion to reach the conclusions about the kind of advice a lawyer must provide.

Seventh, it should be noted that Comment [6] to rule 1.2.1 contains some very awkward language regarding Rule 1.2(b), which permits a lawyer to advise a client with regard to the validity, scope and meaning of California laws that conflict with federal or tribal laws. The first sentence states the basic proposition that paragraph (b) applies to situations where California and federal law might conflict. The second sentence of comment [6] describes the type of assistance a lawyer is permitted to provide in these situations. It provides in relevant part that “the lawyer may assist a client in *drafting* or *administering*, or *interpreting* or *complying with*, California laws.” It appears that the terms “drafting” and “administering,” when used in relation to “California laws,” may have been intended to apply to government lawyers who are called on to draft laws or regulations that might conflict with federal laws. (See “Supplemental Request That the Supreme Court of California Approve Amendments to Rules of Professional Conduct of the State Bar of California,” prepared by the State Bar of California and filed with the Supreme Court of California on August 24, 2018, which in response to public comments on then-proposed Comment [6] stated “the word ‘drafting’ is intended to apply to a lawyer who drafts laws on behalf of governmental client.”) The other two terms, “interpreting or complying with” California laws, would be the two types of assistance applicable to legal services a lawyer could provide to a client pursuing a cannabis business.

We are concerned that this sentence, in particular the last two terms, could be read as a limitation on the services that a lawyer may provide, such that such services must fit precisely into one of the two verbs in the foregoing phrase. The section in the Proposed Opinion entitled “Permitted Assistance” interprets the word “assist” very broadly, but does not address this apparent limitation expressly set forth in Comment [6]. For example, it is not at all clear that permitted assistance identified in Comment [6], read literally, extends to the formation of an entity or the negotiation of the terms of a lease, as well as other activities that lawyers normally engage in on behalf of their clients. We believe these other activities should be covered by the protection afforded by Comment [6], and we urge COPRAC to expressly address this issue in the opinion. Support for the interpretation that such reasonably expected lawyer services are protected under Comment [6] can be found in the work product of the Commission for the Revision of the Rules of Professional Conduct. (See “Supplemental Request That the Supreme Court of California Approve Amendments to Rules of Professional Conduct of the State Bar of California,” prepared by the State Bar of California and filed with the Supreme Court of California on August 24, 2018. That document includes the following statement provided in response to a public comment received from “Multiple Signatories (Bastidas)” on then-proposed Comment [6]: “[T]he Commission does not believe it is necessary to add ‘advocating,’ ‘negotiating,’ or ‘filing’ to the list of permitted lawyer assistance in Comment [6]. The Commission believes the words ‘interpreting’ and ‘complying with’ are sufficiently broad to encompass each of the activities the commenter has identified as services that would typically be provided.” See *id.*, Appx. 5 [Synopsis of Public Comments], at pp. 9-10; see also response to Sapiro in the same Synopsis at p. 7.)

Eighth, in the second paragraph of Part III.C. (“Counseling and Assistance: Analysis of the Statement of Facts”) on page 12, the Proposed Opinion concludes that assisting the client in creating a “rainy day fund” and keeping it in the lawyer’s trust account “clearly falls in that category” (i.e., providing assistance to evade detection or prosecution). Later in the same paragraph, the opinion states that the client’s request for assistance to establish offshore accounts “very likely falls into the forbidden category as well.” Both of these statements are legal conclusions that we understand are beyond the purview of COPRAC. We recommend that the phrase “appears to fall” be substituted for “clearly falls,” and the phrase “also appears to fall” be substituted for “very likely falls.” We also recommend that the word “should” in the last sentence of the paragraph be changed to “must.”

Ninth, In the discussion of competence on page 12, the Committee recommends that the opinion reference other concerns that may have an impact on the client’s business (due to the fact that it is unlawful under federal law), such as potential issues with contract enforceability and the availability of bankruptcy. Generally, a federally-unlawful business is not permitted to maintain a case in bankruptcy. The opinion should not attempt to pronounce on this issue, but lawyers should be cautioned that both they

and their clients may be taking risks that ordinarily do not apply otherwise. See, e.g., *In re Way to Grow, Inc.*, Case No. 18-14330-MER, Dkt. No. 379 (Bankr. D. Co. Dec. 14, 2018); also see *Garvin v. Cook Investments NW, SPNWY, LLC*, 922 F.3d 1031 (9th Cir. 2019); *In re Basrah Custom Design, Inc.*, 600 B.R. 368 (Bankr. E.D. Mich. 2019); *In re CWNevada LLC*, No. 19-12300-MKN, 2019 WL 2420032 (Bankr. D. Nev. June 3, 2019).

Tenth, regarding the “Liability Insurance and Banking” section, the Proposed Opinion states the lawyer must “disclose” pursuant to rule 1.4.1 the fact that the lawyer’s malpractice insurance might not cover the lawyer’s services under these facts. Rule 1.4.1 requires that the lawyer “inform” the client of certain facts regarding the lawyer’s possession of insurance. Given that the word “disclose” is used throughout the rules in other contexts to mean something more than merely informing the client, the opinion should use the word “inform” as required under rule 1.4.1.

Eleventh, the Committee suggests that the discussion of the lawyer’s investment in the client’s cannabis business, which is part of the hypothetical, be more clearly identified in the Opinion. At this point, that discussion is simply included in the section entitled “Additional Ethical Considerations,” which somewhat obscures the fact that this is the discussion of one of the facts presented by the Statement of Facts. We suggest it be more clearly called out, probably by its own subheading, to enable a reader to quickly find that discussion in the Opinion. Likewise, the discussion of this issue should at least be mentioned in the section entitled “Conflicts of Interest” (p. 13), since this is a significant type of conflict. Further, we believe that the section titled “Organizational Clients and Constituents,” on pages 14-15, should appear before the section on investment, which posits the lawyer making an investment in the “entity” that carries out the business.

Substantively, the analysis contained in the section addressing the lawyer’s investment suggests, after making clear that the investment would be permissible as long as it is not intended to avoid detection or prosecution under state or federal law, that the ethical considerations surrounding a lawyer’s investing in a client’s cannabis business are essentially no different than investing in any other kind of business operated by a client. The Proposed Opinion then goes on to list a number of those considerations, which would apply to any business transaction with a client or financial interest received as payment for legal services. The Committee suggests that that discussion is unnecessary, and could be shortened to help sharpen the focus of the opinion to issues that are distinct about the cannabis industry (a consideration given the somewhat unwieldy length of the opinion.) This could be easily accomplished by simply citing the relevant rules (which are now detailed in the Proposed Opinion) after the sentence already contained in the Proposed Opinion: “However, in making such an investment the lawyer must comply with other relevant Rules.”

As a similar point, the discussion in the “Additional Ethical Considerations” section entitled “Organizational clients” seems unnecessary, since there is nothing about that analysis that is particular to cannabis clients (or the Statement of Facts). The citation to potentially applicable rules suggested above could simply include Rule 1.13 rather than have a separate section.

Our last suggestion is with reference to the point made on page 14 that lawyers may be unable to establish a trust account for a practice that involves cannabis clients. The Proposed Opinion suggests that in that instance, the lawyer should “so inform the client” pursuant to Rule 1.4(a)(3). That is certainly the case. It might be useful to also note that the lawyer must take additional steps to ensure compliance with Rule 1.15(a), which does not recognize disclosure to clients as a means of compliance with the rule.

The Committee thanks COPRAC for its work on this important issue and for the opportunity to provide these comments.

Sincerely,



Neil J Wertlieb  
Co-Chair  
California Lawyers Association Ethics  
Committee