Marijuana Legal Ethics 101: Asking the Right Questions*

By Peter R. Jarvis

Even though it is still federally illegal, the marijuana industry is thriving in a number of states and appears likely to continue to do so. Indeed, no other industry in U.S. history has been so clearly and expressly illegal at the federal level while being expressly legal (at least in many locations) at the state level. This situation has left both businesspeople and the lawyers who wish to represent them in a sort of legal limbo. Pending at least a change in federal law or federal enforcement policy, this article reviews a series of questions that lawyers who are interested in representing marijuana industry clients may wish to ask themselves as they proceed:

- Are lawyers who advise marijuana clients in states where marijuana is legal under state law nonetheless subject to professional discipline when doing so?
- Are there any special competence or communication requirements that pertain to advising clients engaged in the marijuana business?
- Are there any risks to attorney-client privilege pertaining to the marijuana business?
- Are there any special client due diligence issues?
- Does it make a difference how much or what kinds of work a lawyer does for a marijuana business?
- How about representing clients that do business with marijuana businesses?
- What are the potential choice-of-ethics law issues?
- What about lawyer ownership of marijuana businesses and lawyer consumption of marijuana?
- How is legal malpractice insurance affected by marijuana-related work?
- Should law firms that represent marijuana businesses develop written policies for what they will and will not do?

1. Marijuana is legal in your state. Are you nonetheless subject to discipline for advising marijuana clients?

The Rules of Professional Conduct differ from state to state, so you must always check the rules applicable in each state where you are licensed.[1] But almost all states have some version of Rule 1.2(d) of the Model Rules of Professional Conduct, which provides that:

> 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.

Several things follow from this rule and its related official comments. First (assuming that a lawyer does not advise or assist a client in conduct that the lawyer knows[2] is criminal or fraudulent), it is ethically permissible to advise a client, without going any further, about what conduct is lawful under state law even though that same conduct is unlawful under federal law.

Second, it is ethically permissible to inform a client of the likely legal consequences of taking certain actions – for example, that you believe based on past experience that prosecutors are likely not to prosecute certain kinds of offenses. On the other hand, it is not ethically permissible to advise a client how to conceal criminal or fraudulent activity from the government, and it also is not ethically permissible to encourage or assist a client in criminal or fraudulent conduct. For example, according to Official Comment [9] to Rule 1.2, "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."

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1 The term "state" for my purposes includes the District of Columbia and federal territories and possessions.

2 Under RPC 1.0(f), knowledge denotes "actual knowledge of the fact in question" but "may be inferred from the circumstances." Needless to say, there are times when it can be very difficult to separate the assertion that someone "should have known" something from the assertion that someone "must have known" it.

But if you are considering representing marijuana industry clients, and you know that the conduct of those clients violates federal law, does it follow that you are advising or assisting a client to conduct a "state law-lawful" but "federal law-unlawful" marijuana business in violation of Rule 1.2(d)? And why or why not?

For those states that have expressly decided to legalize and regulate the marijuana business, the answer seems to be a clear "no." Most if not all of these states have either revised the text or the official comments of their own professional conduct rules, or issued ethics opinions permitting a lawyer to make good faith attempts to advise or assist clients with compliance to state marijuana law without being subject to discipline. *See, e.g.*, Oregon RPC 1.2(d); Adv. Op. 201501 (Wash. St. Bar Ass'n 2015).

In addition, a strong argument can be made that a lawyer should not be subject to discipline for advising a client in state law-lawful but federal law-unlawful conduct even in the absence of a black-letter statement in a state's own professional conduct rules. Pursuant to Official Comment [14] to the Scope section of the Model Rules, they are "rules of reason." And it is a bedrock principle that a primary purpose of attorney discipline is to protect the public. *See, e.g., In re Lesansky,* 25 Cal. 4th 11, 17 P.3d 764 (2001) ("Attorney discipline is imposed when necessary 'to protect the public, to promote confidence in the legal system, and to maintain high professional standards'").

The goal of protecting the public would be disserved by prohibiting lawyers from advising their clients how to comply with state law regulation – particularly where a state has affirmatively adopted a regulatory system for the marijuana industry and where the federal government currently appears to be continuing its hands-off approach policy of not enforcing federal law to upset these state regulatory systems (although without giving up the right to change its position). *See, e.g.*, Washington Advisory Opinion 201501 (2015) (making this argument in part).

Indeed, if lawyers in states where the marijuana business is lawful could not advise clients how to comply with state marijuana regulations, no one else could do so either—because non-lawyer advice about such matters would constitute the unauthorized practice of law.

Some lawyers, however, are also admitted to practice before federal agencies such as the USPTO or the IRS. At least thus far, no federal agencies appear to have adopted any express exception in their conduct rules that would allow lawyers to advise clients engaged in state law-lawful marijuana businesses. On the other hand, based on my present knowledge, no federal administrative agencies appear to have disciplined or to be seeking to discipline lawyers advising state law-lawful marijuana businesses.

2. What competence and communication requirements pertain to advising marijuana clients?

Model Rule 1.1 requires that we provide competent representation to our clients, by either having or promptly acquiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.4(a)(5) requires consultation with the client "about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." And Model Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Needless to say, the amount of information that you must give a client about the risks of engaging in the marijuana business depends on what you understand the client to already know. Nonetheless, it seems likely that you will need to advise about the issues and legal consequences of engaging in the marijuana business beyond the present risk of federal criminal prosecution. At a minimum, you would be well-advised to inform the client about each of the following:

- The risk that the federal government could change its present policies and again begin prosecuting marijuana law cases in substantial numbers and situations;
- Limitations on the use of federal banks and charge cards;
- Limitations with respect to federal intellectual property law;
- Limitations with respect to federal bankruptcy law;
- Differences in federal income tax law; and
- Potential limitations on the ability to enforce contracts.

In addition, state (and even local) regulation of marijuana businesses can be quite extensive. Therefore, undertaking representation of a marijuana business without first satisfying yourself that there are no additional risks to you or the client because the business is a marijuana business raises a greater risk that you might be found to lack the necessary competence.

3. Is the attorney-client privilege at risk when communicating with a client in the marijuana businesses?

The crime-fraud exception is one of the well-known exceptions to the attorney-client privilege. In essence, it makes the privilege inapplicable to communications intended by the client to be in aid of the commission of crimes or that the client should have known were in aid of the commission of crimes. *See, e.g., U.S. v. Zolin*, 491 U.S. 554 (1989).

This raises the question: will attorney-client communications that are in aid of a federal crime, whether or not presently prosecuted as such, be protected by privilege? It doesn't seem likely that courts in a state that has legalized marijuana would apply the crime-fraud exception, but no guarantee can be given with respect to the courts in states that have not legalized and regulated marijuana, or in matters in federal court where the Federal Rules of Evidence apply.

4. What due diligence should lawyers undertake before representing marijuana clients?

Generally, the duty of U.S. lawyers to perform due diligence before agreeing to represent a client, and the extent to which lawyers must thereafter monitor a client's compliance with the law, is fairly limited. But to protect yourself against criminal, civil, and disciplinary risks, when it comes to marijuana clients, you will be well-advised to do more than you would usually do to monitor the continuing compliance with state law—at least for the foreseeable future.

Similarly, you may want to be more selective about whom you accept as a client. For example, a potential client's past criminal history or past findings of civil liability for fraud may be more significant here than in other areas of representation.

It also follows that in advising marijuana businesses you may want to do more to document your advice than you might do with respect to other businesses. For example, you should make clear to marijuana clients in writing that interstate sales, sales to minors, and money-laundering are not only prohibited by state law but could also trigger federal as well as state prosecution in a way that goes beyond the likely consequences of the sale of beer to eighteen-year-olds.

5. Does the kind or amount of work I do for a marijuana business make a difference?

The answer would appear to be a clear "yes." For example, if your only work for a marijuana business involves negotiating a single lease for operating a single retail store, or preparing a marijuana-related estate plan, you likely are at much less ethical (and other) risk than if you were general counsel to such a business.

One corollary: If your representation of marijuana businesses is a limited one, consider your state's version of Model Rule 1.2(c), which provides guidance on expressly limiting the scope of representation. You should also be clear in distinguishing current or continuing clients from past clients.

6. How about representing clients that do business with marijuana businesses?

Like any other business, a marijuana business will need to buy goods and services from others. For example, a marijuana grow operation will need to buy farming equipment and fertilizer. The extent to which federal marijuana laws could be construed to apply to sellers of goods and services who happen to have some customers in the marijuana business is beyond the scope of this overview. But at present, it does not seem likely that federal prosecutors would want to pursue cases against the sellers of such goods and services—unless they also knew that the marijuana business was somehow operating inconsistently with state marijuana law or in violation of other federal priorities.

7. What about potential choice-of-ethics-law issues?

The choice-of-ethics law issue arises because you may be sitting in your office in Ohio advising an Ohio marijuana client on a transaction with a business in another state. Ohio has legalized medical marijuana and expressly adopted a rule permitting a lawyer to "counsel or assist a client" regarding medical marijuana issues. Ohio RPC 1.2(d)(2) (2016). But the other state, although it too has legalized medical marijuana, has not modified its conduct rules, and has no relevant ethics opinions. Whose ethics rules apply? The answer is "it depends."

Model Rule 8.5(b)(1) provides that in litigation, the ethics rules of the forum state usually apply. With respect to transactions, Rule 8.5(b)(2) says:

> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

In other words, in our example, you may be held either to Ohio's ethics rules, or those of the other state, if the "predominant effect" of your conduct occurred there. This obviously introduces a degree of uncertainty and therefore risk.

8. How about lawyer ownership of marijuana businesses and lawyer consumption of marijuana?

Some states that have amended their rules or comments to allow lawyers to advise marijuana businesses without risk of discipline under their versions of Model Rule 1.2(d) do not appear to have expressly addressed whether lawyers can own state law-lawful marijuana businesses or personally consume marijuana in a manner that is consistent with state law. These two points are considered, however, in Washington Advisory Opinion 201501 (2015). That opinion concludes that it would make no sense to allow lawyers to advise marijuana businesses but not to own them or to consume marijuana consistently with state law. This appears to be the better approach. As noted in the Washington opinion, however, a lawyer who wishes to invest in a client's marijuana business is subject to Rule 1.8(a) on business transactions with a client, just as a lawyer would be in investing in any other kind of client business.

9. How might legal malpractice insurance be affected by marijuana-related work?

This may seem like a strange question, but it's important to ask. Many legal malpractice insurance policies contain exceptions for various kinds of illegal acts or advice. It's better to know how your insurer will react before a problem arises. If you represent marijuana businesses, be sure to ask about this in advance and to confirm the answer in writing.

10. Should law firms that represent marijuana businesses develop written policies for what they will and will not do?

Yes. As should hopefully be evident by now, representing marijuana businesses presents distinct challenges. Ideally, a firm should develop written policies for what it will and will not do in such representations, just as it should have written policies regarding when it will undertake other particularly sensitive kinds of work.

*This article was adapted from materials accompanying DRI's 2018 Professional Liability Seminar, Nov. 29-30, New York City.

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