



2018

Ethical Cannabis Lawyering in California

Francis J. Mootz III

University of the Pacific, McGeorge School of Law, jmootz@pacific.edu

Follow this and additional works at: <https://scholarlycommons.pacific.edu/facultyarticles>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Mootz, Francis J. III (2018) "Ethical Cannabis Lawyering in California," *St. Mary's Journal on Legal Malpractice & Ethics*: Vol. 9 : No. 1 , Article 1.

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

ARTICLE

Francis J. Mootz III

Ethical Cannabis Lawyering in California

Abstract. Cannabis has a long history in the United States. Originally, doctors and pharmacists used cannabis for a variety of purposes. After the Mexican Revolution led to widespread migration from Mexico to the United States, many Americans responded by associating this influx of foreigners with the use of cannabis, and thereby racializing and stigmatizing the drug. After the collapse of prohibition, the federal government repurposed its enormous enforcement bureaucracy to address the perceived problem of cannabis, despite the opposition of the American Medical Association to this new prohibition. Ultimately, both the states and the federal government classified cannabis as a dangerous drug with no therapeutic purpose, treating it the same as cocaine and heroin.

Over the past few decades, a number of states have decriminalized cannabis and have permitted residents to purchase cannabis for medical conditions. More recently, a number of states have legalized adult-use, or the “recreational use” of cannabis, including California. Although cannabis remains a Schedule I drug under the federal Controlled Substances Act, California now has a complex regulatory scheme in place that permits parties to cultivate, process, sell, and use cannabis. The appointment of Attorney General Jeff Sessions, who is famously opposed to the decriminalization of cannabis, sharpened the tensions between federal prohibition and state-legal use.

This article addresses one critical issue that arises in this new industry: whether lawyers may ethically advise clients engaged in state-legal cannabis businesses. Several states that employ the Model Rules of Professional

Conduct have formally amended their rules to expressly permit cannabis lawyering. The Supreme Court of California has not directly and expressly addressed the matter, although adult-use cannabis has been legal since January 1, 2018 and many lawyers have been advising clients with regard to the medical cannabis industry for years.

This article addresses “ethical cannabis lawyering” in three distinct ways. First, it considers whether it is “legal” for attorneys to assist state-legal cannabis businesses that are actively engaged in violating federal criminal law. Attorneys are likely exposed to “aiding and abetting” liability and may face asset forfeiture if they accept money generated by the cannabis trade. Second, it considers whether it is “ethical” for attorneys under California state law to assist cannabis clients. After reviewing the determinations made by states under the Model Rules of Professional Conduct, the article addresses how California has addressed the question. Following the nonbinding opinions of the San Francisco Bar Association and the Bar Association of Los Angeles, the article argues that cannabis lawyering is not only ethical but is a positive social good, insofar as the representation is focused on compliance with state law and regulations. Third, the article considers whether it is “prudent” for attorneys to assist cannabis clients. In this regard, the primary issue is the potential waiver of the attorney-client privilege in federal question civil actions and criminal actions brought in federal court. The article concludes with a checklist of considerations for attorneys considering representing parties in the cannabis industry. This article is current as of November 1, 2018.

Author. Francis J. Mootz III served as University of the Pacific, McGeorge School of Law’s ninth dean. After his five-year term as dean, he joined the faculty as Professor of Law. Professor Mootz teaches and writes in traditional doctrinal areas such as insurance, contract, and sales law. He has served as an expert consultant regarding insurance coverage cases, and he has co-edited three volumes of the 14-volume Appleman Library Edition that has updated and replaced the leading insurance law treatise. Most recently, he has written and spoken about the emerging adult-use cannabis industry in California, discussing insurance coverage issues and questions of professional responsibility for attorneys advising cannabis clients. He has served as a

Member of the Board of Commissioners on Uniform State Laws from 2006 until 2012 and was elected to membership in the American Law Institute in 2012.

The author wishes to extend his gratitude to Meghan Shiner, McGeorge class of 2020, for her excellent research and writing in support of this article. His colleague, John Sims, engaged in many helpful conversations to share his expertise regarding the California Rules of Professional Conduct. Ian Stewart of Wilson Elser and the author collaborated on a short post at Law360.com on this topic, which was incorporated into this article. The author is particularly grateful to his colleague Mike Vitiello, who is an expert on the cannabis legalization movement, for encouraging him to get involved in this area of research. Finally, the author would like to thank *St. Mary's Journal on Legal Malpractice & Ethics* Editor in Chief Katina Zampas for her enthusiastic support of this topic as part of the Eighteenth Annual Symposium on Legal Malpractice & Ethics.

ARTICLE CONTENTS

I.	Introduction.....	6
II.	From Reefer Madness to Legalization: What a Long, Strange Trip It's Been	11
	A. Early Cannabis Regulation in the United States	11
	B. Contemporary Prohibition Under the Controlled Substances Act	14
	C. Legalizing Cannabis in California	18
	D. The Current State of Federal Law Regarding Cannabis	21
III.	Ethical Cannabis Lawyering.....	25
	A. Is Cannabis Lawyering Legal in California?.....	25
	B. Is Cannabis Lawyering Ethical in California?.....	31
	1. Cannabis Lawyering Under the Model Rules	32
	2. Cannabis Lawyering in California Prior to 2018	42
	3. Cannabis Lawyering in California Under the 2018 Rules of Professional Conduct	48
	C. Is Cannabis Lawyering Prudent in California?	55
IV.	Conclusion	62

I. INTRODUCTION

Even the staunchest advocates for legalizing cannabis¹ must be surprised by the rapid advance of their cause during the past three decades. The Reagan Administration's "Just Say No" campaign against drugs was particularly focused on cannabis as a gateway drug that was infecting middle class American life, and suburban public opinion in the 1980s appeared to be solidly against cannabis.² However, within a few years, states began to loosen criminal penalties for possession and use of cannabis and then to develop medical marijuana programs that legalized the use of cannabis under state law with a doctor's recommendation. Today, thirty-three states, the District of Columbia, Guam, and Puerto Rico have some form of a medical cannabis program.³ Most recently, states have begun legalizing cannabis for adult recreational use. In 2018, California became the largest and most significant state to join this trend, although counties and municipalities have the power to keep cannabis businesses from operating in their jurisdictions.⁴ At this point, ten states and the District of Columbia have programs that broadly permit adult-use cannabis.⁵

The increasingly rapid legalization of cannabis at the state level is in sharp juxtaposition to the federal government's continuing insistence that cannabis remain a Schedule I drug under the Controlled Substances Act.⁶ Schedule I status means that the federal government has determined that cannabis has no therapeutic value, presents a high potential for abuse, and

1. In this article, I use the term "cannabis," rather than "marijuana" or "marihuana," in recognition that those names (derived from the Spanish name "Mary Jane") were used by state and federal authorities as a means of racializing the prohibition of cannabis. Where context requires, such as in quotes, I use the terms marijuana and marihuana. For purposes of this article, these two names should be considered synonymous with cannabis.

2. See Mark Berman, *How Public Opinion on Marijuana Has Changed over the Last Half-Century*, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/02/24/how-public-opinion-on-marijuana-has-changed-over-the-last-half-century/?noredirect=on&utm_term=.bc8560cafbfd5 [<https://perma.cc/J9MS-2TFG>] ("[P]ublic support for legalizing marijuana gradually increased between the late 1960s and the late 1970s. But that support plummeted in the 1980s, the decade of 'Just Say No,' and remained low through the 1990s.").

3. *State Medical Marijuana Laws*, NCSL (Nov. 8, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/E56U-N5WF>].

4. Jessica Owley, *Unforeseen Land Uses: The Effect of Marijuana Legalization on Land Conservation Programs*, 51 U.C. DAVIS L. REV. 1673, 1694–95, 1698 (2018).

5. *State Marijuana Laws in 2018 Map*, GOVERNING (Nov. 7, 2018), <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> [<https://perma.cc/53FN-WLYQ>].

6. Controlled Substances Act of 1970, Pub. L. No. 91–513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–904 (2012)).

poses dangers to users.⁷ Consequently, serious criminal penalties attach to those who manufacture, sell, possess, or use cannabis in the United States.⁸ Attorney General Jeff Sessions is famously opposed to any relaxation of federal laws against cannabis use, giving rise to the fear that the Trump Administration might prosecute state-legal cannabis businesses in order to reassert federal authority over the matter.⁹ This potential for a clash of laws creates a rather unique and interesting problem of federalism that extends beyond criminal law. Continued federal illegality poses problems for state-legal cannabis businesses with regard to their banking and insurance needs because illegal behavior can neither be financed nor insured.¹⁰ These problems, as well as the efforts to overcome them, have been widely reported in the press.¹¹

7. 21 U.S.C. § 812(b)(1)(A)–(C). Under the Controlled Substances Act, cannabis is a Schedule I drug. *Id.* § 812(c)(10). The criteria for a Schedule I drug are:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Id. § 812(b)(1)(A)–(C).

8. *See id.* §§ 841–44 (outlining prohibited acts and penalties for controlled substances).

9. Trevor Wong, Comment, *Interaction Between State and Federal Law Enforcement: AB 1578: The End of Marijuana Prohibition As We Know It?*, 49 U. PAC. L. REV. 449, 451–52 (2018).

10. The issues regarding insurance coverage are addressed in Francis J. Mootz III, *E/Insuring the Marijuana Industry*, 49 U. PAC. L. REV. 43 (2017). The issues regarding banking services have been similarly addressed. *See* Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE WESTERN RES. L. REV. 597, 604–05 (2015) (providing a comprehensive review of the federal laws and regulations that must be changed to permit state banking cooperatives to satisfy the needs of the cannabis industry); Brittany Cohen, Comment, *Marijuana Dispensaries Not Feeling So High: Financial Institutions Close Their Doors to State-Legalized Marijuana Businesses*, 35 REV. BANKING & FIN. L. 72, 83 (2015) (concluding state-legal marijuana businesses will not be able to obtain access to full banking services without federal legislation); Rachel Cheasty Sanders, Comment, *To Weed or Not to Weed? The Colorado Quandary of Legitimate Marijuana Businesses and the Financial Institutions Who Are Unable to Serve Them*, 120 PENN ST. L. REV. 281, 282 (2015) (detailing the many legal issues preventing state cooperatives from providing cannabis businesses the full services of a bank).

11. *See* Robb Mandelbaum, *Where Pot Entrepreneurs Go When the Banks Just Say No*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/magazine/where-pot-entrepreneurs-go-when-the-banks-just-say-no.html> [<https://perma.cc/2WA5-WL7C>] (describing how Wells Fargo and Chase closed the accounts of a Denver medical marijuana dispensary owner for fear of federal prosecution); *Marijuana Businesses Are Awash with Cash. California Wants to Help Get That Money into Banks*, L.A. TIMES (Dec. 22, 2017, 4:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-marijuana-cash-20171222-story.html> [<https://perma.cc/V9LQ-2JB3>] (noting federal regulators have issued guidelines for financial institutions serving state-legal marijuana enterprises, but less than 5% of federally-

Less attention has been paid to what is perhaps the most important issue for cannabis businesses seeking to operate legally under state law: whether a California attorney may ethically assist a business to engage in activity that is illegal under federal law. Lawyers swear an oath to uphold the law and generally they are precluded from assisting a client to violate the law.¹² On the other hand, states are developing complex regulatory programs under which cannabis businesses may operate legally under state law.¹³ Cannabis businesses require substantial assistance from attorneys and other professionals to comply fully with this dense regulatory mandate.

This article addresses the ongoing efforts in California to determine if lawyers may ethically assist clients to operate their cannabis businesses in full compliance with state law, or whether such assistance necessarily would amount to an unethical subversion of federal criminal law. No state has determined, as a final matter, that all forms of cannabis lawyering are ethical violations under the state's rules of professional conduct. California has just worked through this ethical quandary within the broader context of overhauling its ethical rules and adopting a version of the Model Rules of Professional Responsibility (Model Rules). Therefore, it is an opportune moment to analyze whether attorneys may ethically practice cannabis law in California, and to determine the appropriate scope of any such representation in light of continuing federal proscriptions.

One might assume that this topic is well off the beaten path, a matter of concern only for a small subset of dubious lawyers involved in a shady line

chartered financial institutions do so); Jeff Mordock, *Cash Is King—and Dangerous—for Marijuana Businesses That Lose Bank Accounts*, WASH. TIMES (Jan. 29, 2018), [https://www.washingtontimes.com/news/2018/jan/29/marijuana-businesses-carry-bank-problems-security-/\[https://perma.cc/5F4V-9FJ3\]](https://www.washingtontimes.com/news/2018/jan/29/marijuana-businesses-carry-bank-problems-security-/) (elaborating on the problems facing cannabis businesses that must operate in cash—including increased risk of robbery and added security expenses); B.S., *Why Marijuana Retailers Can't Use Banks*, ECONOMIST (Jan. 22, 2018), <https://www.economist.com/the-economist-explains/2018/01/22/why-marijuana-retailers-cant-use-banks> [https://perma.cc/G5KA-9DHJ] (explaining how asset forfeiture laws allow police to confiscate cash on hand, which cannabis dispensaries cannot always recover).

12. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (AM. BAR ASS'N 2018) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."); CAL. RULES OF PROF'L CONDUCT R. 1.2.1(a) (2018) ("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."). Lawyers may ethically advise clients who seek to challenge the validity of a law through civil disobedience or to protest against a law by engaging in acts such as trespass. *Id.* R. 1.2.1 cmt. 3–4.

13. Dylan Scott, *Medical Marijuana: Do States Know How to Regulate It?*, GOVERNING (Aug. 2012), <http://www.governing.com/topics/public-justice-safety/gov-medical-marijuana-becoming-mainstream.html> [https://perma.cc/6N7C-MJG7].

of work. Such an assumption betrays the historical weight of misconceptions and prejudices regarding cannabis that have accumulated over the past century. With the advent of state-legal adult use of cannabis, venture capital in the hundreds of millions of dollars is flooding into the market.¹⁴ State-legal sales of cannabis are expected to top \$47 billion within a decade.¹⁵ Many of the emerging cannabis businesses are owned and operated by sophisticated businesspeople who view this as a new major industry. Each state is adopting a complex set of statutes and regulations, and in many states, local laws have substantial impact on the operation of cannabis businesses. Considering all this, the image of a hippie couple cultivating weed in their backyard for sale to neighbors is well wide of the mark in describing the emerging cannabis industry. Contemporary cannabis businesses require sophisticated legal counsel and premier law firms are embracing this new business opportunity.¹⁶

14. Mrinalini Krishna, *Top Marijuana Private Equity and Venture Capital Funds*, INVESTOPEDIA (Apr. 20, 2018, 9:52 AM), <https://www.investopedia.com/news/top-marijuana-private-equity-and-venture-capital-funds/> [https://perma.cc/5XZ4-X4KE].

15. Graham Rapiet, *Legal Marijuana Could Be Worth \$47 Billion in the US Alone, According to a Wall Street Analyst*, MARKETS INSIDER (Aug. 22, 2018, 9:42 AM), <https://markets.businessinsider.com/news/stocks/marijuana-cannabis-us-legal-market-could-be-worth-47-billion-2018-8-1027477326> [https://perma.cc/66F5-X5LU].

16. See Silvia San Nicolas, *The California Cannabis Gauntlet—Death by a 150,000 Thousand Cuts*, CANNABIS L.J. (June 2018), <https://journal.cannabislaw.report/the-california-cannabis-gauntlet-death-by-a-150000-thousand-cuts/> [https://perma.cc/Y7KB-YDHE] (describing the incredible complexity of California regulations at the state, county, city, and local levels); Jonathan Storper, *The High Lights of California Cannabis Regulation May 2018*, CANNABIS L.J. (June 2018), <https://journal.cannabislaw.report/the-high-lights-of-california-cannabis-regulation-may-2018/> [https://perma.cc/WH37-FDDU] (“The rules are complex. Cannabis businesses seeking to do business in California should consult with an attorney prior to engaging in any project to ensure full understanding of the most up-to-date rules.”). For example, Wilson Elser (with nearly 800 lawyers in thirty-five offices) has a national cannabis practice with thirty-two lawyers assigned to the group. The firm’s website explains the need for sophisticated legal representation and the firm’s commitment to assisting clients with all phases of their business:

The growth of the cannabis industry necessitates well-informed legal counsel. Solid legal advice is often hard to find given the localized regulation of the field and fast-developing nature of this area of the law. Businesses and insurers operating in this space routinely grapple with the impact of these new regulations on their organizations. Avoiding difficulties—if not disaster—hinges on the intelligent and consistent handling of interrelated governance, commercial, employment, product liability, risk management and coverage issues. Startups in particular face daunting and often unanticipated legal challenges that may undermine otherwise sound business plans.

Wilson Elser’s Cannabis Law practice assists growers, processors, distributors and vendors within the legalized cannabis industry as well as organizations outside the industry impacted by cannabis legalization. Collectively, our attorneys command the experience to tackle the legal

Even lawyers who have no intention of launching a dedicated cannabis practice must be aware of the ethical rules and considerations governing this area of practice. The scope of a \$47 billion industry will be broad and deep, and it is likely that many attorneys will find themselves involved in transactions or disputes that touch on the cannabis industry. For example, a commercial real estate lawyer who represents the owner of warehouses may learn that her client is considering leasing to a cannabis business, requiring her to address the unique risks and considerations for this use of the property. But even before confronting the substantive intricacies of cannabis regulation, the lawyer must determine if she is transgressing ethical rules simply by actively assisting with this transaction. Finally, given the peculiar features of this area of practice, all lawyers ought to be able to sustain a cocktail party conversation when someone asks, “How can a lawyer represent people who are breaking federal law?” Our ethical rules ensure the integrity of the legal system and the protection of clients and the public. Just as it is important for all lawyers to understand and be able to articulate why a criminal defense lawyer may ethically “defend a person guilty of a crime,” all lawyers ought to understand the rudiments of ethical cannabis lawyering.

This article is organized in two parts. Part One offers a brief history of cannabis in American life during the past century, and then recounts the recent move by California and other states to legalize and regulate adult use. This historical background is important because it shades our contemporary understanding and drives current policymaking. Put simply, the dated trope

issues of greatest importance in this space, such as corporate formation and governance, commercial transactions, product liability, professional liability, labor and employment, intellectual property, licensing and regulatory issues, tax assistance and insurance coverage analysis.

Whether representing business entities, individuals or insurance carriers, we form multidisciplinary teams to deploy those resources best aligned with our clients’ needs. These collaborations frequently spawn innovative resolutions to complex legal problems and generate substantial cost and time efficiencies, as clients need not coordinate the efforts of multiple law firms.

Wilson Elser attorneys are well acquainted with the regulations governing this industry and the policies and politics behind them. We continually monitor regulatory bodies to keep clients current with changes in licensing and regulations lest they unknowingly run afoul of the latest requirements. When necessary, we are quite literally by each client’s side, providing counsel at regulatory hearings.

Cannabis Law: Overview, WILSON ELSER, https://www.wilsonelser.com/services/154-cannabis_law [<https://perma.cc/A7XW-XQM9>].

of “reefer madness” casts a long shadow over the contemporary discussions about ethical cannabis lawyering. Part Two considers the ethics of cannabis lawyering in the broadest terms. First, it explores the possibility that lawyers may be committing federal crimes in the course of their representation of cannabis businesses. Second, the ethical rules in California have recently been revised to address cannabis lawyering, but ambiguities remain to be resolved. Finally, it may be ethically imprudent for lawyers to represent cannabis clients because the attorney-client privilege may be overcome in a federal criminal court proceeding under the crime-fraud exception. Despite these serious and overlapping complexities, I conclude that it is not only ethical for attorneys to assist clients to comply with state cannabis laws, but that such representation is a positive social good.

II. FROM REEFER MADNESS TO LEGALIZATION: WHAT A LONG, STRANGE TRIP IT’S BEEN

The social and legal history of cannabis in the United States is indispensable for understanding the ethical considerations of lawyers representing state-legal cannabis businesses. Although cannabis originally was used regularly by doctors and other healers for patient care in our early history, more recently it has been denounced as an evil substance with no redeeming qualities.¹⁷ As a thought experiment, consider your reaction to learning that a lawyer is representing a heroin manufacturer and distributor. Now consider that both heroin and cannabis are Schedule I drugs under the Controlled Substances Act.¹⁸ The reason for this (mis)classification of cannabis is deeply rooted in a social and racial history that we carry forward unconsciously. These historical factors shape how the law has developed and has certainly had an impact on the considerations of professionalism and ethics for attorneys who assist cannabis clients.

A. *Early Cannabis Regulation in the United States*

Cannabis was widely used by doctors and pharmacists well into the twentieth century, without any apparent stigma.¹⁹ The medicinal qualities

17. See EMILY DUFTON, *GRASS ROOTS: THE RISE AND FALL AND RISE OF MARIJUANA IN AMERICA* 2–3 (2017) (tracing marijuana’s shifting status from “legality to illegality and back again”).

18. 21 U.S.C. § 812(c)(b)(10), (c)(c)(10) (2012).

19. See DUFTON, *supra* note 17, at 2–3 (“By the late 1800s, the drug had come to prominence as a useful and widely available medicine and was popular in pain-relieving tinctures sold in local pharmacies. Cannabis was believed to be so safe that the drug was marketed to women through

of cannabis were not questioned, and drug industry lobbyists successfully kept cannabis from being criminalized under the Harrison Narcotics Act of 1914.²⁰ And yet, support for prohibition rapidly emerged after the turn of the century. In 1913, California enacted a ban on the use of cannabis for non-medical purposes—an action that was driven by social and political factors rather than medical concerns.²¹ The public strongly associated increased and recreational use of cannabis with Mexican immigrants streaming into the country,²² and racist characterizations—that Mexicans are lazy and dangerous—were often linked to cannabis use.²³ As Mexican immigration increased in the early twentieth century, so did the fear of marijuana, leading to negative stigmas of the plant and the people who used it. Local anti-cannabis ordinances became more prevalent in the southwestern region, and authorities often targeted “dark-skinned foreigners.”²⁴ Criminalization gained traction federally as an expression of anti-immigrant sentiment.²⁵

romantic postcard campaigns that showed concerned mothers applying a cannabis salve to soothe the gums of teething babies and relieve children’s colds.”).

20. NICK JOHNSON, *GRASS ROOTS: A HISTORY OF CANNABIS IN THE AMERICAN WEST* 19 (2017).

21. *See id.* (“[M]any states chose to outlaw the plant as a preemptive strike against an alternative to already outlawed substances such as opium or alcohol.”).

22. In light of today’s bombastic rhetoric about immigration, it pays to note that it was not illegal to cross the Mexican-U.S. border without authorization until 1929. Act of Mar. 4, 1929, Pub. L. No. 70–1018, 45 Stat. 1551 (repealed 1952). *See generally* KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965*, at 138 (2017) (noting the racially charged motives behind the March 4, 1929 Act). Some of these immigrants may have been skirting the literacy test and head tax enacted in 1917, but they were not committing a crime to cross into the United States. *See generally* Lorraine Boissoneault, *Literacy Tests and Asian Exclusion Were the Hallmarks of the 1917 Immigration Act*, SMITHSONIAN.COM (Feb. 6, 2017), <https://www.smithsonianmag.com/history/how-america-grappled-immigration-100-years-ago-180962058/> [<https://perma.cc/WK2D-26VG>] (detailing the \$8 head tax imposed on every immigrant by the Immigration Act of 1917, as well as a literacy test that required reading short passages in any language).

23. *See* JOHNSON, *supra* note 20, at 18 (“[I]n the hands of Mexicans along the border, cannabis was ‘dangerous’ and ‘more powerful than opium,’ but away from the border, in the hands of Anglo-American[s] . . . it was a useful medicine that was actually *less* harmful than morphine . . .”).

24. *Id.* at 20.

25. *Id.* The racist characterization of cannabis use soon spread beyond Mexican immigrants and was framed in broader terms as an attack on the dignity and safety of refined white citizens.

Recreational marijuana smoking had been introduced to Americans in the late 1800s by Mexican refugees fleeing the dictatorship of President Porfirio Diaz; as it slowly spread north from the border, the drug grew controversial, primarily because of the people associated with its use. A 1917 report from the Treasury Department noted that in Texas, only “Mexicans and sometimes Negroes and lower class whites” smoked marijuana for pleasure and warned that “drug-crazed”

Harry Anslinger was serving as commissioner of the Federal Bureau of Prohibition when he was named to serve as the first head of the Federal Bureau of Narcotics in 1930.²⁶ As the zeal for prohibition of alcohol waned, Anslinger carried the prohibitionist fervor forward with regard to cannabis.

Beginning around 1934, the narcotics chief embarked on a feverish propaganda campaign. He wrote editorials, gave radio talks, suggested storylines for low-budget flicks—including the oft-ridiculed *Reefer Madness* (1936)—and built up a “Gore File,” his personal collection of photos and news clippings detailing grisly acts supposedly committed by people under the influence of cannabis.

....

Anslinger emphasized all kinds of alleged negative effects in his propaganda campaign. In addition to his insistence that the herb magically and unfailingly transformed people into Jekyll-and-Hyde-type monsters, Anslinger played on the gendered racial tensions of the Depression era, arguing that cannabis made white women susceptible to lustful black men and that it drove blacks and Mexicans to commit violent crimes. Mexicans were an easy target: not only were they already associated with “marihuana,” but they were also blamed for siphoning welfare funds and taking jobs from needy white Americans. Bowing to these racial anxieties, President Herbert Hoover’s administration deported 63,874 Mexicans between 1930 and 1933—an increase of nearly ten thousand per year over the previous administration. By insisting that “marihuana” led to race mixing and turned

minorities could harm or assault upper-class white women—by far the report’s chief concern. Fears about its ability to induce violence would continue to haunt the debate over marijuana throughout the early twentieth century. For instance, films like *Reefer Madness*, released in 1936, associated marijuana use with murder, miscegenation, and suicide as it showed the transformation of a group of otherwise upstanding young white people into a laughing cabal of maddened criminals.

DUFTON, *supra* note 17, at 3–4 (footnote omitted). The connection between Mexican immigrants and cannabis was real, but not nearly as perfidious as the authorities assumed. It pays to recall that Mexican immigrants were generally engaged in back-breaking field work, for which the medicinal effects of cannabis were well-suited. Moreover, immigrants were limited in their ability to earn money in the fields, and so a side business of growing cannabis often provided needed income. JOHNSON, *supra* note 20, at 71. Finally, the drudgery of their working lives undoubtedly led immigrants to consume cannabis for recreational purposes similar to how white factory workers in New England used alcohol and nicotine. *Id.* at 72. Despite all this, only a minority of the immigrant community used cannabis. *Id.* at 82.

26. JOHNSON, *supra* note 20, at 47.

already marginalized people into criminals, Anslinger could count on widespread support for his anti-cannabis campaign.²⁷

Beginning as a local reaction in the southwest to Mexican immigrants, laws against cannabis soon became a burning issue across the nation.

The passage of the Marihuana Tax Act of 1937 by the federal government effectively criminalized cannabis.²⁸ The congressional hearings included an embarrassing parade of witnesses spouting pseudo-science and racist assumptions, suggesting that cannabis was more dangerous than opium and falsely claiming that the medical establishment was in favor of prohibition.²⁹

By the end of the hearings, the AMA, representing about 100,000 of some 160,000 physicians in the country, provided the lone voice of opposition to the Marihuana Tax Act. Fear and ignorance triumphed in the Marihuana Tax Act hearings, in the subsequent vote, and in nearly every other federal discussion about cannabis thereafter.³⁰

After 1937, no ethical professional could assist those engaged in the illegal cannabis trade.³¹

B. *Contemporary Prohibition Under the Controlled Substances Act*

In 1965, Dr. Timothy Leary attempted to drive into Mexico with his two teenage children, but was denied entry and forced to turn around on the bridge.³² American authorities searched the car upon his reentry, found a small amount of cannabis, and tried Leary for failing to comply with the Marihuana Tax Act and for knowingly “importing” cannabis.³³ The

27. *Id.* at 48–49 (footnotes omitted); see DUFTON, *supra* note 17, at 4 (quoting Anslinger’s article, *Marijuana: Assassin of Youth*, in which he warns that the number of “murders, suicides, robberies, criminal assaults, holdups, burglaries, and deeds of maniacal insanity [marijuana] causes each year, especially among the young, can only be conjectured”).

28. See Adam Drury, *The Marihuana Tax Act of 1937*, HIGH TIMES (July 13, 2018), <https://hightimes.com/culture/the-marihuana-tax-act-of-1937/> [https://perma.cc/K45L-2A67] (arguing giving the federal government the power to tax marijuana was more effective than an outright ban—and likely added to the Act’s longevity).

29. JOHNSON, *supra* note 20, at 50.

30. *Id.* at 54 (footnote omitted).

31. See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (AM. BAR ASS’N 2018) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).

32. *Leary v. United States*, 395 U.S. 6, 9–10 (1969).

33. *Id.* at 10–11. Shockingly, Leary was sentenced to twenty years in prison and a \$20,000 fine for one offense and ten years in prison and a \$20,000 fine for the other offense. With the prison terms

Supreme Court reversed the conviction, finding that complying with the Marihuana Tax Act amounted to compelled self-incrimination and that mere possession of cannabis could not support a conviction for importation.³⁴ The door was now open to a reconsideration of the laws criminalizing cannabis.

Confronted by massive anti-war protests and a counter-cultural movement, the Nixon Administration showed no interest in conducting a sober review of cannabis laws.³⁵ Rather, it was intent on waging war against brown people and hippies, who were seen as the primary users of cannabis. The hippie movement in particular was deemed a threat to the country and cannabis was vilified as a cause of this domestic disturbance. During congressional hearings on the Controlled Substances Act in 1971, Attorney General John Mitchell lobbied hard to have cannabis classified temporarily as a Schedule I drug—which means that it is banned for all uses and purposes—until further study could be conducted.³⁶ In exchange for the designation, the Act funded a commission—later known as the Shafer Commission—to study cannabis extensively in order to provide a factual basis for its treatment under federal law.³⁷ Unfortunately for the Nixon Administration, the Shafer Commission adopted a thoroughly scientific approach in its review.³⁸ When the 1,184 page report was released in March 1972, it was surprisingly critical of previous regulatory efforts.³⁹ Nixon promptly ignored the findings and cannabis has remained a Schedule I drug to the present. When the Drug Enforcement Agency (DEA) was created in 1973 to replace the Federal Bureau of Narcotics, there was widespread propaganda regarding the dangers posed by cannabis that made cannabis a target of DEA efforts.⁴⁰

running consecutively, Leary faced thirty years in prison for possession of less than an ounce of cannabis. *Id.* at 11 n.5.

34. *Id.* at 18, 52–53.

35. See DUFTON, *supra* note 17, at 45–51 (describing Nixon’s “hatred” for cannabis and his attempts to legalize cannabis).

36. *Id.* at 51.

37. *Id.* at 52.

38. *Id.*; see NAT’L COMM’N ON MARIHUANA & DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 2, 9 (1972) (“We are hopeful that our attempt to clarify the scientific and normative dimensions of marihuana use will further deemphasize the problem orientation and facilitate rational decision-making.”).

39. DUFTON, *supra* note 17, at 53–54.

40. JOHNSON, *supra* note 20, at 103.

Despite the continuing counterfactual rhetoric at the federal level, the release of the Shafer Commission report motivated decriminalization efforts at the state level.⁴¹ The growing evidence that cannabis was not nearly as dangerous as it had been portrayed for decades provided support for libertarian sentiments that the government should not be criminalizing the use of the drug. Shortly after Nixon's resignation, Congress even held a hearing to consider decriminalizing cannabis at the federal level.⁴² The Carter Administration took a decidedly favorable approach to cannabis until a political scandal erupted,⁴³ and the National Organization for the Reform of Marijuana Laws was steadily gaining influence in Washington.⁴⁴ In the late 1970s, there was a pronounced momentum toward legalization grounded on principles of personal liberty and the ineffectiveness of trying to prevent the cannabis trade, but this movement stalled during the Reagan Administration and its militaristic war against cannabis growers.⁴⁵

The Reagan Administration focused on keeping cannabis out of the hands of white, middle class minors and targeted foreigners as the suppliers of the drug. The libertarian argument for legalization carried much less weight with regard to underage users who might suffer particular health risks and concerned parent groups soon coalesced around the "Just Say No" movement that became identified with Nancy Reagan.⁴⁶ Ironically, this last coordinated advocacy for cannabis prohibition occurred at a time when the use of cannabis by minors was dropping significantly and the incipient scourge of the opioid epidemic was moving from heroin to crack cocaine with devastating effects.⁴⁷ In 1982, the National Academy of Sciences issued a comprehensive analysis of cannabis policy that bolstered the Shafer Commission's findings and concluded that "[c]urrent policies directed at controlling the supply of marijuana should be seriously reconsidered" because they were unlikely to significantly reduce the use of a drug that was not harmful to adults.⁴⁸ Like Nixon, Reagan ignored this report and

41. DUFTON, *supra* note 17, at 55–56.

42. *Id.* at 59.

43. *Id.* at 107–09.

44. *See id.* at 82–86 (mentioning the events, "smoke-ins," and the many local chapters of the National Organization for the Reform of Marijuana Laws).

45. The Reagan Administration's war on drugs was an actual military operation launched against drug suppliers and funding was shifted away from anti-drug education and treatment programs to strengthen this effort. *Id.* at 159–60.

46. *Id.* at 150–51, 167–68.

47. *Id.* at 155, 186–87.

48. JOHNSON, *supra* note 20, at 127.

identified Mexican smuggling cartels as an invading force that was destroying (white) American youth. After a century, “cannabis prohibition endures today and still acts disproportionately against black and brown Americans. Black Americans are almost four times more likely to be arrested for cannabis-related crimes than white Americans, even though both groups use the drug at similar rates.”⁴⁹

The failed war on drugs finally faltered in the face of the AIDS epidemic, which struck San Francisco particularly hard in the late 1980s. “Brownie Mary” famously worked to ease the suffering of AIDS victims in the Bay Area by providing them with edible medicinal cannabis products.⁵⁰ There was too much evidence that cannabis caused no real harm, and too much experience that cannabis could effectively ease patient suffering, for the prohibitionist approach to hold sway. After halting steps in the 1970s, efforts by states to decriminalize or legalize cannabis finally hit their stride by emphasizing the medicinal qualities of cannabis.⁵¹

The foregoing brief historical account of cannabis regulation has established that prohibition has been fueled by racist fears rather than scientific evidence. The passionate arguments against cannabis as an evil drug introduced by foreigners inevitably rests deep in the collective unconscious of the nation.⁵² The legalization movement was founded on libertarian and pragmatic principles that did not rehabilitate cannabis as much as they established both the futility and uselessness of prohibition. Against this backdrop, we turn to the legalization effort in California and the issues it raised for attorneys choosing to practice cannabis law.

49. *Id.* at 46.

50. *See generally* DUFTON, *supra* note 17, at 207 (“Baking and distributing as many brownies as she could, the sweet little old lady who cursed like a sailor quickly became known as ‘Brownie Mary’ and, through her activism and numerous arrests, she transformed marijuana into a sympathetic cause.”).

51. *Id.* at 220–21.

52. President Donald Trump’s outrageous statements about immigrants being violent criminals and rapists bringing misery with them from Mexico plays into this longstanding narrative regarding cannabis, although Trump’s crude statements reflect simple and straightforward racism rather than relying on tropes that cannabis use causes the alleged horrible behavior. *See* Philip Bump, *Surprise! Donald Trump Is Wrong About Immigrants and Crime*, WASH. POST (July 2, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/02/surprise-donald-trump-is-wrong-about-immigrants-and-crime/?utm_term=.0c479b334afb [https://perma.cc/33HR-X85U] (quoting then-presidential-candidate Donald Trump as saying of Mexican immigrants, “They’re bringing drugs. They’re bringing crime. They’re rapists.”).

C. *Legalizing Cannabis in California*

In 1996, California citizens enacted an initiative measure to permit the use of cannabis for medicinal reasons, creating the Compassionate Use Act of 1996.⁵³ Proposition 215 had the stated purpose of ensuring that “patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.”⁵⁴ California had been the first state to criminalize nonmedical uses of cannabis in 1913, but now was spearheading the protection of medical uses of cannabis against the longstanding prohibitionist sentiment. However, the seemingly simple impulse of the Compassionate Use Act of 1996 raised a number of complex issues that required comprehensive legislation and regulation to resolve. In 2003, the California legislature enacted Senate Bill 420, the Medical Marijuana Program Act,⁵⁵ which provided the necessary structure for effectively regulating medicinal cannabis in the state. Subsequently, in 2015, the legislature enacted three bills (Assembly Bills 243 and 266 and Senate Bill 643) that formalized the licensing and regulatory framework for medical cannabis through the Medical Cannabis Regulation and Safety Act.⁵⁶ This legislation created the Bureau of Cannabis Control within the Department of Consumer Affairs as the lead regulatory agency.⁵⁷

These legislative actions provided many needed details, including relevant definitions,⁵⁸ that created a modern regulatory approach to cannabis. For example, employers were unsure whether they could continue to drug test and discipline employees for using cannabis if they were using the drug for medicinal purposes. The Medical Marijuana Program Act made clear that

53. Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2010).

54. Compassionate Use Act of 1996, 1996 CAL. STAT. A-321, A-321 (codified as amended at CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(B)).

55. Medical Marijuana Program Act, CAL. HEALTH & SAFETY CODE §§ 11362.7–11362.9 (West 2018).

56. Medical Cannabis Regulation and Safety Act, CAL. BUS. & PROF. CODE §§ 19300–19360 (repealed 2017). The Medical Cannabis Regulation and Safety Act was repealed and incorporated into the Medicinal and Adult-Use Cannabis Regulation and Safety Act. *About Us*, CAL. CANNABIS PORTAL, https://cannabis.ca.gov/about_us/ [<https://perma.cc/QCL2-CBWU>].

57. *See About Us*, *supra* note 56 (explaining the Medical Cannabis Regulation and Safety Act created the “Bureau” and established “California’s first framework for the licensing, regulation, and enforcement of commercial medicinal cannabis activity”).

58. For example, the Medical Marijuana Program Act defined “serious medical condition” by listing the illnesses that meet that requirement. CAL. HEALTH & SAFETY CODE § 11362.7(h)(1)–(12).

employers did not need to accommodate cannabis use on employer property or during work hours,⁵⁹ and a later California Supreme Court case established that employers could refuse to hire or could fire employees who used medical cannabis on their own time.⁶⁰ As the courts and legislature sought to refine the regulation of medical cannabis, the increasing complexity and detail called for individuals and businesses to seek legal advice to ensure that they remained compliant with state law.

In 2016, California voters joined the handful of states that had entirely legalized cannabis by permitting adult use without having to obtain a medical recommendation.⁶¹ The title of Proposition 64 was carefully chosen not to run afoul of continuing prejudices against recreational uses of cannabis: The Control, Regulate and Tax Adult Use of Marijuana Act.⁶² Proposition 64 also provided that local governments could preclude cannabis businesses from operating in their jurisdictions, and the baseline regulations promulgated by the California Bureau of Cannabis Control governing cannabis from seed to sale could be supplemented by local governments.⁶³ Consequently, the regulation of adult-use cannabis is complex, multi-layered, and evolving.

Before Proposition 64 went into effect on January 1, 2018, the California legislature enacted comprehensive legislation that combined the regulation of medical and adult-use cannabis law. Under the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) of 2017,⁶⁴ cannabis businesses face an ever-more-complex regulatory scheme. For example, the

59. *Id.* § 11362.785(a).

60. In *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2008), the California Supreme Court held that the Compassionate Use Act simply decriminalized the use of cannabis and did not address the employment relationship, and therefore employers were free to continue prohibiting employees from using cannabis on their own time for medicinal purposes. *Id.* at 208–09. This is only one of numerous important legal issues raised by the Compassionate Use Act that have been settled over time by the courts and legislature.

61. See CAL. HEALTH & SAFETY CODE § 11362.1(a)(4) (legalizing cannabis use for persons twenty-one years of age and older).

62. Control, Regulate and Tax Adult Use of Marijuana Act, 2016 Cal. Legis. Serv. 1 (West) (codified as amended in scattered sections of CAL. HEALTH & SAFETY CODE §§ 11018, 11357–11362, CAL. BUS. & PROF. CODE §§ 26000–26211 (Deering 2017), CAL. LAB. CODE § 147.6 (Deering 2017), CAL. WATER CODE § 13276 (Deering 2017), CAL. REV. & TAX. CODE §§ 34010–34021 (Deering 2017), CAL. FOOD & AGRIC. CODE §§ 81000–81010 (Deering 2017)).

63. *Id.* § 3, at 3.

64. Medicinal and Adult-Use Cannabis Regulation and Safety Act, CAL. BUS. & PROF. CODE §§ 26000–26231.2.

MAUCRSA delineates twenty different licenses for participants in the industry.⁶⁵ The public safety concerns raised by legal use of cannabis are evident in provisions focused on preventing minors from obtaining cannabis⁶⁶ and strictly regulating the advertising of cannabis products.⁶⁷ The three agencies charged with implementing the MAUCRSA have filed proposed regulations for public comment that add complexity. The Bureau of Cannabis Control has issued 152 pages of initial regulations;⁶⁸ the Department of Public Health has issued 111 pages of initial regulations;⁶⁹ and the Department of Food and Agriculture has issued 68 pages of regulations.⁷⁰ One need not have special powers to foresee increasingly detailed regulations at the state and local levels.

Thus, cannabis legalization in California has not vindicated the use of cannabis as much as it effects a toleration of the drug in light of the failure of prohibition. The narrative supporting legalization is premised as much on the ability to generate tax revenue and to use a highly regulated market to prevent use by minors as it is on the legitimate uses of cannabis by adults. For example, the Control, Regulate and Tax Adult Use of Marijuana Act expressly provides that employers may continue to test for cannabis and may refuse to hire or fire based on a person's use of cannabis outside the workplace.⁷¹ It is fair to conclude that cannabis remains highly suspect

65. *Id.* § 26050(a)(1)–(20).

66. *See id.* § 26140(a)(1)–(3) (prohibiting both the sale of cannabis to persons under twenty-one years of age and the employment of such persons in cannabis businesses).

67. *See id.* §§ 26150–26156 (promulgating California's advertising and marketing restrictions on cannabis).

68. CAL. CODE REGS. tit. 16, div. 42 (proposed 2018).

69. *Id.* at tit. 17, div. 1, ch. 13.

70. *Id.* at tit. 3, div. 8, ch. 1.

71. CAL. HEALTH & SAFETY CODE § 11362.45 (Deering 2017) provides that cannabis legalization does not amend, repeal, affect, limit, or preempt:

The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.

Id. § 11362.45(f). A number of other states have enacted protections for use of medical cannabis offsite by employees. *See Noffsinger v. SSC Niantic Operating Co.*, 273 F.Supp. 3d 326, 330 (D. Conn. 2017) (holding the Connecticut medical cannabis program prohibits discrimination against employees and is not preempted by federal law); *Barbuto v. Advantage Sales & Mktg., L.L.C.*, 78 N.E.3d 37, 40 (Mass. 2017) (finding an employee dismissed for using medical cannabis may sue for handicap discrimination).

despite the legalization of adult use in California.⁷²

D. *The Current State of Federal Law Regarding Cannabis*

As California and other states create complex systems to regulate the cannabis industry, the federal government has not rescinded its criminal prohibition of cannabis. California law cannot change the fact that growing, distributing, using, and possessing cannabis remain serious crimes under federal law and are subject to harsh penalties.⁷³ Forty years after cannabis was “temporarily” listed as a Schedule I drug, it remains so today.

Soon after taking office, the Obama Administration signaled that it would not interfere with cannabis businesses that were operating within the scope of state medical cannabis laws as long as federal drug prosecution priorities were not implicated.⁷⁴ Recognizing the need for express uniform guidance from the Justice Department regarding the conflict between state medical cannabis laws and the federal prohibition, the Justice Department issued the

72. In her review of the role of activists on both sides of the cannabis debate over the past century, Emily Dufton concludes: “Legalization activists today celebrate the passage of recreational use laws and argue that, because of their expansion, the battle is over and legal marijuana is here to stay. But the history of marijuana activism shows that voters are fickle, and that attitudes toward the drug can rapidly change.” DUFTON, *supra* note 17, at 9. Dufton continues:

In short, America’s current embrace of marijuana legalization is as tenuous as support for decriminalization was in the 1970s, though with several important updates. . . .

. . . Activists believed that the tide was about to turn in the early and mid-1970s, only to watch their progress disappear with the rise of the parent movement and its growing affiliation with the Reagan administration. Today, with a new administration in the White House that is overtly suspicious of recreational legalization, and a small but growing coalition of anti-marijuana activists staking their claim, the history of marijuana activism tells us that only one thing is certain: absolutely nothing is guaranteed, and the pendulum of public opinion on marijuana can always swing back again, as the cycle of activism begins anew.

Id. at 248.

73. See *Gonzales v. Raich*, 545 U.S. 1, 27–29 (2005) (holding the Supremacy Clause precluded state law from insulating persons from prosecution under the Controlled Substances Act, and that application of the Controlled Substances Act provisions criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes in accordance with state law did not violate the Commerce Clause). Federal penalties associated with growing, distributing, possessing, or using cannabis are not for the faint of heart. See 21 U.S.C. §§ 841–844 (2012) (outlining the severe penalties associated with cannabis).

74. See Matt Williams, *Obama: Marijuana Use Not a Top Priority for Federal Prosecutors*, GUARDIAN (Dec. 14, 2012, 10:48 AM), <https://www.theguardian.com/world/2012/dec/14/obama-marijuana-not-top-priority> [https://perma.cc/G9KH-MNUW] (quoting President Obama as saying, “It would not make sense for us to see a top priority as going after recreational users in states that have determined that it’s legal”).

“Ogden Memorandum” to United States Attorneys across the nation. The Justice Department reinforced its “commit[ment] to the enforcement of the Controlled Substances Act in all [s]tates[,]” but also signaled its “commit[ment] to making efficient and rational use of its limited investigative and prosecutorial resources.”⁷⁵ In balancing these commitments, the Justice Department concluded:

As a general matter, pursuit of [the Justice Department’s priority of targeting drug trafficking networks] should not focus federal resources in your [s]tates on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. . . . On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.⁷⁶

As states began adopting adult-use cannabis laws, the Obama Administration clarified its enforcement priorities regarding cannabis. The “Cole Memorandum” issued to United States Attorneys reaffirmed the principles of the Ogden Memorandum, but noted that there had been

an increase in the scope of commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. . . .

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution.⁷⁷

75. Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana to Selected U.S. Attorneys 1 (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/C49B-ENL6>].

76. *Id.* at 1–2.

77. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use to U.S. Attorneys 1–2 (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/4B4D-SGGG>].

These guidance letters provided more comfort to the emerging state-legal cannabis industry than warranted by their legal status. As statements of guidance regarding enforcement priorities, the two memoranda have no binding legal effect.⁷⁸

More significant, Congress has included a provision in every spending bill since 2014 that prohibits the Justice Department from expending funds in a manner that would interfere with state medical cannabis programs.⁷⁹ The spending limitation, known as the Rohrabacher-Blumenauer Amendment (formerly known as the Rohrabacher-Farr Amendment), has been enforced by courts.⁸⁰ Despite Attorney General Sessions requesting Congress to eliminate this restriction and permit the Justice Department to prosecute persons acting in conformity with state medical cannabis programs,⁸¹ the limitation was included in the most recent spending bill.⁸² This congressional action provides real protection to parties engaged in the medical cannabis trade, but this protection can disappear after the fact if Congress fails to renew the provision.

The federal government can prosecute [federal cannabis] offenses for up to five years after they occur. Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could

78. See Memorandum from David W. Ogden, *supra* note 75, at 1 (“This memorandum provides clarification and guidance to federal prosecutors . . .”).

79. Alicia Wallace, *Senate Passes Spending Bill with Medical Marijuana Protections, Trump Agrees to Sign It*, CANNABIST (Mar. 22, 2018, 12:36 PM), <https://www.thecannabist.co/2018/03/22/medical-marijuana-federal-budget-rohrabacher-blumenauer/102137/> [<https://perma.cc/K8J5-MFHV>].

80. See *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016) (concluding § 542 of the Consolidated Appropriations Act prevents the Department of Justice from spending appropriations funds “for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws”); *United States v. Silkeutsabay*, 678 F. App’x 608, 609 (9th Cir. 2017) (mem.) (holding the federal government is prohibited “from prosecuting individuals who comply with state medical marijuana laws” (citing *McIntosh*, 833 F.3d at 1177)). However, the federal government is free to prosecute an individual engaged in state-legal medical cannabis activities for offenses that do not relate to cannabis. See *United States v. Ragland*, No. 2:15-cr-20800, 2017 WL 2728796, at 3 (E.D. Mich. June 26, 2017) (permitting prosecution for “possession of a destructive device by a prohibited person and possession of explosive material by a prohibited person In any event, the Government does not seek to impose criminal liability on conduct that would be wholly legal under Michigan’s medical marijuana laws” (citation omitted) (citing 18 U.S.C. § 922(g)(3) (2012))).

81. Christopher Ingraham, *Jeff Sessions Personally Asked Congress to Let Him Prosecute Medical-Marijuana Providers*, WASH. POST (June 13, 2017), https://www.washingtonpost.com/news/work/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/?utm_term=.032b1d88b028 [<https://perma.cc/6L2N-UQWE>].

82. Wallace, *supra* note 79.

restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.⁸³

It bears emphasis that this funding limitation applies only to the prosecution of individuals acting in full compliance with a state-legal medical cannabis program.

When President Trump appointed Jeff Sessions as his Attorney General, there was concern that the federal government would begin to undermine state-legal cannabis programs. Sessions has long been steadfastly opposed to the use of cannabis, and yet he has also acknowledged that cannabis prohibition was not necessarily the highest priority in the war on drugs.⁸⁴ In the end, Sessions rescinded the Ogden and Cole Memoranda, although it is unclear whether he will deploy the assets of the Justice Department to prosecute persons for activity that conforms to state-legal cannabis programs.⁸⁵ Thus, the clash between state-legal cannabis programs and the

83. *McIntosh*, 833 F.3d at 1179 n.5 (citation omitted) (citing 18 U.S.C. § 3282); see Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 645 (2011) (noting the Obama Administration's Non-Enforcement Policy does not prevent subsequent administrations from enforcing federal marijuana laws against persons who are in compliance with state laws).

84. For early press speculations about the approach to cannabis that Sessions would adopt, see Melissa Hoffmann, *With Eyes on Trump, Legal Marijuana Warily Rolls Along*, LAW.COM (Jan. 27, 2017, 7:36 PM) <https://www.law.com/sites/almstaff/2017/01/27/with-eyes-on-trump-legal-marijuana-warily-rolls-along/> [<https://perma.cc/P3XF-TNY5>] (considering the possibility the Cole memo will expire or be struck down, but expressing cautious optimism at Sessions' silence on the matter during his confirmation hearings); Tom Huddleston Jr., *What Jeff Sessions Said About Marijuana in His Attorney General Hearing*, FORTUNE (Jan. 10, 2017), <http://fortune.com/2017/01/10/jeff-sessions-marijuana-confirmation-hearing> [<https://perma.cc/FGY2-AQ49>] (“[T]he Sessions nomination makes it unclear where Trump’s administration will stand on the question of statewide decisions to legalize the drug for either medical or recreational purposes.”).

85. See Memorandum from Jefferson B. Sessions, III, Attorney Gen., U.S. Dep’t of Justice on Marijuana Enforcement to U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/79W8-LQ8C>] (“Given the Department’s well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.”). Attorney General Sessions concluded that ordinary enforcement priorities were sufficient to guide U.S. attorneys and that there was no need for specific guidance documents. The Sessions Memorandum listed the following general factors that affect prosecutorial priorities: “These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.” *Id.* It is certainly cold comfort for state-

imposition of substantial criminal penalties for that same behavior by the federal government is now drawn in sharp relief.

III. ETHICAL CANNABIS LAWYERING

Cannabis once was a widely feared and reviled drug that was seen as a scourge brought into the country by suspect foreigners. Increasingly, cannabis is seen as a legitimate product produced by large corporations for widespread adult consumption. It should come as no surprise that the role that lawyers can and should play in the cannabis industry is similarly in flux. For cannabis advocates, lawyers are viewed as just one profession necessary to assist the state-legal industry to provide the benefits of cannabis to the public. For cannabis prohibitionists, it is an anathema for lawyers sworn to uphold the law to assist persons to violate federal criminal law. The ethical dilemmas of cannabis lawyering arise from these conflicting views and legal regimes.

This part of the article considers the ethics of cannabis lawyering in California in the broadest sense. First, I analyze whether lawyers who assist cannabis clients may be subject to federal prosecution solely on the basis of their professional services. Attorneys should certainly be concerned if cannabis lawyering is illegal under federal law. Second, I consider whether cannabis lawyering violates the rules of professional conduct that govern California lawyers, and compare the developing approach in California to the ethical rules in other states that have legalized cannabis. Finally, I assess whether it is prudent for lawyers to represent cannabis clients, given the persistent bias against cannabis, at least for recreational use, and the possibility that communications with clients will not be protected by the attorney-client privilege under federal common law.

A. *Is Cannabis Lawyering Legal in California?*

A lawyer who provides accurate and complete advice about the meaning of state and federal law to a cannabis client would not be at risk for criminal prosecution by the federal government.⁸⁶ However, cannabis clients seek

legal cannabis businesses to learn that the priorities of Attorney General Sessions are the first factors to be applied.

86. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (AM. BAR ASS'N 2018) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

much more from lawyers than an interpretation of the requirements of the law. Lawyers also assist clients in a myriad of ways to achieve their objectives. For example, a client may ask its lawyer to negotiate contracts, develop forms for use in business transactions, conclude real estate purchases, and engage in many other activities that extend beyond simply explaining the law and involve assisting the client to conduct its business. This is even more true of lawyers serving as in-house counsel for a cannabis business, as they certainly would be deeply involved with all facets of the business.

Lawyers who engage in the full representation of cannabis clients face the risk of federal prosecution for a variety of crimes. As long as the Rohrabacher-Blumenauer Amendment prohibits the federal government to expend funds to prosecute persons acting in conformity with state medical cannabis laws, the exposure is hypothetical for that part of the industry. However, Congress can convert the exposure to a real risk with a single vote and the effect would be retroactive up to the point of the statute of limitations.⁸⁷ Exposure to potential criminal prosecution by the federal government, even if there is no imminent potential for such prosecution at the present moment, is not to be taken lightly.

Under the Controlled Substances Act, it is a federal crime “to manufacture, distribute, or dispense . . . a controlled substance[.]”⁸⁸ Substantial penalties attach to any such violation.⁸⁹ Cannabis businesses operating in accordance with state law are certainly violating this criminal

87. See *McIntosh*, 833 F.3d at 1179 n.5 (cautioning while Congress at that time restricted the government from using federal funds to prosecute marijuana offenses, an Administration’s enforcement priorities could shift quickly and be enforced five years retroactively). It is important to note that the federal government cannot compel state law enforcement entities to enforce federal law. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding states cannot be conscripted to enforce federal policy, as this would be fundamentally inconsistent with our federal system of dual sovereignty). Of course, states could voluntarily lend their law enforcement assets to the federal enforcement of laws against cannabis, but states that have legalized cannabis use have made clear that they reject the federal policy and will challenge it. Louise Esola, *State Officials Vow to Challenge Justice Department’s Marijuana Enforcement Memo*, BUS. INS. (Jan. 5, 2018, 1:04 PM), <https://www.businessinsurance.com/article/00010101/NEWS08/912318313/State-officials-vow-to-challenge-Justice-Department%E2%80%99s-marijuana-enforcement-memo> [https://perma.cc/4K8R-97PE].

88. 21 U.S.C. § 841(a)(1) (2012).

89. *Id.* § 841(b). For example, even a violation involving less than fifty kilograms of cannabis can result in a prison sentence of not more than five years and substantial fines. *Id.* § 841(b)(1)(D). Additionally, penalties imposed by the Controlled Substances Act are “in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.” *Id.* § 847.

statute.⁹⁰ Federal criminal penalties are triggered even by conduct that occurs wholly within the state of California and does not affect interstate commerce.⁹¹ A lawyer who assists a cannabis client to operate a state-legal business can be treated as a principal for purposes of federal criminal laws if a lawyer “aids, abets, counsels . . . or procures”⁹² a violation of such laws. The long reach of “aiding and abetting” liability is certainly sufficient to attach to traditional lawyering activities, such as negotiating transactions and providing counsel to the enterprise to facilitate its activities.⁹³

A lawyer would be subject to liability as a principal for aiding and abetting a violation of the Controlled Substances Act if he consciously shared the principal’s knowledge of the underlying criminal act, intended to assist the principal to engage in the conduct, and sought to enable the success of the criminal act.⁹⁴ It is irrelevant that the lawyer was not personally involved in

90. See *Gonzales v. Raich*, 545 U.S. 1, 28–29 (2005) (holding state-legal cannabis laws conflict with federal criminal law and therefore do not render cannabis “legal”); *United States v. Gilmore*, 886 F.3d 1288, 1291 (9th Cir. 2018) (finding compliance with state law irrelevant in a federal prosecution); *United States v. Stacy*, 734 F. Supp. 2d 1074, 1084 (S.D. Cal. 2010) (determining the California medical cannabis program does not protect persons from federal prosecution).

91. See *United States v. Sawyers*, 902 F.2d 1217, 1221 (6th Cir. 1990) (rejecting appellant’s argument that, because there was no proof that his marijuana ever left Kentucky or was intended for interstate commerce, no federal criminal jurisdiction existed); *United States v. Marchildon*, 519 F.2d 337, 341–42 (8th Cir. 1975) (upholding a conviction for the sale and transportation of illegal drugs within the state of Minnesota).

92. 18 U.S.C. § 2(a) (2012).

93. This is similar to the rule in many states that lawyers may face civil liability for aiding and abetting a tort by their client, such as facilitating the client’s breach of fiduciary duty. See David M. Saperstein, *Dancing with the Devil: Aiding and Abetting Liability for Lawyers*, 30 ABA/BNA LAW MANUAL ON PROF. CONDUCT 337, 338 (2014) (listing the three types of conduct commonly alleged in support of an aiding and abetting claim as fraud, breach of fiduciary duty, and breach of statutory duty); Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers be “Privileged” to Assist Their Clients’ Wrongdoing?*, 29 PACE L. REV. 75, 78 (2008) (criticizing recent cases that reject the majority rule holding lawyers liable for civil damages).

94. See *United States v. Rullan-Rivera*, 60 F.3d 16, 19 (1st Cir. 1995) (stating appellant could be found liable for aiding and abetting only if he knowingly participated in the underlying venture “and sought by his actions to make it succeed” (quoting *United States v. Clifford*, 979 F.2d, 896, 899 (1st Cir. 1992))); *United States v. Ledezma*, 26 F.3d 636, 642 (6th Cir. 1994) (finding lack of possession of cocaine by the principals irrelevant—all that needed to be proven was appellant’s intent to facilitate the crime); *United States v. Teffera*, 985 F.2d 1082, 1086 (D.C. Cir. 1993) (stating the government did not have the burden of showing the defendant ever physically possessed or controlled the movement of the drugs—only that he knowingly and willfully participated in the offense with the intent that it succeed); *United States v. Williams*, 985 F.2d 749, 755 (5th Cir. 1993) (delineating two key elements in aiding and abetting: knowledge and sharing in the criminal intent of the principal).

the handling of any cannabis.⁹⁵ As one court summarized:

For an attorney to be convicted for aiding and abetting a client's [crime], that attorney must have had actual knowledge of the [crime] and must have taken an active role in advancing the wrongdoing. Of course, where an attorney has an intimate association with his client's activities, a jury may reasonably infer that the attorney had knowledge of their illegal nature, even absent direct evidence to that effect.⁹⁶

The attorney need not have deployed any special knowledge or exercised authority to aid in the crime. For example, a security guard with a fourth-grade education working at a doctor's office was found to have aided in the doctor's direct violations of the Controlled Substances Act.⁹⁷ A lawyer can be found to have aided a criminal violation simply by engaging in traditional lawyering activities, such as negotiating a lease.⁹⁸

95. See *Ledezma*, 26 F.3d at 641 (determining the government did not have to prove the principals actually or constructively possessed the drug); *Williams*, 985 F.2d at 753 ("Defendants need not have actual or constructive possession of the drugs to be guilty of aiding and abetting possession with intent to distribute."); *United States v. Winston*, 687 F.2d 832, 835 (6th Cir. 1982) (holding it unnecessary to show that appellant actually touched or possessed the cocaine, if the specific intent to aid the commission of the crime is shown); *United States v. Green*, 511 F.2d 1062, 1072 (7th Cir. 1975) (finding it clear that physician-appellant need not have physically filled a prescription to be culpable for attempting to dispense it).

96. *United States v. Beckner*, 134 F.3d 714, 720 (5th Cir. 1998) (citations omitted) (citing *United States v. Connery*, 867 F.2d 929, 936 (6th Cir. 1989); *United States v. Vaughn*, 797 F.2d 1485, 1492 (9th Cir. 1986); *United States v. Enstam*, 622 F.2d 857, 860 (5th Cir. 1980); then citing *United States v. Brown*, 943 F.2d 1246, 1251–52 (10th Cir. 1991); *United States v. Serrano*, 870 F.2d 1, 11 (1st Cir. 1989); *Wallace v. United States*, 281 F.2d 656, 659–60 (4th Cir. 1960)).

97. See *United States v. Hicks*, 529 F.2d 841, 844 (5th Cir. 1976) ("It was not necessary that Hicks personally 'dispense,' only that he knowingly participate in a conspiracy with Dr. Young, a licensed physician, to dispense controlled substances" (citing *United States v. Green*, 511 F.2d 1062 (7th Cir. 1975))); see also *United States v. Baresh*, 790 F.2d 392, 399–400 (5th Cir. 1986) (holding a warehouse owner liable for aiding and abetting for permitting smuggled cannabis to be stored in his facility); *United States v. Vamos*, 797 F.2d 1146, 1148, 1154 (2d Cir. 1986) (affirming conviction of a physician's nurse and office manager for aiding and abetting physician's violations of the Controlled Substances Act); *People ex rel. Feuer v. Nestdrop, L.L.C.*, 199 Cal. Rptr. 3d 871, 881 (Ct. App. 2016) (finding the developer of an app liable for aiding and abetting by facilitating cannabis deliveries that failed to comply with state law); *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10, 22 (Me. 2018) (holding an employer cannot be compelled to reimburse an employee for medical cannabis taken for a workplace-related injury because this would potentially amount to aiding and abetting a violation of the Controlled Substances Act and therefore is preempted by federal law under principles of conflict preemption).

98. In *United States v. Vaughn*, the attorney was convicted for aiding and abetting a cannabis smuggling operation by negotiating and drafting a lease of an airplane to be used for the smuggling. *Vaughn*, 797 F.2d at 1492. The attorney was not told expressly that the plane was to be used for

In contrast, if the lawyer merely understands that the client is engaging in illegal conduct but does not assist in that conduct in any manner, no liability as a principal would attach.⁹⁹ Thus, the lawyer who simply provides an interpretation of relevant laws and does nothing to further the enterprise is highly unlikely to risk prosecution. However, summarizing the relevant law falls far short of the expert assistance that most cannabis clients will require of their counsel, just as all other business clients seek more from their lawyers than a summary of legal rules.

In addition to aiding and abetting liability, any person who “conspires to commit any offense” under the Controlled Substances Act is “subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”¹⁰⁰ A conspiracy to violate the Controlled Substances Act exists if there is an agreement between persons to violate the act and the defendant willfully participated in that agreement.¹⁰¹ Therefore, a cannabis lawyer might also be subject to prosecution for being an active participant in a conspiracy to violate federal law.¹⁰²

Finally, an established cannabis business might meet the elements of “a continuing criminal enterprise[,]” which is defined as a continuing violation of the Controlled Substances Act “undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and . . . from which such person obtains substantial income or resources.”¹⁰³ An in-house attorney who is part of the management team for a large cannabis business could very well be adjudged to have been a participant in a continuing criminal enterprise. This criminal liability raises

criminal activity, but the court found that all the surrounding circumstances supported a reasonable inference that the attorney knew the ultimate purposes for the leased plane and that he actively participated in the plan by securing the plane for his client. *Id.*

99. *See* *United States v. Garcia-Carrasquillo*, 483 F.3d 124, 130 (1st Cir. 2007) (“[M]ere association with the principal or presence at the scene of the crime is insufficient, even with knowledge that the crime is to be committed.” (citing *United States v. Hyson*, 721 F.2d 856, 862 (1st Cir. 1983))).

100. 21 U.S.C. § 846 (2012).

101. *United States v. Clark*, 928 F.2d 639, 641–42 (4th Cir. 1991).

102. *See* *United States v. Badolato*, 701 F.2d 915, 921–22 (11th Cir. 1983) (stating the co-defendant’s intentions and motives are irrelevant if he knowingly and intentionally entered into a conspiracy to violate the law).

103. 21 U.S.C. § 848(a), (c)(2)(A)–(B).

the stakes substantially because the term of imprisonment is mandated between twenty years to life, along with substantial financial penalties.¹⁰⁴

In addition to criminal liability, lawyers would be subject to various forfeiture provisions that might lead to confiscation of substantial assets related to their work. An attorney convicted of a violation of the Controlled Substances Act would face criminal forfeiture of “any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation[.]”¹⁰⁵ The criminal forfeiture provision applies concurrently with civil forfeiture provisions and is not an alternative remedy.¹⁰⁶

In an effort to thwart money laundering of funds derived from criminal activity, the federal government has promulgated reporting requirements that are triggered when a trade or business receives large sums of cash.¹⁰⁷ Failure to abide by these currency reporting obligations may result in criminal and civil penalties.¹⁰⁸ A lawyer receiving \$10,000 in cash, whether in a single transaction or series of related transactions,¹⁰⁹ is under a duty to report this receipt or face the stiff penalties. Given the difficulties that cannabis businesses face in obtaining banking services, the use of cash for payments, including payments to legal counsel, means that these obligations are going to be triggered often.¹¹⁰ Merely receiving a payment of more than \$10,000 from a known cannabis business might itself be a serious federal crime.¹¹¹ More important, even in the absence of a conviction (because, for example, of an inability to prosecute under the Rohrabacher-

104. *Id.* § 848(a).

105. *Id.* § 853(a)(1).

106. *United States v. Moffitt, Zwerling & Kemler, P.C.*, 875 F. Supp. 1190, 1197 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 83 F.3d 660 (4th Cir. 1996).

107. Federal law requires nonfinancial entities, including lawyers, to report any cash transactions that exceed \$10,000 total. I.R.C. § 6050I(a)–(b) (2012); 31 U.S.C. § 5324(b)(1) (2012).

108. 31 U.S.C. §§ 5321–5322.

109. I.R.C. § 6050I(a)(2).

110. It is unlikely for an attorney to commit money laundering offenses directly, but it is always possible that an attorney assisting a cannabis client to deal with its cash proceeds responsibly might violate money laundering statutes if there is any degree to which the cash is being handled to disguise its illegal provenance. *See* 18 U.S.C. §§ 1956(a)(1), 1957(a) (2012) (prohibiting the direct or indirect “[l]aundering of monetary instruments[.]” as well as engaging “in a monetary transaction in criminally derived property . . . [that] is derived from [an] unlawful activity”).

111. *See id.* § 1957(a) (“Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from [an] unlawful activity, shall be punished . . .”).

Blumenauer Amendment), the federal government might still be able to seize assets.¹¹²

Lawyers generally are risk-averse. As a result, one would expect that the technical exposure that lawyers face under federal criminal law would be a huge disincentive for representing cannabis clients. Before assessing whether lawyers may ethically represent cannabis clients, it is important to acknowledge that lawyers may not be able to provide full professional representation of those clients without acting illegally under federal law. Although the prospect of prosecution at this time is negligible, the social and legal history of cannabis in this country demonstrates that the tides can turn quickly. Lawyers must stay attentive to these very real risks.

Lawyers may prevent criminal exposure by limiting their representation of cannabis clients to simple counseling about the requirements of state and federal law, avoiding any work that would assist the client in the conduct of its business, and by attending to the need to report transactions in cash as required by law. Unfortunately, a lawyer restricting representation to this degree would prove relatively unhelpful to cannabis businesses seeking to comply with complex state regulations and to thrive as business ventures in an entrepreneurial and competitive environment.

B. *Is Cannabis Lawyering Ethical in California?*

With a significant risk that engaging in the full scope of cannabis lawyering will be considered illegal conduct under federal law, one might assume that such conduct would certainly constitute an ethical violation under the rules of professional conduct. However, this assumption conflates two distinct inquiries. Ethical rules are promulgated by states to govern attorneys within their jurisdiction and are not products of federal law.¹¹³ The question posed, then, is whether California acknowledges the legitimacy of cannabis lawyering with regard to clients operating legally under state laws and regulations, even while recognizing that the lawyer may be assisting the client to engage in conduct that violates federal criminal law. This question is unique in light of the current legal status of cannabis in the United States.

112. See *id.* § 981(a)(1)(A) (providing for civil forfeiture of property “involved in a transaction or attempted transaction in violation of section 1956 [and] 1957”).

113. Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 463 (1996).

Despite being the first state to legalize medical cannabis, and a state to embrace adult-use cannabis early on, California has not resolved the ethical issues related to cannabis lawyering in a clear and definitive manner. In this part of the article, I identify the ethical issues confronting cannabis lawyers in California at this pivotal moment. Before 2018, California had developed and interpreted its own ethical rules rather than using a variation of the Model Rules.¹¹⁴ The California Supreme Court has now approved a wholesale revision of the ethical rules to bring them in line with the Model Rules, and as of November 1, 2018, attorneys in California will be subject to a new code of professional conduct.¹¹⁵ To explore the ethics of cannabis lawyering in California, it is necessary to understand the previous rules and the interpretation given to them, and to assess the changes brought about by the adoption of the new rules.

I begin this part by analyzing the language of the Model Rules and tracking how various states have interpreted and amended their version of the Model Rules to address cannabis lawyering. I then turn to the California ethical rules that governed cannabis lawyering prior to 2018 and the (unofficial) interpretation of the rules offered by local bar associations. Finally, I describe the new rules that have just taken effect in California and critically assess the failure of the rules and comments to provide definitive and clear guidance on some key ethical questions. I conclude that the State Bar of California Committee on Professional Responsibility and Conduct should immediately provide cannabis lawyers with additional guidance in the form of a binding ethics opinion.

1. Cannabis Lawyering Under the Model Rules

Most states use the Model Rules as the basis for their state ethics rules.¹¹⁶ The pertinent provision for cannabis lawyering is Rule 1.2(d):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may

114. Neil J. Wertlieb, *The Disruptive and Controversial New Rules*, DAILY J. (Oct. 17, 2018), <https://www.dailyjournal.com/articles/347613-new-rules-of-conduct-the-disruptive-and-controversial> [<https://perma.cc/X5RY-26K2>].

115. *Id.*

116. *See id.* (“California is the only state that does not base its rules on the American Bar Association’s Model Rules of Professional Conduct. Until the new rules take effect, California remains the only state with its own unique set of rules.”).

counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.¹¹⁷

One may safely assume that no legitimate lawyer would “counsel a client to engage . . . in conduct that the lawyer knows is criminal[,]”¹¹⁸ and certainly a cannabis lawyer would not affirmatively counsel a client to engage in activity with the express purpose of committing a crime. The problem for cannabis lawyers is posed by the part of the rule that prohibits a lawyer from assisting “a client . . . in conduct that the lawyer knows is criminal[,]”¹¹⁹ This provision would facially apply to lawyers who assist a client in operating a state-legal cannabis business, since that activity is, by definition, “criminal” activity under federal law.

The official comments supply further elaboration of Rule 1.2 with regard to cannabis lawyering, although the application of the rule in the unique situation of state-legal cannabis is not clear. Consider Comment 9:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. 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.¹²⁰

Comment 9 makes clear that it is ethical for a lawyer to opine about the legality of a client’s proposed course of conduct. The obvious policy supporting this interpretation is to permit lawyers to provide relevant factual information to a client with the anticipation that the client will follow the lawyer’s advice and not engage in illegal conduct, but the manner in which the ethical line is drawn is less than clear. Comment 9 distinguishes the ethically permissible conduct of providing “an analysis of legal aspects of questionable conduct[,]” from the ethically impermissible conduct of “recommending the means by which a crime or fraud might be committed

117. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (AM. BAR ASS’N 2018).

118. *Id.*

119. *Id.*

120. *Id.* R. 1.2 cmt. 9.

with impunity.”¹²¹ The obvious problem is that there is a wide gap between these two opposed characterizations of lawyering activity.

A lawyer engaged by a cannabis client to assist in creating a limited liability entity, negotiating contracts with providers and customers, counseling about how to comply with state and local regulations regarding cannabis, and providing general business and strategic advice must consider the import of Comment 9 very carefully. The enumerated activities go well beyond an analysis of the legality of the client's conduct, but seemingly do not amount to the lawyer recommending the means for the client to act illegally “with impunity.”¹²² A cannabis lawyer is likely to conclude that her practice is somewhere in-between these “easy” cases. A cannabis lawyer who affirmatively assists the client to engage in state-legal activity in conformity with detailed and complex state law is simultaneously assisting the client to violate federal criminal statutes, even if not with a specific intent to do so. Comment 10 to Rule 1.2 adds additional information relevant to the analysis:

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.¹²³

On one level, Comment 10 states the obvious: If a lawyer is oblivious to the illegal purposes to which their counsel is being applied by the client, once the lawyer becomes aware, the lawyer should cease the representation. This is not relevant to cannabis lawyering because the lawyer should understand from the beginning that the legal advice is being used in furtherance of activities that are illegal under federal law. But one sentence stands out in rather stark fashion: A lawyer may not “assist a client[] in conduct that the

121. *Id.*

122. *Id.*

123. *Id.* at cmt. 10 (citations omitted).

lawyer knows is criminal or fraudulent[.]”¹²⁴ This certainly applies to cannabis lawyering, which does not involve the lawyer’s sudden recognition that the legal advice is being utilized to facilitate criminal behavior under federal law, but rather which commences with the understanding that the conduct is federally illegal.

Given all this uncertainty under the Model Rules and the official comments, it should come as no surprise that many jurisdictions with state-legal cannabis regimes have sought to clarify their version of the Model Rules in order to determine and clarify the ethical status of cannabis lawyering. There are a variety of strategies adopted by these states. Some states have amended the ethical rules themselves to ensure a clear statement regarding cannabis lawyering. Other states have attempted to clarify the ethics of cannabis lawyering by adopting new comments to Rule 1.2. Presumably, an amendment of the rule itself is preferable for clarity sake, but the comments also are respected by the courts in adjudicating ethics claims.¹²⁵ Other states have issued policy statements similar in effect to the Cole Memorandum, announcing a decision not to prosecute ethical violations that stem from cannabis lawyering in accordance with state law.

We begin with the states that decided it was necessary to amend the ethical rules directly to accommodate cannabis lawyering. For example, in Oregon, Rule 1.2(d) has been amended to include the following language: “[A] lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”¹²⁶ The ethical rules in seven other states have been amended to accommodate cannabis lawyering in similar fashion.¹²⁷ The amended

124. *Id.* R. 1.2(d).

125. *See* *La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court*, 17 Cal. Rptr. 3d 467, 479 (Ct. App. 2004) (acknowledging comments as persuasive authority); *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 176 A.3d 729, 733 (Me. 2017) (“Relying on the Maine Rules of Professional Conduct, comments to those Rules, and opinions of the Maine Professional Ethics Commission that interpreted the Rules, the court concluded that, to include an agreement to arbitrate future malpractice claims against the firm in an engagement letter, Bernstein was obligated to fully inform Snow of the scope and effect of that agreement.”); *Hill v. Crozer Keystone Health Sys.*, No. 11-007715, 2015 Pa. Dist. & Cnty. Dec. LEXIS 9012, at *4 (Pa. Ct. C.P. Apr. 23, 2015) (“It is clear from the Rules of Professional Conduct comments that a lawyer may only retain papers as security for a fee when he has been unfairly discharged by the client, and even then, the attorney must still take all steps reasonable to mitigate the consequences to the client.”).

126. OR. RULES OF PROF’L CONDUCT R. 1.2(d) (2018).

127. There is nuance and detail in how the rules have been amended by various states and so it is necessary to quote the key language of the revisions. The Alaska rule states that “[a] lawyer may . . .

rules all specifically permit a lawyer to assist a client to engage in conduct that is authorized by state law. Sometimes, but not always, the rule or comment directly references the state's cannabis statutes, which makes clear that cannabis lawyering in conformity with state law is ethical. Using a specific reference raises a potential problem as states expand the scope of their cannabis laws, inasmuch as a citation to the medical cannabis program in the state may be deemed not to apply to lawyering on behalf of clients engaged in the subsequently authorized adult-use market.¹²⁸

Other states have chosen to address cannabis lawyering in the comments to Rule 1.2. In Connecticut, the amendment to the commentary was motivated by an adverse ethics opinion that interpreted Rule 1.2 strictly so as to essentially prohibit cannabis lawyering.¹²⁹ In Colorado, the comments

assist the client to engage in conduct that the lawyer reasonably believes is authorized by [state] laws." ALASKA RULES OF PROF'L CONDUCT R. 1.2(f) (2018). Hawaii amended its rule to permit lawyers to "counsel or assist a client regarding conduct expressly permitted by Hawai'i law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." HAW. RULES OF PROF'L CONDUCT R. 1.2(d) (2015). The rule in Illinois provides that "a lawyer may . . . counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences." ILL. RULES OF PROF'L CONDUCT R. 1.2(d)(3) (2016). North Dakota's amended rule provides that "[a] lawyer may counsel or assist a client regarding conduct expressly permitted by North Dakota law. To the extent required by Rule 1.1, a lawyer shall counsel such a client about the legal consequences, under other applicable law, of the client's proposed course of conduct." N.D. RULES OF PROF'L CONDUCT R. 1.2(e) (2017). In Ohio, the rules provide that "[a] lawyer may . . . assist a client regarding conduct expressly permitted under [Ohio's medical cannabis laws] . . ." OHIO RULES OF PROF'L CONDUCT R. 1.2(d)(2) (2017). The rule in Pennsylvania has been amended to provide that "[a] lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." PA. RULES OF PROF'L CONDUCT R. 1.2(e) (2018). Finally, West Virginia's rule permits a lawyer to "counsel a client regarding West Virginia law and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If West Virginia law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and its potential consequences." W. VA. RULES OF PROF'L CONDUCT R. 1.2(e) (2018).

128. For example, Nevada's Comment 1 to Rule 1.2(d) specifically references the Nevada statutes establishing the Medical Use of Marijuana program but has not yet been amended to expressly refer to the newly enacted adult-use program in the state. NEV. RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (2018). One way to address this issue is for a state to use an ethics opinion to "update" the scope of a rule amendment. *See* Wash. State Bar Ass'n, Advisory Op. 201501 (2015) (explaining that Comment 18 to Rule 1.2 "necessarily must be, broad enough" to cover the adult use state program as well as the medical cannabis state program that was specifically referenced at the time the comment was drafted).

129. The narrow and literal interpretation of Rule 1.2 by the Ethics Committee in Connecticut threatened to preclude effective legal services to state-legal cannabis businesses, and so the Connecticut Supreme Court added official commentary to Rule 1.2 to permit attorneys to provide legal services to

specifically allow attorneys to “counsel a client regarding the validity, scope, and meaning of Colorado” law regarding cannabis use, and to assist such clients “in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them.”¹³⁰ The comment mandates that “the lawyer shall also advise the client regarding related federal law and policy.”¹³¹ The Washington State Bar Association amended the comments to permit attorneys to “assist a client in conduct that the lawyer reasonably believes is permitted by [state cannabis laws] and the other statutes, regulations, orders, and other state and local provisions implementing them.”¹³² In contrast, Nevada adopted commentary that fails to definitively permit the full range of cannabis lawyering activities. Referencing the state’s medical cannabis statutes, the comment provides that “[a] lawyer may counsel a client regarding the validity, scope, and meaning of” the state’s medical cannabis statutes.¹³³ By restricting the commentary to counseling about interpretations of state law, a presumption may arise that traditional lawyering activities that *assist* a client’s federally illegal conduct may not fall within the protective scope of the amended commentary.

Finally, a number of states have handled the question of cannabis solely by means of a formal ethics opinion that provides a definitive interpretation of Rule 1.2 for purposes of cannabis lawyering.¹³⁴ Only one state has

the cannabis industry. The additional commentary states: “Subsection (d) (3) is intended to permit counsel to provide legal services to clients without being subject to discipline under these Rules notwithstanding that the services concern conduct prohibited under federal or other law but expressly permitted under Connecticut law, e.g., conduct under [Connecticut cannabis laws] . . .” CONN. RULES OF PROF’L CONDUCT R. 1.2 cmt. (2018).

130. COLO. RULES OF PROF’L CONDUCT R. 1.2 cmt. 14 (2018).

131. *Id.*

132. WASH. RULES OF PROF’L CONDUCT R. 1.2 cmt. 18 (2018).

133. NEV. RULES OF PROF’L CONDUCT R. 1.2 cmt. 1 (2018).

134. As described in greater detail below, these states are Arizona, Illinois, Maine, Maryland, Massachusetts, New Mexico, New York, Rhode Island, and Washington. States that have amended the text of the rule or commentary have also issued ethics opinions to provide greater clarity on the scope of the amendment. In Pennsylvania, for example, the amendment to Rule 1.2(e) did not make clear whether an attorney could ethically participate directly in a cannabis business. In an ethics opinion, the Pennsylvania Bar Association clarified that “[a] lawyer may participate as a principal or a backer in a medical marijuana organization authorized under the Pennsylvania Medical Marijuana Act. Even if this violates the federal Controlled Substances Act, it does not reflect adversely on the lawyer’s fitness within the meaning of Rule 8.4(b).” Pa. Bar Ass’n, Formal Op. 2016-017 (2016). In contrast, the Colorado Supreme Court specifically amended Rule 8.4 to permit a lawyer to “advise, direct, or

issued an opinion that cannabis lawyering is unethical under Rule 1.2 that continues in force. In a 2016 ethics opinion, New Mexico followed the literal reading of the rule and distinguished counseling about the requirements of law from assisting a client to engage in conduct that violates federal law. The opinion acknowledged that drawing a line between counseling and assisting is difficult:

The Committee is unable to agree as to the exact parameters of “assistance.” At one end of the spectrum, the Committee is in general agreement that negotiating contracts for the purchase of cannabis would be directly assisting the client to engage in a criminal activity. At the other end of the spectrum, some Committee members opined that forming a general alternative medical business, which *could possibly* include the prescribing and distributing of medical cannabis would not be such assistance.¹³⁵

In contrast, a Connecticut ethics opinion permitted lawyers to advise clients about the requirements of state and federal law, but stated that they “may not assist clients in conduct that is in violation of federal criminal law[,]” before unhelpfully adding that “[l]awyers should carefully assess where the line is between those functions and not cross it.”¹³⁶ The Connecticut Supreme Court superseded this opinion by changing the text of Rule 1.2.¹³⁷ Similarly, in Ohio, an ethics opinion adopted a literal reading of Rule 1.2 and found that cannabis lawyering was in violation of the rules, prompting the Ohio Supreme Court to quickly amend Rule 1.2 to accommodate cannabis lawyering.¹³⁸ In an interesting twist, after issuing a formal opinion in 2010

supervise others” with regard to cannabis activities. COLO. RULES OF PROF'L CONDUCT R. 8.4(c) (2018).

135. N.M. State Bar Ethics Advisory Comm., Formal Op. 2016-01 (2015).

136. Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 2013-02 (2013).

137. *See* CONN. RULES OF PROF'L CONDUCT R. 1.2 cmt. (2018) (referring to Connecticut cannabis law and stating a lawyer is not “subject to discipline under these Rules notwithstanding that the services concern conduct prohibited under federal or other law but expressly permitted under Connecticut law”).

138. An ethics opinion issued in 2016 established that cannabis lawyering was unethical under the Ohio rules:

Unless and until federal law is amended to authorize the use, production, and distribution of medical marijuana, a lawyer only may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law and explain the scope and application of state and federal law to the client's proposed conduct. However, the lawyer cannot provide the types of legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact with medical marijuana businesses.

that essentially precluded ethical cannabis lawyering, Maine later rescinded and replaced that opinion with a new opinion that followed the lead of other states by permitting cannabis lawyering.¹³⁹

Most states have issued opinions to make clear that cannabis lawyering is ethical despite the literal meaning of the rules. By adopting an interpretation of the rule backed by reasons rather than simply amending the language of the rule and comments, states are able to explain the reason for permitting ethical cannabis lawyering in some detail. First, these rationales flesh out the requirements of ethical conduct in this unique setting, rather than simply permitting cannabis lawyering without any requirements. For example, an opinion in Arizona establishes preconditions for cannabis lawyering to be ethical. Lawyers may assist a client pursuant to state cannabis laws

despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.¹⁴⁰

This interpretive opinion operates much more like an amendment of the rule and follows the requirements generally imposed by states when they

Supreme Court of Ohio Bd. of Prof'l Conduct, Op. 2016-6 (2016). Soon thereafter, the Ohio Supreme Court amended Rule 1.2 to provide that "[a] lawyer may . . . assist a client regarding conduct expressly permitted under [the state medical cannabis laws] In these circumstances, the lawyer shall advise the client regarding related federal law." OHIO RULES OF PROF'L CONDUCT R. 1.2(d)(2) (2017).

139. In 2010, Maine issued an opinion that recognized that a lawyer may counsel or assist a client to understand the provisions of state law, but Rule 1.2 "forbids attorneys from counseling a client to engage in the [cannabis] business or to assist a client in doing so." Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 199 (2010). They later rescinded this opinion and replaced it with an opinion calling for an amendment of Rule 1.2(e). Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 214 (2016). In turn, this opinion was quickly replaced by an opinion that clearly stated that cannabis lawyering is ethical, despite the literal wording of Rule 1.2. The opinion stated, "[N]otwithstanding 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" Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 215 (2017).

140. State Bar of Ariz., Op. 11-01 (2011).

amend Rule 1.2.¹⁴¹

Second, the opinions generally illuminate and explore the policy questions implicit in determining whether cannabis lawyering is ethical. A number of states conclude that permitting clients to have the benefit of a full range of legal services to comply with the state regulatory regime is preferable to withholding such counsel solely because the same conduct remains illegal under federal law.¹⁴² Another common theme is that the Department of Justice's enforcement priorities under the Cole Memorandum permitted states to find that their interest in ensuring compliance with cannabis

141. See R.I. Supreme Court Ethics Advisory Panel, Op. 2017-01 (2017) (requiring lawyers advise clients about federal law criminalizing cannabis); Minn. Lawyers Prof'l Responsibility Bd., Op. No. 23 (2015) ("A lawyer may . . . represent, advise and assist clients in all activities relating to and in compliance with the [state's cannabis law], including the manufacture, sale, distribution and use of medical marijuana . . . so long as the lawyer also advises his or her client that such activities may violate federal law, including the federal Controlled Substance[s] Act[.]" (citation omitted)). Washington does not follow the "rule-like" approach, but instead notes that, as a matter of competence, the lawyer should advise the client of federal law that may criminalize the same activity. Wash. State Bar Ass'n, Advisory Op. 201501 (2015).

142. For example, Illinois concluded:

Given the conflict between federal and state law on the subject of marijuana as well as the accommodation provided by the Department of Justice [under the Cole memorandum in effect at that time], the provision of legal advice to those engaged in nascent medical marijuana businesses is far better than forcing such businesses to proceed by guesswork.

....

. . . The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses.

Ill. State Bar Ass'n, Advisory Op. 14-07 (2014). In a similar vein, Maryland cited Illinois and other states that expressly "disfavor withholding legal advice and forcing clients to guess how to pursue activities that are consistent with conduct contemplated by state statute[.]" and utilized the preamble to the Model Rules as the basis for permitting

legal services to further the policy goals and expressly authorized activities under state law and allows attorneys to advise clients conducting medical marijuana activities within the State as to the ramifications of their activities as well as to also actively provide legal services beyond advice, including contract construction, negotiations, assistance in procuring state licenses, and any other legal service necessary to protect or promote business activities sanctioned by the statute, or to comply with the Maryland State Legislature's regulatory scheme of a business.

Md. State Bar Ass'n Comm. on Ethics, Ethics Docket No. 2016-10 (2016); see N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1024 (2014) ("Lawyers might provide a range of assistance to clients seeking to comply with [state cannabis laws] and to act consistently with federal law enforcement policy [articulated in the Cole Memo]. . . . Leaving aside the federal law, the above-described legal assistance would be entirely consistent with lawyers' conventional role in helping clients comply with the law.").

regulatory requirements outweighed the federal interest in enforcing the related criminal statutes.¹⁴³

Other states have chosen not to amend the rules or comments in favor of announcing an administrative policy that it will not prosecute cannabis lawyers for conduct that is arguably contrary to the text of Rule 1.2. For example, the Florida Bar issued a policy statement that they “will not prosecute a Florida Bar member solely for advising a client . . . or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida [law] . . . as long as the lawyer also advises the client regarding related federal law and policy.”¹⁴⁴ A policy of non-prosecution reaffirms that at least some aspects of cannabis lawyering are unethical under the literal terms of Rule 1.2 but grants an administrative waiver as a matter of prosecutorial discretion.

Whether by direct amendment of Rule 1.2, addition of new commentary, or issuance of a formal ethics opinion, jurisdictions that have addressed the issue of cannabis lawyering have nearly unanimously found a means to avoid the literal application of Rule 1.2 to forbid such activity.¹⁴⁵ There are common themes despite the different approaches: Lawyers must assist

143. For example, the Maryland ethics opinion discusses the Cole Memorandum before reaching the following conclusion:

The Committee does not believe that [ethics rules] . . . [are] violated by an attorney who advises and assists clients who conduct medical marijuana activities in compliance with Maryland’s Medical Marijuana Law.

....

. . . The Committee’s position is largely predicated upon the DOJ’s stated position it will leave appropriately state regulated medical marijuana activities unmolested.

Md. State Bar Ass’n Comm. on Ethics, Ethics Docket No. 2016-10 (2016).

144. See Gary Blankenship, *Board Adopts Medical Marijuana Advice Policy*, FLA. B. (June 15, 2014), <https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2Fcb53c80c8fabd49d85256b5900678f6c%2F575b2ba3c91f53dd85257cf200481980> [<https://perma.cc/AXN5-4LYD>] (quoting the Florida Bar policy). Massachusetts adopted the same approach, with the Massachusetts Board of Bar Overseers and the Massachusetts Office of the Bar Counsel adopting a similar policy of non-prosecution for cannabis lawyering. See *BBO/OBC Policy on Legal Advice on Marijuana*, MASS. BD. OF B. OVERSEERS (Mar. 29, 2017), <https://www.massbbo.org/Announcements?id=a0P36000009Yzb3EAC> [<https://perma.cc/V4WC-MJHN>] (“The Massachusetts Board of Bar Overseers and Office of the Bar Counsel will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes and laws regarding medical or other legal forms of marijuana . . .”).

145. Quite a few jurisdictions have not yet formally addressed cannabis lawyering under their ethics codes, including Delaware, the District of Columbia, Louisiana, Michigan, Montana, New Hampshire, and Vermont.

clients only with respect to conduct that is fully compliant with state law, lawyers must fully advise clients of their exposure under federal criminal law, and the previous federal enforcement policy under the Cole Memorandum was a factor in the decision to permit cannabis lawyering.

This rich history provides a backdrop for assessing the ethics of cannabis lawyering in California. In the next section, I analyze how the ethical issues were addressed under the old California Rules of Professional Conduct. In the final section, I analyze the recent adoption of the Model Rules by California and the implications for cannabis lawyering today.

2. Cannabis Lawyering in California Prior to 2018

Whether cannabis lawyering is ethical in California is a complex question.¹⁴⁶ California had long used its own ethical rules until it adopted a version of the Model Rules in 2018. As a result, the dilemmas of cannabis lawyering were expressly considered as the state developed new Rules of Professional Conduct (New Rules) that are drawn from the Model Rules. This significant change occurred after more than twenty years of state-legal cannabis lawyering had been tolerated without comment under the old California Rules of Professional Conduct (Old Rules), and so this historical backdrop is important for understanding the approach taken in the New Rules. In this section, I analyze the application of the Old Rules to cannabis lawyering. This is a hypothetical project, given that the state never produced a definitive statement on the issue by amending the rule, adding commentary, or issuing a binding ethics opinion.

It is clear that California lawyers must respect federal law as part of their professional obligation. The California legislature has imposed on attorneys the duty to “support the Constitution and laws of the United States and of

146. As discussed below, the question is complex because of the twists and turns in the development of the rules of professional conduct in California. However, it is also complex because multiple ethical rules may be implicated with respect to the unique characteristics of cannabis lawyering. For example, because cannabis lawyering might be illegal under federal law, *supra* Part II, Section D, a lawyer's malpractice policy might not provide effective coverage by virtue of an exclusion for claims that arise out of illegal conduct. *Cf.* Mootz, *supra* note 10, at 53–54 (presenting scenarios in which “merely [a] technical” matter could create a “basis for a denial of insurance coverage” in cannabis lawyering). If the malpractice carrier is likely to balk at providing coverage for a claim arising out of cannabis lawyering, the lawyer is acting unethically if she does not advise her cannabis client that she may not have effective professional liability insurance for the representation. *See* CAL. RULES OF PROF'L CONDUCT R. 3-410(A) (1992) (“A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement . . .”). This rule has carried forward in substantially the same form in 2018 as CAL. RULES OF PROF'L CONDUCT R. 1.4.2(a) (2018).

this state.”¹⁴⁷ The centrality of this duty is underscored by the inclusion of this obligation in the statutory oath that every attorney must take, in which the attorney swears “to support the Constitution of the United States and the Constitution of the State of California[.]”¹⁴⁸ The ethics of cannabis lawyering are clearly in doubt when an attorney must swear an oath to uphold a statutory duty to support federal law.

The Old Rules did not compel the conclusion that cannabis lawyering was unethical though, because California’s distinctive rule was phrased very differently than the Model Rule. The corollary to Model Rule 1.2 under the Old Rules provided:

Rule 3-210 Advising the Violation of Law

A member [of the bar] shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.¹⁴⁹

The scope of the Old Rules forbidding lawyers to “advise the violation of any law”¹⁵⁰ is significantly narrower than the Model Rules, which forbid a lawyer from counseling or assisting a client in illegal conduct.¹⁵¹ No reasonable person would claim that a lawyer could ethically advise a client to violate the law, and cannabis lawyering can be accomplished without doing so. Of course, a lawyer would be duty-bound to advise the client that its state-legal activity could result in adverse actions under federal law and would not be permitted to advise the client directly to violate the law.

On the other hand, this literal reading of the Old Rules is certainly too limited. Consider a lawyer who strenuously pleads with a client not to embezzle funds, but when the client chooses to proceed with the illegal conduct the lawyer actively assists the client to do so by lending material assistance to the scheme. It would be bizarre for the lawyer to contend that he acted ethically because he specifically advised the client not to engage in the illegal conduct. As a result, despite the clear difference in the language of the Old Rules and the Model Rules, it is far from clear how Rule 3-210 would address cannabis lawyering differently.

147. CAL. BUS. & PROF. CODE § 6068(a) (Deering 2007).

148. *Id.* § 6067.

149. CAL. RULES OF PROF’L CONDUCT R. 3-210 (1992).

150. *Id.*

151. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (AM. BAR ASS’N 2018).

Although Rule 3-210 was adopted in 1989,¹⁵² the State Bar of California (California Bar) did not issue an ethics opinion to address the representation of medical cannabis clients during the next two decades. However, local bar associations intervened and provided analysis that, although non-binding, provided some measure of comfort to lawyers in the state. Because the California Bar chose not to respond to these well-argued opinions, and because they have been cited and discussed by other jurisdictions considering the ethics of cannabis lawyering, it pays to review the arguments in detail. They emphasize different considerations and provide an interesting array of arguments and analyses that are likely to influence the ethical assessment of cannabis lawyering.

In June 2015, the Bar Association of San Francisco responded to the lack of guidance by the California Bar by issuing an opinion on the ethics of cannabis lawyering. The Association noted the very different wording of the rule, but concluded that “[e]ven if Model Rule 1.2(d) applied in California,” it should not “deprive California residents of candid advice and advocacy.”¹⁵³ The key to the non-binding opinion is easily stated but never fully explained: “Assisting the client who wants to comply with state and local laws is not the same as advising the client to violate federal laws.”¹⁵⁴ This principle leads to a conclusion that is similar in scope to those reached in other jurisdictions under the Model Rules: A California attorney may ethically represent a California client with respect to lawfully forming and operating a medical marijuana dispensary and related matters permissible under state law, even though the attorney may thereby aid and abet violations of federal law. However, the attorney should advise the client of the potential liability under federal law, the relevant adverse consequences, and should be aware of the attorney’s own risks.¹⁵⁵

This conclusion highlights several key points. First, it is limited to California attorneys providing legal assistance to California cannabis companies to assist them in complying with California law. Second, the interpretation recommends not only that the attorney advise the client of the risks under federal law, but that the attorney remain aware of the

152. CAL. RULES OF PROF'L CONDUCT R. 3-210 (1992).

153. Bar Ass'n of S.F., Op. 2015-1 (2015).

154. *Id.*

155. *Id.* The Association made clear that the State Bar's Office of Chief Trial Counsel might disagree with the interpretation since it was not a binding opinion, although it also referenced other state ethics opinions regarding Model Rule 1.2(d), which came to a similar conclusion despite less friendly language in the rule. *Id.*

attorney's own risks. This is a helpful reminder that even (state) ethical cannabis lawyering might include activities that amount to a federal crime. Certainly, a lawyer's ethical obligations to a client include remaining attentive to the potential that the representation will embroil the lawyer in criminal proceedings that may prejudice the client's position.

The ethical opinion squarely confronts the conflict between the lawyer's obligation to support federal laws and the public benefit of ensuring that cannabis clients receive full lawyering services to remain compliant with state law. The opinion states, "What is a lawyer to do when th[e]se laws conflict? We believe that the lawyer may advise, assist, and represent the client in complying with state and local laws and ordinances while, at the same time, counseling against conduct that may invite prosecution for violation of federal laws."¹⁵⁶ But, this resolution leaves much to be desired regarding clarity. If the lawyer is to counsel against conduct that "may invite prosecution" of federal crimes, how are we to interpret this guideline after the rescission of the Cole Memorandum? How may one judge if the active engagement of a lawyer assisting in the growth of a cannabis business is inviting federal prosecution when the entire landscape is fraught with uncertainty?

Finally, the opinion addresses the question of whether representing state-legal cannabis businesses demonstrates an unethical character trait by concluding:

[T]hat a lawyer's assistance to a client who wants to comply with [state law] should not be considered an act of moral turpitude because it does not suggest that the lawyer is dishonest, untrustworthy, or unfit to practice. To the contrary, [under state law] . . . a lawyer who assists a client in complying with [state law] is fulfilling a public service.¹⁵⁷

This point bears emphasis. It is a positive public good that entities comply with a state regulatory system established to protect the public and facilitate the industry. This is made clear in a recent state statute enacted to ensure the enforceability of cannabis-related contracts.¹⁵⁸ The statute provides that state-legal cannabis activity is a "lawful object of a contract[.]" and is "[n]ot contrary to, an express provision of law, any policy of express law, or

156. *Id.*

157. *Id.* (citation omitted). Indeed, the Association concludes that an ethical rule against cannabis lawyering under state law would bring the California Bar into disrepute among the public. *Id.*

158. CAL. CIV. CODE § 1550.5 (West, Westlaw through 2018 Legis. Sess.).

good morals[.]” nor is it “against public policy.”¹⁵⁹ The legislature had clearly established that full cannabis lawyering is in furtherance of state public policy.

Several months later, the Los Angeles County Bar Association issued its own (non-binding) ethics opinion under the Old Rules. The Association’s conclusion adopts different phrasing than the Bar Association of San Francisco’s opinion:

A member [of the California Bar] may advise and assist a client regarding compliance with California’s marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade [federal] arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California’s marijuana laws, a member must limit the scope of the member’s representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law.¹⁶⁰

The Association adds an interesting gloss on the rule. It notes the literal ban on advising the client to violate federal law, but adds an extension that forbids the lawyer from assisting the client to violate federal law “in a manner that would enable the client to evade [federal] arrest or prosecution[.]”¹⁶¹ This qualification protects a cannabis lawyer acting under the authority of state law, but only to the extent that the lawyer does not work to protect the client from federal prosecution. To emphasize the point, the opinion forbids a lawyer from rendering advice or assistance that permits the client “to violate federal law with impunity.”¹⁶² The import is clear: A lawyer may affirmatively assist a client in state-legal activity but may not act affirmatively to protect the client from the exposure under federal law for this same conduct.

This is explained in the opinion by differentiating between a conscious goal and an unintended effect of pursuing another objective. The opinion reasons 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[.]” and

159. *Id.* § 1550.5(b)(1)–(3).

160. L.A. Cty. Bar Ass’n Prof’l Responsibility & Ethics Comm., Op. No. 527 (2015).

161. *Id.*

162. *Id.*

concludes that “[s]o long as the member is not assisting a client in evading the prescriptions of federal law, that member is not acting in a manner that constitutes a failure to support federal law[.]”¹⁶³ This distinction is justified because ethical obligations are a matter of state law and must be read consistently with other state law, including those regulating state-legal cannabis. The Association emphasized that reading ethical rules in a complimentary manner to state cannabis laws is required if “there is a reasonable interpretation of the State Bar Act and the Rules” that fits with the expressed state policy of permitting cannabis businesses to operate legally under state law.¹⁶⁴ Consequently, a lawyer working solely to assist a client to comply with all applicable state laws and regulations could properly be considered ethical under state law even if the client’s conduct violates federal law, so long as the lawyer is not working to hide the client’s conduct from federal authorities.

Both of the local Bar Association opinions reference the Cole Memorandum and the federal government’s decision not to prioritize enforcement activities for state-legal conduct related to medical cannabis.¹⁶⁵ With Attorney General Sessions having rescinded the Cole Memorandum, but also having not provided an alternative statement regarding the federal government’s interest in prosecuting persons engaging in state-legal cannabis activity, the ability to balance the federal interest in the ethics calculus is much more difficult. The Los Angeles Bar Association persuasively focused on whether the lawyer is engaged in behavior designed to shield the client from federal prosecution¹⁶⁶ and this may be the best means for taking into account shifting federal priorities. Should Attorney General Sessions suddenly decide to focus drug enforcement efforts on certain state-legal cannabis activity, the lawyer’s ethical obligation would become more complex because the lawyer would need to ensure that her counsel and assistance regarding compliance with state law could not at the same time be regarded as representation with the effect of evading the attention of the federal government so as to permit the client to act with impunity.

For example, the Los Angeles Bar Association opinion clearly establishes that a lawyer may ethically assist a cannabis client to purchase real estate and

163. *Id.*

164. *Id.*

165. *Id.*; Bar Ass’n of S.F., Op. 2015-1 (2015).

166. L.A. Cty. Bar Ass’n Prof’l Responsibility & Ethics Comm., Op. No. 527 (2015).

engage in other financial transactions.¹⁶⁷ However, if these transactions are funneled through (legal) intermediary business entities in a manner that happens to make it more difficult for the federal government to trace the proceeds of the cannabis business pursuant to an announced and ongoing program of federal drug enforcement, the lawyer is likely crossing the line between merely assisting the client to conduct its business and assisting the client to shield its activities from the federal government. Thus, the application of the rule may work a bit like ethical civil disobedience.¹⁶⁸ The lawyer and client may engage in principled lawbreaking, but they also must accept the consequences for their actions under federal positive law if they fail to persuade authorities of the injustice of law enforcement in that setting.

Against this rich backdrop, the Board of Trustees of the California Bar has been working for years to adopt a form of the Model Rules for the state's rules of professional conduct. In this context, it did not make sense for the California Bar to clarify the ethics of cannabis lawyering under Rule 3-210. Instead, the ethics of cannabis lawyering were worked out through the development of the New Rules and commentary.

3. Cannabis Lawyering in California Under the 2018 Rules of Professional Conduct

On March 30, 2017, the California State Bar's Board of Trustees (Board) adopted a comprehensive recommendation to the California State Supreme Court to adopt new rules of professional conduct that draw extensively from the Model Rules in form and substance.¹⁶⁹ Included in this recommendation was proposed Rule 1.2.1 and proposed comments to the rule. The text of the proposed rule and pertinent comment are as follows:

Rule 1.2.1 Advising or Assisting the Violation of Law (Proposed Rule Adopted by the Board on March 9, 2017)

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct

167. *Id.*

168. *See generally* KIMBERLEY BROWNLEE, CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE 146 (Timothy Endicott et al. eds., 2012) (“[T]o be civilly disobedient, we must accept the *risk* of being punished . . .”).

169. *See generally* Order Amendments to the Rules of Professional Conduct, No. S240991, 2018 Cal. LEXIS 3785, at *1 (Cal. May 10, 2018) (“[T]he Board of Trustees of the State Bar of California filed a request for approval of comprehensive amendments to the California Rules of Professional Conduct. . . . The submission included [seventy] new or amended rules.”).

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.

Comment

....

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.¹⁷⁰

With this proposed rule and comment, the Board adopted a highly conservative approach to ethical cannabis lawyering.

First, the Board did not address the question in the text of the proposed rule. This is odd inasmuch as the rule was being fashioned from scratch and so its final articulation could easily have accommodated a direct and straightforward response to the dilemma of cannabis lawyering. Under the canon of *expressio unius*,¹⁷¹ a reader might expect that the exceptions provided in Rule 1.2.1(b) are a complete and exclusive statement of the valid exceptions, and neither exception addresses on its face the full scope of cannabis lawyering. Recognizing that lawyers may ethically counsel clients about the effects of laws is not the same as recognizing that lawyers may assist the client to conduct a state-legal cannabis business. There can be no doubt that adopting the language of the Model Rules regarding “assisting”

170. Order Re Request for Approval of Proposed Rule 1.2.1 of the Rules of Professional Conduct of the State Bar of California, No. S240991, Admin. Order 2018-04-11, attachment 1 (Cal. Apr. 11, 2018) (en banc), <http://board.calbar.ca.gov/Agenda.aspx?id=14807&tid=0&show=100018897&s=true#10026432> [<https://perma.cc/4YFF-3NMR>] (follow “Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct” hyperlink).

171. See *Expressio Unius Est Exclusio Alterius*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.”).

broadened the scope of the ethical violation as stated in the Old Rules, and therefore heightened the necessity of addressing cannabis lawyering in some fashion.

The newly drafted Comment 6 asserted that proposed Rule 1.2.1(b) “permits” a lawyer to counsel a client about the meaning of state law that might conflict with federal law, “and, despite such a conflict, to assist a client in conduct that the lawyer reasonably believes is permitted” by state law.¹⁷² Of course, the language of the rule says no such thing, and so the comment can best be read as seeking to accommodate cannabis lawyering as an exception to the rule without actually inscribing that exception within the rule itself.

The Board further complicated matters by not addressing the Comment 6 exception solely to the unique circumstances of cannabis lawyering. Other states directly reference state cannabis laws in their efforts to determine the scope of the ethical rules with respect to that circumstance, but the Board chose to phrase the comment in highly general terms. This represented a missed opportunity to carefully consider how the competing ethical considerations play out in the rich and unprecedented context of state-legal cannabis without having to frame the language as if it applied in multiple contexts.

When the proposed new rules were submitted to the California Supreme Court, it withheld approval of proposed Rule 1.2.1 and recommended that the Board adopt changes to Comment 6.¹⁷³ The California Supreme Court specifically directed the Board to consider substantive revisions to Comment 6 drafted by the court. The court’s proposed Comment 6 included a few changes, which are indicated below in ~~strikeout~~ (deletion) and underline (addition):

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

172. Order Re Request for Approval of Proposed Rule 1.2.1 of the Rules of Professional Conduct of the State Bar of California, No. S240991, Admin. Order 2018-04-11, attachment 1 (Cal. Apr. 11, 2018) (en banc), <http://board.calbar.ca.gov/Agenda.aspx?id=14807&tid=0&show=100018897&cs=true#10026432> [<https://perma.cc/4YFF-3NMR>] (follow “Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct” hyperlink).

173. *Id.*

~~implementing that execute or apply to~~ those laws. If California law conflicts with federal or tribal law, the lawyer ~~should also advise~~ must inform the client ~~about regarding~~ related federal or tribal law and policy (see rule 1.4), and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see, e.g., rule 1.1).¹⁷⁴

The court’s version of Comment 6 emphasized the mandatory obligation under certain circumstances to advise the client of a conflict with federal law and to render advice regarding that conflict, which is appropriate and clarifying. However, the primary thrust of the proposal by the court is to restrict the exception regarding the scope of potentially ethical cannabis lawyering. The Board’s proposal to permit a lawyer to assist a client to engage in conduct that is state-legal was reduced to permitting a lawyer only “to assist a client in . . . drafting, administering, or complying with” state-legal cannabis laws.¹⁷⁵

The literal meaning of the court’s proposal would provide protection only for those lawyers working on behalf of governmental actors to “draft” and “administer” the laws comprising state-legal cannabis and would arguably extend to private lawyers only if they are seeking to assist a client to “comply” with those regulations. The scope of compliance is ambiguous and could be construed literally to permit only advice and assistance regarding technical compliance with state-legal obligations. This literal reading would forbid assistance through broader representation, such as negotiating contracts on behalf of a cannabis client or facilitating the financing of its business activities. These forms of representation are not tied directly to compliance with state and local regulations, and these forms of assistance clearly promote the business in ways that directly implicate federal law.

In May 2018, the California Rules Revision Commission (Commission) responded to the court’s narrowing of Comment 6 by proposing that the language be amended.¹⁷⁶ The Commission’s changes to the court’s proposal are indicated below in ~~strikeout~~ (deletion) and underline (addition):

174. *Id.* at attachment 2.

175. *Id.*

176. Memorandum from Justice Lee Edmon et al., Chair, Comm’n for the Revision of the Rules of Prof’l Conduct on Proposed Rule 1.2.1 of the Rules of Professional Conduct—Return from Public Comment & Request for Adoption to Members, Regulation & Discipline Comm. Members, Bd. of Trs. 3 (July 19, 2018), <http://board.calbar.ca.gov/Agenda.aspx?id=14807&tid=0&show=100018897&es=true#10026432> [<https://perma.cc/4YFF-3NMR>] (follow “Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct” hyperlink). For a description of the process

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, ~~and, despite. In the event of~~ such a conflict, ~~to the lawyer may~~ assist a client in drafting, interpreting, administering, or complying with California laws, including statutes, regulations, orders, and other state or local provisions ~~that execute or apply to those laws, even if the client's actions might violate the conflicting federal or tribal law.~~ If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy (see rule 1.4), and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see, e.g., rule rules 1.1 and 1.4).¹⁷⁷

Some of the changes are stylistic and meant solely to improve readability, but the Commission also clearly sought to strengthen the scope of the exception for cannabis lawyering.

First, the Commission's changes expressly embraced the situation in which ethical assistance may be rendered even if the client's conduct is illegal under federal law. Second, the Commission added "interpreting" to the list of lawyering services that may be rendered to assist the client. Although this is a critical addition, it remains ambiguous and fails to provide effective guidance to lawyers.

Consider an attorney who represents a wholesaler of cannabis products that operates in complete conformity with state and local law. The Commission's version of proposed Comment 6 clearly provides that a lawyer may give advice about the meaning and requirements of California cannabis laws and may assist the client to comply with those laws. However, the client may reasonably expect the lawyer to provide representation that goes beyond a narrow construction of "interpreting" and "complying." For example, the lawyer may negotiate and conclude sales agreements, real estate purchases, and acquisitions of inventory on behalf of the client. Additionally, the lawyer may provide general corporate counseling to facilitate the client's business. Presumably, the state has an interest in ensuring that clients have access to lawyering services in their state-legal conduct, but the Commission's Comment 6 fails to make this point expressly and clearly. These considerations are even more pointed when

the Board employed, see *Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct*, ST. B. OF CAL., <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2018-Public-Comment/2018-07> [<https://perma.cc/46UD-FDG6>].

177. Memorandum from Justice Lee Edmon et al., *supra* note 176, at 3.

one considers the role of an in-house lawyer employed by a cannabis business who is deeply involved with all facets of the operation of the business.

In short, the Commission offered amendments to the court's proposed Comment 6 designed to broaden the scope of the cannabis lawyering exception but failed to provide a definitive resolution of the matter. Had the Commission and the court believed that cannabis lawyering should be restricted to the literal meaning of the proposed Rule 1.2.1, they could easily have expressed that intention in Comment 6. By going beyond the literal meaning and seeking to define an exception to the proposed rule, the Commission and the court assumed the responsibility to do so in a manner that provides clear guidance to California attorneys.

After generating its competing version of Comment 6, the Commission sought public comment on the two alternatives.¹⁷⁸ The court's proposed language, designated as Alternative 1, did not receive support.¹⁷⁹ The Commission's proposed language, designated as Alternative 2, was favored by those submitting comments, but a number of commentators noted the inadequacies of Alternative 2 to address effectively the questions regarding cannabis lawyering.¹⁸⁰

The Commission met on July 19, 2018 to consider the public comments and to finalize its proposal to the California Supreme Court for a new Rule 1.2.1 and related comments. In light of criticisms of the wording of Alternative 2, the Commission changed the positioning of the word "interpret," as indicated below in ~~strikeout~~ (deletion) and underline (addition):

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting, ~~interpreting,~~ 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.

178. *Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct*, *supra* note 176.

179. Memorandum from Justice Lee Edmon et al., *supra* note 176, at 2–3. The two alternatives were published by the Commission as it sought public comment on the alternatives. The public comments received were summarized in a document prepared by the Commission, which reveals that all comments either expressed a preference for Alternative 2 or for "neither" Alternative 1 or 2. *Id.* at 3–4.

180. A number of commentators joined me in expressing a preference for Alternative 2, while also emphasizing that Alternative 2 was inadequate. *Id.*

If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).¹⁸¹

The Commission explained that the revisions were “non-substantive” and designed to “help clarify the assistance that a lawyer may provide to a client when there is a conflict between state and federal or tribal law.”¹⁸² The revised version of Alternative 2 as the Commission’s recommended rule for Board adoption was approved unanimously.¹⁸³

The Commission attached the public comments received and considered, along with its responses to those comments. The author drafted a comment on behalf of law professors who teach and write about cannabis law in California that critiqued the seemingly narrow approach of Alternative 2.¹⁸⁴ As explained above, the addition of “interpretation” to the list of professional activities in Comment 6 was unclear in that it appeared in connection with the terms “drafting,” “administering,” and “complying,” which might be construed to extend only to government lawyers designing and enforcing the regulatory regime. Additionally, adding “interpretation” is more narrow than adding “assisting the client to engage in state-legal behavior,” and so various aspects of cannabis lawyering may fall within the rule, but not within the exception established in Comment 6. The Commission offered the following response to the public comment:

The Commission . . . disagrees with the suggestion that the original Comment [6] language should be restored. The Commission believes that the [California] Supreme Court’s revision to the comment (as further modified by the Commission), which specifically identifies the kind of assistance that a lawyer is permitted to provide under paragraph (b), provides better guidance and is thus more appropriate for a comment to a disciplinary rule.

The Commission believes the words “interpreting” and “complying with” are sufficiently broad to encompass each of the activities the commenter has

181. *Id.* at 4.

182. *Id.*

183. *Id.*

184. Professor Francis J. Mootz III et al., Comment Letter on Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct (July 2, 2018), <http://board.calbar.ca.gov/Agenda.aspx?id=14807&tid=0&show=100018897&s=true#10026432> [<https://perma.cc/4YFF-3NMR>] (follow “Reconsideration of Proposed Rule 1.2.1 of the Rules of Professional Conduct” hyperlink).

identified as services that would typically be provided. Moreover, the Commission recommended that the words be reordered for further clarification.¹⁸⁵

This “drafter’s history” would appear to provide assurance that all aspects of cannabis lawyering are ethical, but it doesn’t change the text of the rule nor resolve the ambiguity of the exception that uses more narrow terms than the rule.

The Commission’s revision of Alternative 2 was endorsed by the Board of Trustees and submitted to the California Supreme Court for approval. On September 26, 2018, the California Supreme Court approved Rule 1.2.1 and its comments to become effective on November 1, 2018.¹⁸⁶ Unfortunately, the final result is unsatisfactory. Read literally, Rule 1.2.1 provides that cannabis lawyering is unethical. Comment [6] permits lawyers to represent clients by interpreting the relevant cannabis laws and complying with them, but this seemingly ignores activities such as negotiating and drafting purchase agreements for cannabis. The Commission expressly stated that such activity would fall within the scope of Comment [6] but using this statement to construe the comment that appears to be in conflict with the language of the rule is not certain to prevail in a potential dispute about the scope of an exception for cannabis lawyering.

C. *Is Cannabis Lawyering Prudent in California?*

Even if a lawyer is willing to risk potential criminal prosecution and ethical violations to engage in cannabis lawyering, there are additional prudential concerns that might lead a lawyer to steer clear of the nascent industry. Cannabis prohibition was rooted in racism and unfounded fears that led to demonizing the drug, and this legacy has continuing effects. A cannabis lawyer will certainly find that many people regard cannabis as an immoral or even “evil” drug despite its legalization at the state level. As a result, a cannabis lawyer runs the risk of alienating friends and family by the nature of the lawyer’s practice. One might compare the situation to a lawyer representing legal brothels in rural Nevada: Even if fully legal and in compliance with rules of professional conduct, there certainly are many

185. Memorandum from Justice Lee Edmon et al., *supra* note 176, at attachment 3.

186. Order Re Request for Approval of Proposed Rule 1.2.1 and Other Amendments to the Rules of Professional Conduct of the State Bar of California, No. S240991, Admin. Order 2018-09-26-01 (Cal. Sept 26, 2018) (en banc), <https://newsroom.courts.ca.gov/news/releases-20180928> [<https://perma.cc/C2ZH-NX9M>] (follow “Order and Attachments 1 and 2” hyperlink).

people who would find representation of participants in this (oldest) profession to be unsavory.

The general stigma surrounding cannabis might have implications for cannabis lawyers seeking to maintain a reputation for high quality legal services and professionalism. Similar to “mob lawyers” or others who work on behalf of clients who are not respected, members of the public might assume that cannabis lawyers are a bit shady and untrustworthy simply because of the nature of their work. This risk is likely to fade quickly as large and sophisticated firms embrace cannabis lawyering and begin to represent large, well-funded entities, but it may be an important consideration for solo or small firm practitioners who are specializing in the early stages of legalized cannabis. Perhaps an even greater concern is the risk that a lawyer’s other clients might believe that representation of cannabis clients will have an adverse effect on the non-cannabis clients’ objectives and reputation. For example, a lawyer specializing in an administrative practice on behalf of school boards across the state might experience pushback from his clients if he builds a high profile administrative and regulatory practice on behalf of cannabis clients. The stigma of prior prohibition is likely to be a factor for some years to come.

There are many other ways that representing cannabis clients might cause difficulties for a lawyer. Because banks are extremely wary of accepting deposits derived from the cannabis industry, a lawyer whose principal client base is in the cannabis industry might find that banks are unwilling to accept the lawyer’s firm as a customer.¹⁸⁷ Indeed, the lawyer might even have difficulty securing personal banking services once the local banking industry recognizes that the lawyer’s income is principally derived from cannabis clients.¹⁸⁸ Errors and omissions policies purchased by attorneys are likely to contain exclusions for liabilities arising out of illegal conduct, and many insurers may be unwilling to expressly cover the risks arising out of cannabis

187. See Cheryl Miller, *Questions Raised After Bank Terminates Cannabis-Industry Lawyer’s Account*, LAW.COM (Mar. 1, 2018, 6:00 AM), <https://www.law.com/nationallawjournal/2018/03/01/questions-raised-after-bank-terminates-cannabis-industry-lawyers-account/> [https://perma.cc/A9N4-35X5] (“Marijuana dispensaries and growers have historically struggled to find banks willing to open and maintain accounts for them. That struggle can extend to companies providing services to those businesses, including law firms.”).

188. See Aparajita Saxena, *Marijuana Firms in Cloudy Haze over Banking Woes*, REUTERS (Dec. 29, 2017, 8:27 AM), <https://www.reuters.com/article/us-cannabis-banking/marijuana-firms-in-cloudy-haze-over-banking-woes-idUSKBN1EN191> [https://perma.cc/8AME-837B] (describing how cannabis business owners have had personal bank accounts closed because of the source of their income).

lawyering.¹⁸⁹ A prudent lawyer will have to consider all of these complexities when determining whether to engage in cannabis lawyering.

Perhaps the most troubling concern is that consultations between a lawyer and her cannabis client might not be privileged in the context of some proceedings in federal court. The confidentiality of client communications is one of the oldest privileges and it is at the heart of a lawyer's professional representation of a client. Any risk of losing the privilege must be carefully assessed and fully disclosed to a client. The lawyer-client privilege¹⁹⁰ in California is broadly defined. Communications subject to the privilege include "information transmitted between a client and his or her lawyer in the course of [the attorney-client] relationship and in confidence[,]" and the privilege extends to "a legal opinion formed and the advice given by the lawyer in the course of that relationship."¹⁹¹

"[T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . ."¹⁹² Public policy supports the privilege as a means of ensuring that clients are free to discuss the details of their situation fully without fear that a confidential communication could later be revealed to their detriment.¹⁹³ The privilege is "no mere peripheral

189. See Duane Crone, *Smoke in Our Eyes: Cannabis and Legal Services*, MAINSTREET LEGAL MALPRACTICE INS. (Feb. 15, 2017), <http://www.mainstreetlawyersinsurance.com/smoke-in-our-eyes-cannabis-and-legal-services/> [<https://perma.cc/EU69-R4L4>] (describing the reluctance of malpractice carriers to expressly underwrite cannabis lawyering in light of the complex and evolving regulatory structure).

190. Most states refer to the privilege as the "attorney-client privilege," but California refers to it as the "lawyer-client privilege." CAL. EVID. CODE § 954 (West, Westlaw through 2018 Legis. Sess.).

191. *Id.* § 952.

192. *Id.* § 954.

193. The California Supreme Court has explained that the privilege

exists to permit a client to freely and frankly reveal confidential information, including past criminal conduct, to the attorney or others whose purpose is to assist the attorney, and to thereby enable the attorney to adequately represent the client. In a criminal case the privilege also serves to preserve the defendant's privilege against self-incrimination . . .

People v. Clark, 789 P.2d 127, 151 (Cal. 1990) (citations omitted) (citing *United States v. Zolin*, 491 U.S. 554, 562 (1989)). The federal privilege is justified in similar terms:

The attorney-client privilege is essential to preservation of liberty against a powerful government. People need lawyers to guide them through thickets of complex government requirements, and, to get useful advice, they have to be able to talk to their lawyers candidly without fear that what they say to their own lawyers will be transmitted to the government.

Much of what lawyers actually do for a living consists of helping their clients comply with the law. This valuable social service of counseling clients and bringing them into compliance with

evidentiary rule, but is held vital to the effective administration of justice.”¹⁹⁴

And yet, even this strong policy supporting the privilege may be outweighed by other public policy concerns in certain situations. For example, when a client is communicating with a lawyer in furtherance of criminal or fraudulent activity, the privilege may be vitiated and the lawyer may be compelled to testify about the substance of the confidential communication. The “crime-fraud” exception in California provides that the lawyer-client privilege is overcome “if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.”¹⁹⁵ The exception is narrowly construed, and so the privilege is not lost if the client merely discloses its intent to commit a crime or fraud in the course of a confidential communication.¹⁹⁶ A communication is not protected by the privilege when it “is for the purpose of obtaining assistance in the commission of the crime or fraud or in furtherance thereof”¹⁹⁷

Under the general rules of evidence, providing advice and assistance to a state-legal cannabis business would almost certainly fall within the crime-fraud exception to the lawyer-client privilege because the communication would be for the purpose of facilitating the client’s business in violation of serious federal criminal statutes. Recognizing this significant problem for lawyers, the California legislature amended the Evidence Code to extend the lawyer-client privilege specifically to communications regarding state-legal cannabis activities. The rule regarding the crime-fraud exception now includes the following:

the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants.

United States v. Chen, 99 F.3d 1495, 1499–1500 (9th Cir. 1996) (citations omitted) (first citing *Zolin*, 491 U.S. at 562; *Upjohn Co. v. United States*, 449 U.S. 383, 389, 392 (1981); then citing *United States v. Weitzenhoff*, 35 F.3d 1275, 1293–95 (9th Cir. 1993) (Kleinfeld, J., dissenting); *Fisher v. United States*, 425 U.S. 391, 403 (1976)); see Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978) (“The privilege is also considered necessary to the lawyer’s function as confidential counselor in law on the similar theory that the legal counselor can properly advise the client what to do only if the client is free to make full disclosure.”).

194. *Roberts v. City of Palmdale*, 853 P.2d 496, 506 (Cal. 1993) (en banc) (citing Welfare Rights Org. v. Crisan, 661 P.2d 1073, 1075–77 (Cal. 1983) (en banc)).

195. CAL. EVID. CODE § 956(a).

196. *Clark*, 789 P.2d at 152–53.

197. *Id.* at 53 (quoting CAL. EVID. CODE § 981 cmt.).

This exception to the [lawyer-client] privilege . . . shall not apply to legal services rendered in compliance with state and local laws on medicinal cannabis or adult-use cannabis, and confidential communications provided for the purpose of rendering those services are confidential communications between client and lawyer . . . provided the lawyer also advises the client on conflicts with respect to federal law.¹⁹⁸

For purposes of proceedings in California state courts, this provision ensures that the crime-fraud exception will not overcome the privilege as long as the communications regard state-legal activities.¹⁹⁹

The attorney-client privilege in non-diversity federal court proceedings is governed by federal law, and it is in this setting that cannabis lawyers in California must be cautious. Under the Federal Rules of Evidence, claims of privilege are governed by federal common law.²⁰⁰ “But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”²⁰¹ As explained in the Advisory Committee Notes, this rule “provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced.”²⁰² For example, if the federal government pursues civil forfeiture proceedings against a cannabis client in federal court by exploiting potential ambiguity in the Rohrabacher-Blumenauer amendment, the privilege would be governed by federal common law. More directly, the privilege would be governed by federal common law in the context of a federal criminal prosecution of a cannabis client engaged in the adult-use business, which is not subject to the Rohrabacher-Blumenauer amendment.

The federal common law jurisprudence regarding the crime-fraud exception would overcome the lawyer-client privilege in cases in which the communications were in furtherance of activities that violate the Controlled Substances Act. A federal court will apply the federal common law privilege

198. CAL. EVID. CODE § 956(b).

199. For example, a medical cannabis business owner was prosecuted in California for violating state regulatory requirements and his lawyer’s files were seized under a theory that the communications were in furtherance of a crime. The trial court ordered the attorney’s files returned under the lawyer-client privilege and held that the crime-fraud exception under state law did not apply. *See* Brief for Defendant at 4–5, *California v. Padilla*, No. SCD232218 (Cal. Super. Ct. May 10, 2012) (detailing an unlawful seizure of documents protected by attorney-client privilege).

200. FED. R. EVID. 501.

201. *Id.*

202. *Id.* at advisory committee’s notes to 1974 enactment.

in cases that involve mixed claims, some of which would ordinarily be governed by the state law privilege.²⁰³ The Supreme Court has emphasized that the purpose of the privilege is not served when the confidential communications concern future wrongdoing, by stating, “It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the ‘seal of secrecy[]’ . . . between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.”²⁰⁴ The client’s intent controls, and so it is irrelevant if the lawyer is unaware of the client’s illegal objectives.²⁰⁵ The federal crime-fraud exception would trump the protections that California law provides for purposes of adjudications under state law.²⁰⁶

203. *Wilcox v. Arpaio*, 753 F.3d 872, 876 (9th Cir. 2014).

204. *United States v. Zolin*, 491 U.S. 554, 563 (1989) (quoting *O’Rourke v. Darbishire* [1920] AC 581, 604), *overruled in part by* *United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997). It pays to quote the inimitable Justice Cardozo at greater length than the brief excerpt quoted in *Zolin*:

There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. . . . To drive the privilege away, there must be “something to give colour to the charge;” there must be “*prima facie* evidence that it has some foundation in fact.” When that evidence is supplied, the seal of secrecy is broken.

See Clark v. United States, 289 U.S. 1, 15 (1933) (quoting *O’Rourke v. Darbishire* [1920] AC 581, 604, 614, 622, 631, 633) (drawing analogy to the lawyer-client privilege in a case concerning the confidentiality of a jury ballot).

205. *See United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996) (“[I]t is the client’s knowledge and intentions that are of paramount concern to the application of the crime-fraud exception; the attorney need know nothing about the client’s ongoing or planned illicit activity for the exception to apply. It is therefore irrelevant . . .” (quoting *In re Grand Jury Proceedings*, 87 F.3d 377, 381–82 (9th Cir. 1996); then citing *United States v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988)); *United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977) (“The crime or fraud exception applies even where the attorney is completely unaware that his advice is sought in furtherance of such an improper purpose.” (citing *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir. 1971); *Clark*, 289 U.S. at 15)); *United States v. Calvert*, 523 F.2d 895, 909 (8th Cir. 1975) (“In applying this exception to the doctrine of privilege, it is the client’s purpose which is controlling, and it matters not that the attorney was ignorant of the client’s purpose in making the statements.” (citing *Clark*, 289 U.S. at 15; *United States v. Aldridge*, 484 F.2d 655, 658 (7th Cir. 1973))); *Id.* (“The exception may be invoked where the communications are made in furtherance of acts contemplated by the client; the attorney need not have joined together with the client to commit the fraudulent or criminal acts and the attorney may be ignorant of them.” (citing *Clark*, 289 U.S. at 15)).

206. *See, e.g., Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829, 857 (N.D. Cal. 2016) (holding the federal Sarbanes-Oxley rules governing financial whistleblowing by the general counsel of a firm preempts the ethical rules regarding disclosure of client confidences under California state law).

The procedure for assessing a claim that the crime-fraud exception overcomes the privilege is succinctly described in a recent federal court opinion:

The government has the burden of providing sufficient justification for invoking the crime-fraud exception. To trigger the crime-fraud exception, there are two steps. First the government must satisfy the judge that there is a “factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the [] crime-fraud exception applies.” Then, the otherwise privileged material may be submitted for *in camera* examination. Second, based on the materials presented to the court, the government must make a prima facie showing that the communications were in furtherance of an intended or present illegality and there is some relationship between the communications and the illegality. Mere allegations or suspicion by the government are insufficient. But proof beyond a reasonable doubt is not necessary. The test is whether there is “reasonable cause to believe that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme.” Reasonable cause is more than suspicion but less than a preponderance of the evidence.²⁰⁷

If the federal government ever sought to overcome the privilege in the context of a lawyer’s representation of a state-legal cannabis business, the lawyer would be duty-bound to challenge the request with an *in camera* review, and, if that fails, to argue that the evidence does not support the government’s claim. Unfortunately, this will be nearly impossible to sustain if it is apparent that the client had retained the lawyer’s services to provide full representation and assistance in support of activities that are clearly in violation of federal criminal law.

Prudential concerns must be carefully considered in representing cannabis clients. The continuing stigma of cannabis may lead to adverse consequences for the lawyer professionally and personally. Federal criminal prohibition may cause difficulties in banking and insurance coverage. Perhaps most important, the bedrock expectation that the lawyer-client privilege protects the client’s confidential communications is not justified with regard to federal question civil cases and federal criminal cases.

207. United States v. Braun, No. C-02-5184 RMW, 2003 WL 21791231, at *4 (N.D. Cal. June 17, 2003) (citations omitted) (quoting *Chen*, 99 F.3d at 1503).

IV. CONCLUSION

California recently created the largest adult-use cannabis market in the United States. It has chosen a complex and multi-tiered regulatory scheme that requires the assistance of lawyers and other professionals to navigate the numerous requirements placed on cannabis businesses, but also to provide assistance in running the large, well-funded business operations that are now entering the cannabis space. Despite having just enacted a new comprehensive set of rules of professional conduct, the California Bar and Supreme Court did not expressly provide clear guidance that cannabis lawyering in all its dimensions is ethical. This was a missed opportunity that adds to the already complex considerations that lawyers must weigh in deciding whether to represent cannabis clients.

Lawyers must first consider that cannabis lawyering may trigger criminal liability under federal law, even for traditional lawyering activities, if the requirements of “aiding and abetting” a crime or participating in a “continuing criminal enterprise” are met. Moreover, they must consider the possibility that their confidential communications with clients will be subject to discovery under the crime-fraud exception to the attorney-client privilege pursuant to federal common law. Additional prudential considerations are raised by the long history of false information and fear-mongering by cannabis prohibitionists, which may lead many to regard lawyers working in this space to be of questionable character or quality.

Under the newly adopted rules of professional conduct that became effective on November 1, 2018, it is unethical for a lawyer to “assist a client in conduct that the lawyer knows is criminal.”²⁰⁸ Rule 1.2.1 provides no language that accommodates cannabis lawyering for clients operating in accordance with state law, although Comment [6] does state that “the lawyer may assist a client in drafting or administering, or interpreting or complying with California laws . . . even if the client’s actions might violate . . . conflicting federal or tribal law.”²⁰⁹ There is a clear difference between the unqualified prohibition on “assistance” in Rule 1.2.1, and the suggestion in Comment [6] that “assistance in interpreting or complying with California laws” when there is a conflict with federal law is permissible. The California

208. Order Re Request for Approval of Proposed Rule 1.2.1 and Other Amendments to the Rules of Professional Conduct of the State Bar of California, No. S240991, Admin. Order 2018-09-26-01 (Cal. Sept 26, 2018) (en banc), <https://newsroom.courts.ca.gov/news/releases-20180928> [<https://perma.cc/C2ZH-NX9M>] (follow “Order and Attachments 1 and 2” hyperlink).

209. *Id.*

Bar and Supreme Court will need to take further action to resolve this ambiguity.

As expressed in the Ethics Opinions by the San Francisco and Los Angeles County Bar Associations, there is a demonstrable public benefit to having lawyers be able to assist clients in conducting business in accordance with state and local law. Simply put, if the state has created a highly regulated arena in which a business may operate legally under state law, the purpose of those regulations is best achieved by permitting lawyers to assist the business to operate within legislatively-determined constraints that have presumably been designed to benefit, or minimize harm to, the public. Ensuring that lawyers may legally, ethically, and prudently represent cannabis clients has proven challenging.

Ethical cannabis lawyering in California remains an unfinished story, particularly when set against the past century of governmental action to suppress the use of cannabis by demonizing it and its users. It is easy to assume that the massive influx of venture capital and increasing popular support for legalization ensures that lawyers working to advance the interests of cannabis businesses will have nothing to fear going forward. But this long and winding road may have a few more twists and turns before a federal solution puts these issues to rest.