

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

SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 17-0001 (Advising a Cannabis Business).

Deadline: February 24, 2020

Background

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with State Bar policy and procedure, the Committee shall publish proposed formal opinions for public comment (See, State Bar Board of Trustee Resolutions July 1979 and December 2004. See also, Board of Trustee Resolution November 2016).

On May 10, 2018, the California Supreme Court issued [an order](#) approving 69 new Rules of Professional Conduct, which will go into effect on November 1, 2018. Information about the new rules is available at the [State Bar website](#). Proposed Formal Opinion Interim No. 17-0001 interprets the new Rules of Professional Conduct.

Discussion/Proposal

Proposed Formal Opinion Interim No. 17-0001 considers: 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?

The opinion interprets rules 1.1, 1.2.1, 1.4, 1.4.2, 1.6, 1.7, 1.13, 1.15, 4.1, and 8.4 of the Rules of Professional Conduct of the State Bar of California; Business and Professions Code sections 6068, 6101, 6102, 6103, and 6106; and Evidence Code 956.

The opinion digest states: 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 the attorney-client privilege, that may result from the fact that the client's conduct may be prohibited under federal law.

At its June 7, 2019 meeting and in accordance with its Rules of Procedure, the State Bar Standing Committee on Professional Responsibility and Conduct tentatively approved Proposed Formal Opinion Interim No. 17-0001 for a 90-day public comment distribution. Subsequently, at its December 6, 2019 meeting, COPRAC revised the opinion in response to public comment and approved Proposed Formal Opinion Interim No. 17-0001 for an additional 60-day public comment distribution.

Any fiscal/personnel impact

None

Background material

Proposed Formal Opinion Interim No. 17-0001

Source

State Bar Standing Committee on Professional Responsibility and Conduct

Deadline

February 24, 2020

Direct comments to

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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 on the lawyer-client relationship, including on the attorney-client privilege, that could 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, 1.13, 1.15, 4.1 and 8.4 of the Rules of Professional Conduct of the State Bar of California.¹

Business and Professions Code sections 6068, 6101, 6102, 6103, and 6106.

Evidence Code section 956

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

California has recently adopted a comprehensive and complex regulatory scheme covering the use, production, and sale of cannabis² 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, against 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.

² 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.

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 (Bus. & Prof. Code §§ 6000 et seq.) when providing advice and assistance with respect to conduct regulated under both state and federal law. This opinion does not address: (1) any issues of federal criminal law, except as assumed background for its ethical analysis; (2) the likelihood of criminal or civil proceedings stemming from alleged violations of federal criminal law; (3) the effect of a federal criminal conviction of a lawyer in a subsequent disciplinary proceeding against the lawyer; or (4) the lawyer's obligation to self-report criminal proceedings or convictions to the State Bar. See Business and Professions Code sections 6101-6102; 6068(o)(4)-(5). Because this opinion is based on California law and policy, its conclusions are limited to California lawyers counseling or assisting with respect to conduct occurring in California. Finally, as noted below, this Committee's opinions are not binding on entities charged with the discipline of California lawyers; a fortiori they are not binding on 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.

Notwithstanding this federal prohibition, thirty-three states and the District of Columbia have taken steps to legalize cannabis.³ Thirty states and the District of Columbia have legalized cannabis for medical use. Eleven states and the District of Columbia 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 & Saf. 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 relating to cannabis. (*Id.* at pp. 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*,

³ 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)].

supra, at pp. 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 pp. 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 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 cannabis 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 cannabis laws may in the future be criminally prosecuted and convicted under federal law, and, thus, become subject to subsequent state law discipline based upon such a conviction.

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, after approval by the California Supreme Court, 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 local 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 this opinion.

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

Rule 1.2.1 provides as follows:

- (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) discuss the legal consequences of any proposed course of conduct with a client; and
 - (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of a law, rule or ruling of a tribunal.

The rule does not define the critical terms "counsel" or "assist." Like other California ethics committees that have 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.* It defines "assisting" a client as "providing, with a similar intent, other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency." *Id.*

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

Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting, or administering, or interpreting or complying with, California laws, including statutes, regulations, orders and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related tribal or federal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

Permitted Advice. Under rule 1.2.1 and Comment [6], a lawyer may provide advice concerning the validity, scope and meaning of California state and local laws, including, but not 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 1.2.1(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 are criminal or fraudulent. 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, Comment [6] requires that any advice the lawyer gives about California law must be accompanied by information about any conflict with related federal law and policy. The Comment does not specify the level of detail that the lawyer must provide, but given the current conflict between California and federal law related to cannabis, the lawyer's ethical obligations both to the client and to respect federal law require that the lawyer explain clearly that the client's contemplated conduct violates federal criminal law, the penalties for such a violation, and any related risks of civil forfeiture. Often, as Comment [6] suggests, the lawyer's duties of competence or 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 or tribal law.” 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 that conflict with federal law. We believe that the inclusive term “California laws” is broader than that, encompassing on its face assistance in interpreting or complying with all California laws, whether or not they conflict with federal law. Thus, Comment [6] 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 or tribal law.” Rule 1.2.1, Comment [6].

The legislative history of rule 1.2.1 also makes clear that the fact the Comment itself ties permitted assistance to “interpreting” or “complying” with the law is not intended to limit the forms of professional assistance that a lawyer may provide. For example, one public comment submitted during the drafting of rule 1.2.1 and Comment [6] expressed concern that the words “interpreting” and “complying” did not make it sufficiently clear whether lawyers for cannabis businesses were permitted to engage in negotiating and concluding sales agreements, real estate purchases, acquisition of inventory and general corporate counseling.⁴ The Rule Revision Commission’s (“Commission”) response was that those words “are sufficiently broad to encompass each of the activities the commenter has identified as services that would typically be provided.”⁵ In response to a similar public comment, the Commission stated that “assisting a client in interpreting or complying with California laws includes doing so in connection with drafting contracts, negotiating contracts, or other business activities.”⁶ In response to a third public comment, the Commission stated that it did “not believe it is necessary to add ‘advocating,’ ‘negotiating,’ or ‘filing’ to the list of permitted lawyer assistance . . . because] the words ‘interpreting’ and ‘complying with’ are sufficiently broad to encompass” those activities.⁷ These comments and responses were included in the rule filing petition submitted to the California Supreme Court when the rule was approved. This history supports the conclusion that rule 1.2.1 and Comment [6] are intended to permit lawyers to render all the services that lawyers customarily provide to business clients, including entity formation, applying for permits or other regulatory approvals, negotiating and drafting in connection with all forms of business transactions, and general business and regulatory counseling.

⁴ See the Board of Trustees of the State Bar of California, Regulation and Discipline Committee Agenda Item 54-121 from the July 19, 2019 meeting at Attachment 3 [Summary of Public Comments with Commission Responses], at pp. 19-20 [Comment of Francis Mootz].

⁵ *Id.* at p. 20 [Response to Francis Mootz].

⁶ *Id.* at p.21 [Response to Jerome Sapiro].

⁷ *Id.* at pp. 23-24 [Response to Multiple Signatories [Bastidas]].

This reading of Comment [6] is also 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 p. 11 (emphasis in original). Given the complexity and pervasiveness of the California regulatory scheme, and the potential severe consequences of a violation of current federal law, it makes sense to construe the client’s right to assistance to encompass every situation where such a violation could occur. 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 respect to the full range of 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. Rule 1.2.1 Comment [1]; Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 12.⁸ 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 1.4.⁹ Specifically, rule 1.4(a)(4)

⁸ 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 the law of their obligation to comply. Moreover, because the specifics of announced federal enforcement policies can and do transform 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 cannabis 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.

⁹ 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;

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.

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 p. 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. See Bar Association of San Francisco Ethics Opinion No. 2015-1 at p. 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.¹⁰

(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.

¹⁰ 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

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. Our discussion assumes that there has been no prior criminal prosecution or conviction for violation of federal law. See Business and Professions Code sections 6101-02; 6068(o)(4)-(5). As noted in Section I of this opinion, the disciplinary consequences of a federal criminal prosecution or conviction are outside the scope of this opinion.

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, that conduct should not be viewed for disciplinary purposes as “reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”

Business and Professions Code section 6068(a) provides that it is the duty of an attorney “[t]o support the Constitution and laws of the United States and of this state.” 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

Conduct 1.2, Comment [1]), in some by statute (see, Minnesota Statutes §152.32(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=a0P36000009Yzb3EAC>] (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.

cause for disbarment or suspension.” The California 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.4th 11, 14 [104 Cal.Rptr.2d 409]. 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.

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 assist 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 forbidden assistance, the lawyer must 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).

Finally, the protections of rule 1.2.1 and Comment [6] do not extend to the client’s proposal to compensate the lawyer for rendering legal services by giving the lawyer an interest in the client’s business in lieu of fees. Simply put, those provisions cannot be read to authorize a lawyer to acquire an interest in a cannabis business, or to participate on an ongoing basis in such a business, if such acquisition or participation violates federal criminal law. As explained above, the terms of rule 1.2.1 and Comment [6], read together, permit lawyers to “counsel” or “assist” clients whose cannabis-related business activities may violate federal law. Both the text of rule and the text of the Comment are concerned exclusively with the scope of prohibited and permitted counseling and assistance. Neither says anything about whether a lawyer may invest in or otherwise participate in such a business. While there is an argument that the California regulatory and disciplinary policies reflected in rule 1.2.1 and Comment [6] would be advanced by permitting lawyers to accept this form of compensation for legal services, the

Rules themselves do not enact that permission. Whether and under what circumstances a lawyer's acceptance of that form of compensation, in violation of federal law, would support discipline under rule 8.4 and Business and Professions Code sections 6068(a) and 6106 is beyond the scope of this opinion.

IV. Additional Ethical Considerations

Competence. The duty of competence requires that the lawyer apply the “(i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Rule 1.1(b). 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 1.1.¹¹

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.” Evidence Code section 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.” (Evid. Code, § 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. However, in a federal criminal or forfeiture proceeding, the governing privilege law will be federal, and the federal, rather than the state, crime-fraud exception to the privilege 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 proceeding that the tribunal will rule that the attorney-client privilege does not protect confidential communications between lawyer and client, and compel discovery or testimony concerning such 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. &

¹¹ Among the substantive law rights of the client that may be affected by conflicting federal law are the right to enforce contracts (which may be subject to a federal defense of illegality) and the right to seek discharge in bankruptcy.

Prof. Code, § 6068(e)), the lawyer's statutory obligation to obey a court order (Bus. & Prof. Code, § 6103, *In the Matter of Collins* (Review Dept. 2018) 2018 WL 1586275), and the lawyer's own interest in avoiding imprisonment or fines for contempt.

The potential unavailability of the attorney-client privilege under federal law 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 whenever there is a significant risk that the lawyer's representation of the client, including the lawyer's ability to comply with the duties of competence, confidentiality, and loyalty, will be materially limited by the lawyer's own interests. In addition, rule 1.7(d) requires that the lawyer reasonably believe that, notwithstanding the risk of conflict, the lawyer will be able to provide competent and diligent representation to the client.

Whether the risk of a future conflict is significant depends on both the severity of the conflict and the likelihood that it will arise. Rule 1.7, Comment [4]. A federal criminal investigation or action, targeting either the lawyer or the client, could give rise to a severe and consequential conflict between the lawyer and client, not least because in such matters pressure may be brought against the client and the lawyer to testify against each other and the attorney-client privilege may not be available. Moreover, though federal investigations and prosecutions of state-licensed cannabis businesses or their lawyers may not currently be routine, they have occurred, and current Justice Department policy is that cannabis-related enforcement is governed by "the well-established principles that govern all federal prosecutions."¹² Given those facts, the risk of conflict stemming from the threat of federal investigations and enforcement under current law cannot reasonably be viewed as insignificant. Accordingly, the lawyer must consider whether the representation can be undertaken, consistent with rule 1.7(d), notwithstanding the significant risk of a future conflict. If the lawyer concludes that rule 1.7(d) is satisfied, the lawyer must inform the client of the potential for such conflict pursuant to rule 1.4(a)(1) and rule 1.7(b), and seek the client's informed written consent thereto.

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 clients in cannabis law, or they may discover that their insurance policy contains an express exclusion for criminal conduct. If a lawyer is not able to obtain insurance coverage for the lawyer's cannabis practice, the lawyer must so inform the client pursuant to rule 1.4.2.

¹² Sessions, J. (January 4, 2018). Marijuana Enforcement [Memorandum]. Washington, D.C.: U.S. Department of Justice.

Lawyers may also find it difficult 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 an 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 under rule 1.15, and the lawyer is unable to do so, the lawyer should inform the client pursuant to rule 1.4(a)(3). The lawyer should also comply with any applicable provisions of rule 1.15.

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 is 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 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 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 evaluate whether withdrawal from the matter is permitted or required under rule 1.16. Rule 1.4(a)(4) and rule 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 a 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.

Marlaud, Angela

From: Evan Jenness <evan@jennesslaw.com>
Sent: Thursday, December 26, 2019 4:20 PM
To: Marlaud, Angela
Subject: Comment on Draft Ethics Opinion No. 17-0001 (Advising a Cannabis Business)

As a tenured criminal defense lawyer, former federal public defender, former chair of the LACBA's ethics committee, and current member of my local federal court's attorney discipline committee, I am writing to express my view that this opinion should not be adopted.

Notwithstanding its disclaimers, the opinion advises members that they may participate in activity that remains unlawful under federal law. Members helping a client to set up or clean up their cannabis production and/or distribution operations should be concerned about violating 18 USC 371 (conspiracy), which would result in the member's culpability for the drug trafficking (21 USC 841, et al.) and related activities of all others within the scope of the entire conspiracy (growers, owners, managers, salespeople, etc.); aiding and abetting the client in violation of 18 USC 2; and money laundering for advising/assisting efforts to conceal the nature/origin of MJ sales proceeds, in violation of 18 USC 1956. Also, possible violations of 18 USC 4 (misprision of felony – knowing about and concealing a felony rather than informing law enforcement), and various federal statutes criminalizing 'obstruction of justice' (the altering/concealment of records or influencing witnesses regarding a federal crime/investigation).

The current improbability of federal prosecution should not be considered at all given the potential 5 and 10-year statutes of limitations applicable under federal law, as well as the possibility of prosecution in other States.

The State Bar should stay within its jurisdiction, and decline to apply the California Rules of Professional Conduct to sanction members for advising clients regarding cannabis-related activity in compliance of State law. That is a one-sentence opinion. I do not believe it behooves California's lawyers to encourage them to violate criminal law, even where most of our legislators, citizenry and lawyers disagree with the laws at issue.

Best,

-Evan

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February 14, 2020

Angela Marlaud
Office of Professional Competence
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

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

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 agree with the majority of the opinion's conclusions and believe the opinion will provide valuable guidance for attorneys facing the ethical dilemmas described in the opinion. In particular, we are glad the opinion now concludes that rule 1.2.1 does not apply to an attorney's investment in a cannabis business.

We also have several comments and suggestions that we believe could strengthen the opinion and provide even more clarity for practitioners confronted with these dilemmas, which we address below:

- The discussion on pages 7 and 8 relies in significant part on what COPRAC refers to as "the legislative history of rule 1.2.1." We are concerned that this discussion may set a disconcerting precedent over the importance and precedential value of the Rules Revision Commission's work. The RRC was not a legislative body nor charged with interpretation of the Rules it proposed. Thus, we do not think it appropriate to refer to its work as "legislative history" nor to put such weight on the RRC's opinion as to what words such as "interpreting" and "complying" with California laws means. While the RRC's responses to public comments may be worthy of note

- (most likely in a footnote), at best they show what the RRC's opinion was of what the words mean; that opinion, however, is not binding on anyone. We also do not think the fact the public comments and the RRC's responses to those comments were included in the thousands of pages of materials submitted to the Supreme Court means the Supreme Court implicitly adopted the comments or the responses as their own. Thus, the proposed opinion should refrain from suggesting the following: that the RRC's responses to public comments are "legislative history," that the RRC's responses are part of Rule 1.2.1, or that the Supreme Court directly approves of the activities described simply because the Comments and responses thereto were submitted to the Supreme Court.
- Reliance on the RRC's responses to public comments as to what the words "interpreting or complying" means may also not be necessary to reach the opinion's conclusion on the question of whether rule 1.2.1 protects other legal activities related to advising a cannabis business (*e.g.*, negotiating a lease or purchase and sale contract). While we do not necessarily disagree with COPRAC's ultimate conclusion that it does (although we did not have complete consensus in our Committee), we are troubled with the integrity of the analysis that supports the conclusion. We believe that it is not necessarily correct that activities such as negotiating a lease would fairly be considered "interpreting or complying" with any law. Rather, COPRAC may want to consider basing its conclusion on the plain language of the Rule itself, which prohibits assisting a client in conduct that violates the law, not assisting a client in conduct that does not violate a law. COPRAC's analysis assumes that, but for the language of Comment [6], drafting a lease – an activity that does not involve any conflict between, or violation of, any law – would be prohibited by Rule 1.2.1. We are not sure that is the case, which is a point likely worth making.
- Finally, however analyzed, we are concerned with the confidence with which the proposed opinion states its conclusion on the subject of whether other legal services are permitted even if the client's conduct violates federal law. To the extent otherwise prohibited by Rule 1.2.1 (see second bullet point, above), it is not necessarily "clear" that "interpreting" and "applying" laws includes contract negotiations, and reasonable minds could differ on that issue; more importantly, lawyers have been convicted under federal law for engaging in just those types of activities.¹ A lawyer engaging in conduct for which the lawyer may be criminally convicted presents its own ethical issues, even if the opinion concludes that the Rule and/or language of Comment [6] ethically permits the conduct. We are concerned that the proposed opinion's analysis as drafted may give false comfort to practitioners who may face federal criminal conviction for engaging in conduct the opinion concludes is ethically permitted.

¹ See <https://www.voiceofsandiego.org/topics/news/san-diego-das-prosecution-of-pot-attorney-has-sent-chills-through-the-legal-community/> and <https://www.justice.gov/usao-edca/pr/los-angeles-lawyer-sentenced-4-years-prison-role-wide-ranging-marijuana-conspiracies>.

Thank you for considering our comments.

Sincerely,

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

Scott Garner
2020 President
The Orange County Bar Association