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

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

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

**AUTHORITIES INTERPRETED:** Rules 1.1, 1.2.1, 1.4, 1.4.2, 1.6. 1.7. 1.8.1, and 8.4 of the Rules of Professional Conduct of the State Bar of California.[1]

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

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

California has recently adopted a comprehensive and complex regulatory scheme covering the use, production, and sale of cannabis[2] for both medicinal and adult recreational use. Many local California communities also regulate cannabis businesses. At the same time, both possession and commercial production, distribution, and sale of cannabis remain unlawful under federal law, where violators are potentially subject to criminal penalties and civil forfeitures. Those wishing to engage in a cannabis business based in California need compliance advice with respect to both state and federal law and assistance in establishing and operating a business that complies with state law. Lawyers wishing to provide such services are understandably concerned that counseling or assisting conduct that may violate federal criminal law will subject them to discipline for professional misconduct. Relying in significant part on recent changes to the California Rules of Professional Conduct, this opinion aims to address those concerns.

**STATEMENT OF FACTS**

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

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

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

## DISCUSSION

### I. Scope of the Opinion

The conflict between state and federal law that gives rise to the need for this opinion presents difficult questions concerning the relationship between those two bodies of law. This opinion, however, is limited to the issue of a lawyer's obligations—and susceptibility to professional discipline—under the California Rules of Professional Conduct and the State Bar Act when providing advice and assistance with respect to conduct regulated under both state and federal law. This opinion does not address any issues of federal criminal law, except as assumed background for its ethical analysis, does not assess the likelihood of criminal or civil proceedings stemming from alleged violations of federal criminal law, nor does it address the effect of a criminal conviction of a lawyer in a subsequent disciplinary proceeding against the lawyer. *See* Business and Professions Code sections 6101-02. Finally, because this opinion is based on California law and policy, conclusions made here are limited to California lawyers counseling or assisting with respect to conduct occurring in California. This opinion is not binding on state or federal law enforcement authorities.

### II. Legal Background

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

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

Notwithstanding this federal prohibition, thirty-three states have taken steps to legalize cannabis.[3] Thirty states have legalized cannabis for medical use. Ten states have legalized cannabis for adult recreational use. California has legalized both medical and adult recreational use. The California approach to medical cannabis was originally codified in the Compassionate Use Act of 1996 ("CUA"), Health and Safety Code section 11362.5, as supplemented by the Medical Marijuana Program Act ("MMPA"), addressing the prescription, possession and use of cannabis for medicinal purposes. That statute has now been greatly expanded and, in significant part, replaced by the Medicinal and Adult-Use Cannabis Regulation and Safety Act of 2017 ("MAUCRSA"), which comprehensively regulates cultivation, transport, distribution and sale of cannabis for both medicinal and adult recreational use. This statutory framework has in turn given rise to an extensive scheme of regulations promulgated by the Bureau of Cannabis Control (Cal. Code Regs., tit. 16, § 5000 et seq.), the California Department of Public Health (Cal. Code Regs., tit. 17, § 40100 et seq.), and the California Department of Food and Agriculture (Cal. Code Regs., tit. 3, § 8000 et seq.). Possession, prescription, use, cultivation, transportation, distribution, testing and sale of cannabis in compliance with the CUA, MMPA, and MAUCRSA is not subject to criminal punishment or assets seizure under state law. (Health & Safety Code, §§ 11362.5(c), 11362.5(d), 11362.7-.83; Bus. & Prof. Code, § 26032(a).) However, conduct falling outside those boundaries remains subject to criminal prosecution and civil forfeiture under state law. (Health & Safety Code, §§ 11357-61, 11469-95.)

Because California law permits and regulates conduct that is criminal under federal law, there is a conflict between federal and state law regulating cannabis. There is recent authority that regulation of intrastate cultivation, possession, use, and commercialization of cannabis is a lawful exercise of Congressional power to regulate interstate commerce. (*Gonzales v. Raich* (2005) 545 U.S. 1, 29 [125 S. Ct. 2195].) It is also clear that federal law will not recognize a defense of medical necessity to a prosecution under the CSA, where a necessity defense for marijuana is not provided in statute, even in a state which has legalized and regulated medical cannabis. (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483 [121 S. Ct. 1711].) Accordingly, California courts construing the CUA and MMPA have concluded that the permissions and exemptions granted by those statutes under California law have "no impact on the legality of medical marijuana under federal law." (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 385 [68 Cal.Rptr.3d 656]; see also, *Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 759 [115 Cal.Rptr.3d 89].) At the same time, California cannabis laws are not preempted by federal law. There is no express or field

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

preemption relating to cannabis. (*Id.* at p. 756-58.) Moreover, because California has chosen to legalize complying cannabis related activities by suspending state criminal law enforcement, rather than by requiring conduct unlawful under federal law, there is no direct conflict preemption. (*City of Garden Grove v. Superior Court, supra,* at p. 385; *Qualified Patients Assn v. City of Anaheim, supra,* at p. 758-59.) Nor is there obstacle preemption, since state agencies cannot be compelled to enforce federal law under anti-commandeering principles and the ability of federal authorities to enforce those laws is unimpaired by California law. (*Id.* at p. 758-63; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 826-827 [81 Cal.Rptr.3d 461].)

Although federal authorities thus have the power to enforce federal criminal law against persons who are exempt from state prosecution because they are in compliance with state law, they have used that power sparingly in recent years. In the so-called Cole Memorandum, the United States Department of Justice advised that it did not intend to use federal resources to prosecute under federal law, patients and their caregivers who were in "clear and unambiguous compliance" with state medical marijuana laws, except in cases involving broader issues of federal policy, such as sale to minors or money-laundering. (Cole, J. (August 29, 2013). Guidance Regarding Marijuana Enforcement [Memorandum]. Washington, D.C.: U.S. Department of Justice.) More recently, then Attorney General Sessions declared that, given limited resources, federal prosecutors "should follow the well-established principles that govern all federal prosecutions" in deciding which marijuana cases to prosecute and rescinded prior Justice Department guidance with respect to medical marijuana prosecutions as unnecessary. (Sessions, J. (January 4, 2018). Marijuana Enforcement [Memorandum]. Washington, D.C.: U.S. Department of Justice.) In 2014, Congress passed the Rohrabacher-Farr amendment to an appropriations bill, which prohibited the Justice Department from spending appropriated funds to prevent enumerated states, including California, from implementing state laws that authorize the use, distribution, possession or cultivation of medical marijuana. That amendment has been renewed repeatedly since then, most recently in February 2019, and it has been interpreted as prohibiting federal prosecutors from spending funds for the prosecution of individuals who engage in conduct permitted by state medical marijuana laws and are in full compliance with those laws. (*United States v. McIntosh* (9th Cir. 2016) 833 F.3d 1163, 1177.)

In summary, California has established an extensive and complex scheme of state and local regulation of the production, distribution, and use of both medical and recreational cannabis. Compliance with that scheme results in exemption from relevant state criminal penalties, while non-compliance can lead to criminal and civil sanctions under state law. Much of the conduct permitted under California's regulatory scheme is subject to prosecution as a federal felony or misdemeanor; under the federal scheme, compliance with state law may sometimes provide a

defense in medical cannabis cases but is unlikely to do so in cases involving recreational use. Indeed, a lawyer's assisting such conduct may itself be a federal crime.

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

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

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

Rule 1.2.1 provides as follows:

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

The rule does not define the critical terms "counsel" or "assist." Like other California ethics committees that have addressed this issue, we adopt the definitions of those terms as stated in the Restatement (Third) of the Law Governing Lawyers § 94 (2000). "Counseling" by a lawyer is defined as "providing advice to the client about the legality of contemplated activities with the

intent of facilitating or encouraging the client's action." (Rest.3d Law Governing Lawyers § 94, Comment (a), para. 3.) *Id*.

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

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

**Permitted Advice.** Under rule 1.2.1 and Comment [6], a lawyer may provide advice concerning the validity, scope and meaning of California state and local laws permitting and regulating the production, distribution and sale of cannabis, even if the client's contemplated course of conduct clearly violates federal law, so long as the lawyer believes that the client is engaged in a good faith effort to comply with California law. That permission is express in Comment [6]. It is also supported textually by rule 1.2(b). Rule 1.2.1(b)(1) permits discussing the consequences "of any proposed course of conduct," including courses of conduct that the lawyer knows is criminal or fraudulent. And rule 1.2.1(b)(2) permits a lawyer to counsel or assist a client to "make a good faith effort to determine the validity, scope, meaning, or application of a law, rule or ruling of a tribunal." These provisions collectively support the conclusion that "a lawyer is not advising a client to violate federal law when the lawyer advises the client on how not to violate state law." Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 9.

At the same time, any advice that the lawyer gives about California law must be accompanied by clear and explicit information about any conflict with related federal law and policy. The Comment does not specify the level of detail that the lawyer must provide, but common sense suggests that given the current California and federal law relating to cannabis, the lawyer must at a minimum explain clearly that the client's contemplated conduct violates federal criminal law, the penalties for such a violation, and any related risks of civil forfeiture. Often, as Comment [6] suggests, the lawyer's duty of competence may require more detailed advice, a subject that we discuss further below.

In addition, the lawyer's right to advise concerning compliance with California law does not extend to advice about how to avoid detection of, or to conceal, a violation of California or federal law. This conclusion is reinforced by Comment [1] to the rule 1.2.1, which notes, "there is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." See also, Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 12 ("advice and assistance directed to violating federal law is not permitted").

**Permitted Assistance.** Comment [6] explicitly states that in cases of conflict between California and federal law, a lawyer may assist a client in "interpreting or complying with California laws . . . even if the client's actions might violate the conflicting federal . . . law." On its face, this language encompasses assistance in conduct that raises an actual or potential issue of interpretation or compliance with state or local laws regulating cannabis. But it would be incorrect to read that language so narrowly. Rather, we read the inclusive term "California laws" to permit a lawyer dealing with a conflict between state and federal law to assist in conduct calling for interpretation of or compliance with any laws that are relevant to the client's proposed actions, including generally applicable laws relating to contracts, real property, employment, taxation, and other subjects, even "if the client's actions might violate . . . federal law."

This reading of the term "California laws" is supported by considerations of policy. The case for permitting assistance in interpreting or complying with California cannabis laws is strong: "if a lawyer is permitted to *advise* a client on how to act in a manner that would not result in a California crime, the lawyer should be able to *assist* a client in carrying out that advice so the California crime does not occur." Los Angeles County Bar Assn. Formal Opn. No. 527 at 11 (emphasis in original). Given the complexity and pervasiveness of the California regulatory scheme, and the severe consequences of a violation, it makes sense to construe the client's right to assistance to encompass every situation where such a violation could occur—the proposed reading of the term "California laws" accomplishes that goal. Furthermore, a rule that permits assistance in interpreting and complying with California cannabis law (for example, helping to obtain a permit) but denies the same service with the general laws applicable to the formation and operation of that business would hardly advance the California substantive policies in question. Finally, to the extent that the concern is the degree of conflict between federal and state law, it would make little sense to authorize assistance in interpreting or complying with California law that conflicts with federal law, while denying such assistance with respect to California laws that raise no issue of conflict.

The lawyer's permission to assist is not, however, unlimited. It, too, is conditioned upon the lawyer having provided information about the conflict between state and federal law in the

manner required by the rule. Moreover, the lawyer's permission to assist, like the permission to give advice, does not extend to assistance in evading detection or prosecution under state or federal law. *Id*. Rule 1.2.1 Comment [1]; Los Angeles County Bar Assn. Formal Opn. No. 527 at p. 12.[4] Limitations on the lawyer's ability to provide assistance imposed by rule 1.2.1 may also trigger obligations to communicate with the client under rule 1.4.[5] Specifically, rule 1.4(a)(4)

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

[5] Rule 1.4 provides, in pertinent part that:

(a) A lawyer shall:

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

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

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

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

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

**Other California Authorities:** Our analysis of rule 1.2.1 is consistent with the policy considerations previously identified in other California authorities on this issue. California residents are entitled, as a matter of fairness, to understand "their rights, duties and liabilities" under California law. Bar Association of San Francisco Ethics Opinion No. 2015-1 at 3; Los Angeles County Bar Assn. Formal Opn. No. 527. These considerations are especially powerful where, as here, the law involved is complex and criminal sanctions are associated with its violation. Such advice also advances California public policy by increasing the likelihood that the purposes of California's comprehensive and complex regulatory scheme will be fulfilled. These goals can be accommodated, consistent with respect for federal law, provided that lawyers also provide meaningful information on conflicting federal law and policy and the sanctions for its violation. Bar Association of San Francisco Ethics Opinion No. 2015-1 at 3; Los Angeles County Bar Assn. Formal Opn. 527 at p. 13. In the case of cannabis specifically, this balance of policy goals is strongly and independently reaffirmed by recent California legislation, signed by the Governor, amending the crime-fraud exception to the California attorney-client privilege to provide that the exception "shall not apply to legal services rendered in compliance with state and local laws on medical cannabis or adult use cannabis, and confidential communications provided for the purpose of rendering those services" remain privileged, provided that the "lawyer also advises the client on conflicts with respect to federal law." (Evid. Code, § 956(b).) That legislation aligns all three branches of state government in support of the approach outlined here.[6]

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

[6] Similar approaches to the ethical issues of counseling and assisting conduct permitted by state laws have now been adopted in virtually every jurisdiction that has legalized cannabis for medical or adult recreational use. In some states, the conclusion is reflected in an opinion construing existing Rules of Professional Conduct (*e.g.*, Arizona Ethics Opinion 11-01; Illinois Informal Opinion 14-07; New York State Bar Association Opinion 1024 (2014); Washington Advisory Opinion 201501 (2015)), in some by new or amended Rules of Professional Conduct (*e.g.*, Colorado Rules of Professional Conduct 1.2, Comment [14]; Nevada Rules of Professional Conduct 1.2, Comment [1]), in some by statute (*see,* Minnesota Statutes 152.32, subdivision (2)(3)(i)), and in some by changes in prosecutorial policy (see, e.g., Board Adopts Medical Marijuana Advice (Florida, June 15, 2014) [https://www.floridabar.org/the-florida-bar-news/board-adopts-medical-marijuana-advice-policy/ (last accessed: July 15, 2019)]; Massachusetts BBO/OBC Policy on Legal Advice on Marijuana (March 29, 2017)

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

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

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

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

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

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

Based on this background, we conclude that the lawyer in the Statement of Facts may, consistent with the California Rules of Professional Conduct and the Business and Professions Code, provide advice and assistance to any client whom the lawyer believes to be engaged in a good faith effort to comply with state or local law regulating the medicinal or adult-recreational

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[https://www.massbbo.org/Announcements?id=a0P36000009Yzb3EAC (last accessed: July 15, 2019)]. The statutes and rules in each of these states differ in their details from those in California, but the similar approaches adopted reflect broadly shared judgments concerning how best to balance the underlying policies.

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

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

## IV. Additional Ethical Considerations

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

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

Under this provision, a client whose lawyer has complied with rule 1.2.1 may be able to claim the privilege in a state court proceeding. But in a federal criminal or forfeiture proceeding, the governing privilege law will be federal, and the federal, rather than the state, crime-fraud exception will apply. *United States v. Zolin* (1989) 491 U.S. 554 [109 S. Ct. 2619]. The trigger for that exception is that the lawyer's advice was sought in furtherance of a federal crime. *Id.* To the extent that conduct permitted under state law constitutes a federal crime, there is a risk in a federal court proceeding that the lawyer's files may be discoverable and the lawyer may be called as a witness, that the court will rule that because of the crime-fraud exception the privilege does not apply to confidential communications between lawyer and client, and that the lawyer will be ordered to testify concerning those communications. In those circumstances, the lawyer may face a conflict between her statutory duty of confidentiality under California law, which contains no express exception for compliance with a court order (*see* rule 1.6 and Bus. & Prof. Code, § 6068(e)), her statutory obligation to obey a court order (Bus. & Prof. Code, § 6103, *In the Matter of Collins* (Review Dept. 2018) 2018 WL 1586275), and her own interest in avoiding imprisonment or fines for contempt.

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

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

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

know that the insurance contract will not be effective with respect to that practice, the lawyer must disclose that fact in writing to the client pursuant to rule 1.4.2.

Lawyers may also find that they are unable to find a bank that will allow them to establish a client trust account for a practice which involves representing cannabis businesses or deposit funds from those clients into the existing client trust account. If a lawyer finds that she is unable to provide safekeeping of the client's funds, she should so inform the client pursuant to rule 1.4(a)(3).[7]

**Lawyer Investment in the Client's Cannabis Business.** The facts presented in this opinion raise the possibility that the lawyer will make an investment in the entity that carries out the business in lieu of legal fees. Given the analysis above, there can be no ethical objection to such an investment based on a conflict between state and federal law, so long as the arrangement is not intended to evade detection or prosecution under California or federal law. The same principles that permit a California business to receive a California lawyer's assistance in complying with California law, notwithstanding any resulting violation of federal law, should also permit the client to pay for those services and for the lawyer to receive payment in the form of an interest in that business. However, in making such an investment the lawyer must comply with other relevant Rules. Thus, if the investment opportunity is in substance a payment for legal services, it must satisfy the standards of rule 1.5. Additionally, the lawyer's investment will constitute a business transaction with the client, subject to the requirements of rule 1.8.1. Therefore, the terms of the transaction must be fair and reasonable to the client, full disclosure of its terms and of the lawyer's role in the transaction must be in writing in a manner that should reasonably be understood by the client, the client must be represented or advised in writing to seek representation by an independent counsel, and the client must give informed written consent to the terms of the transaction and the lawyer's role in it. Finally, the fact that the lawyer is taking a financial stake in the client's business will ordinarily give rise to a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest which requires compliance with rules 1.7(b) and (d), including obtaining the client's informed written consent.

**Organizational Clients and Constituents.** One important goal of California's expanded regulatory scheme is to draw former participants in the unregulated market into the regulated market created by that scheme. Assuming that purpose is successful, it seems likely that many new participants will choose, perhaps for the first time, to conduct their business using an

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

organizational form. Lawyers for these organizations should be alert to the concept that the client is the organization itself, rather than its constituents, and their obligation is to act in the organization's best lawful interests. Rule 1.13(a). In particular, they should take special care to explain the identity of the client to organizational constituents whenever it is known or reasonably knowable that the interests of the organization and the constituent are adverse. Rule 1.13(f).

**Truthfulness to Third Parties.** Rule 4.1(b) forbids a lawyer from failing "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," unless disclosure is barred by the lawyer's duty of confidentiality. The fact that a business is engaged in commercial cannabis activity—as well as the nature and degree of that engagement—is likely to be a material fact in many transactions between that business and with a third party, notably because it has a material impact on the financial, legal, and reputational risks of dealing with the business. Moreover, depending on the circumstances, including the expectations and situation of the third person, the client's intentional failure to disclose such facts may itself be a form of civil fraud. (BAJI No. 1901 (2017).) In addition, under rule 1.2.1, given the present conflict between federal and state cannabis regulation, a lawyer may not assist in conduct that is intended to conceal the client's actions or evade prosecution for them. For all these reasons, lawyers representing cannabis businesses should be alert to situations where the lawyer's duty of truthfulness may bar the lawyer from assisting the client in dealings with a third party unless the material facts regarding the client's business have been disclosed. In such situations, if the client declines to permit disclosure, the lawyer must inform the client of the relevant limitations on the lawyer's conduct and should consider withdrawal from the matter. Rule 1.4(a)(4) and 4.1, Comment [5].

## CONCLUSION

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

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of

California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.