

---

# Dazed and Confused: Clearing the Ethics Weeds in the Marijuana Business

by Andrea Geraghty, Meyer, Unkovic & Scott LLP, Pittsburgh, PA

Originally published in the September 2017 ACREL Newsletter, Vol. 35 No.3

## Introduction

To date, 29 states and the District of Columbia, Guam and Puerto Rico have enacted statutes permitting medical marijuana.<sup>1</sup> Additionally, eight states and the District of Columbia have legalized marijuana for recreational use.<sup>2</sup> Since 1996 there has been a clear and aggressive trend toward legalization or decriminalization<sup>3</sup> of marijuana; however, it is still unlawful to manufacture, distribute, or dispense marijuana under the Federal Controlled Substances Act (“CSA”).<sup>4</sup> For lawyers working with clients involved in the marijuana industry in states where some form of marijuana is permitted, this dichotomy creates a difficult intersection under the Model Rules of Professional Conduct (the “RPC”), which as adopted in many jurisdictions broadly permits lawyers to advise clients on the legal consequences of conduct but prohibits lawyers from counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal or fraudulent.<sup>5</sup>

To assist the real property practitioner in this relatively new and rapidly changing area of the law, this article reviews the different approaches states have taken with respect to lawyers advising clients involved in the marijuana industry. It is indisputable that patients, physicians, sellers, growers, dispensaries, and other businesses need lawyers to help navigate this new industry. Unfortunately, these individuals and entities are not well served by ethical rules that prohibit legal counsel from providing advice.

## The Controlled Substances Act

When Congress passed the CSA in 1970, it classified marijuana, alongside heroin and LSD, as a Schedule I drug, while oxycodone and methamphetamine are regulated differently as Schedule II drugs.<sup>6</sup> Under the CSA, Schedule I drugs are drugs that “have

no approved medical use in treatment” and “a high potential for abuse.” During the Obama administration, the Drug Enforcement Agency (the “DEA”) was expected to reschedule marijuana.<sup>7</sup> In 2015, the U.S. Surgeon General, Vivek Murthy, suggested that marijuana “can be helpful” for some medical conditions, which contributed to the expectation of rescheduling.<sup>8</sup> However, on Aug 11, 2016, the DEA rejected rescheduling, concluding that marijuana has no currently accepted medical use in treatment in the United States, and has a high potential for abuse.<sup>9</sup> While at the same time, the DEA indicated it would increase the amount of marijuana available for legitimate research, it remains unlawful under federal law to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, marijuana in any form.<sup>10</sup>

Notwithstanding the federal prohibition, the U.S. Department of Justice (the “DOJ”) issued a memoranda addressing the enforcement of federal law in states that permit medical or recreational marijuana use (the “Cole Memorandum”).<sup>12</sup> The Cole Memorandum reiterated the DOJ’s commitment to enforcing the CSA consistent with Congress’ determination that marijuana is a dangerous drug that serves as a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.<sup>12</sup> In furtherance of that commitment, the Cole Memorandum instructed DOJ attorneys and law enforcement to focus on the following eight priorities in enforcing the CSA against marijuana related conduct:

1. Distribution of marijuana to minors;
2. Revenue passing to criminal enterprises, gangs and cartels;
3. Diversion of marijuana from states where it is legal;
4. Use of state-authorized marijuana activity as a cover for other illegal drugs or activity;

*continued on p. 7*

---

## Dazed and Confused...

*continued from p. 6*

5. Violence and the use of firearms;
6. Driving under the influence or other adverse public health consequences;
7. Use of public lands for marijuana production; and
8. Marijuana possession or use on federal property.<sup>13</sup>

In those states that enacted laws to authorize the production, distribution and possession of marijuana but also established strict regulatory schemes that protect the enforcement priorities identified in the DOJ Memorandum, the Obama DOJ signaled its intent to defer to state law to address marijuana activity.<sup>14 15</sup> Although the Trump administration has hinted that it may take a harder line on the use and distribution of marijuana, it has not, as of this writing, reversed the Cole Memorandum. However, in early April 2017, the current Attorney General has created a task force within the Justice Department which will evaluate marijuana policy as part of a larger review of crime reduction and public safety.

While the shifting political winds may result in more aggressive enforcement, the use and distribution of marijuana remains illegal under federal law, and as a result the Rules of Professional Conduct create an obvious ethical tension for lawyers in states where some form of marijuana is legal under state law.

### **Model Rule 1.2(d)**

The ABA Model RPC 1.2(d), permits lawyers to advise clients on the legal consequences of conduct, but prohibits lawyers from assisting clients with conduct the attorney knows is criminal.<sup>16</sup> Rule 1.2(d) provides:

“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.”<sup>17</sup>

As the marijuana industry grows it has become even more important for bar associations and courts in affected states to provide guidance for lawyers who are asked to advise clients on marijuana-related matters.

### **Approaches to the Rule 1.2 Dilemma**

Those states that permit the use and distribution of marijuana in some manner have approached this issue in a number of ways, from complete prohibition to tolerance in the forms of ethics opinions, comments, and amendments to their state’s version of the RPC 1.2(d) and, over time, some have altered their stances. In 2010, Connecticut and Maine counseled its attorneys to stay away from state-permitted marijuana businesses because of the concern they violated federal law.<sup>18</sup> In August of 2016, Ohio’s Supreme Court followed suit by issuing a non-binding advisory opinion stating that Ohio lawyers could not advise medical marijuana businesses and patients under the state’s conduct standards.<sup>19</sup> While these opinions provided a bright line rule for lawyers, they also deprived numerous clients of legal counsel. Subsequently, Connecticut, Maine, and Ohio abandoned their zero-tolerance approaches. Effective January 1, 2015, Connecticut’s Superior Court judges amended Rule 1.2(d) to permit a lawyer to advise or assist a client with conduct permitted by that state’s law “provided the lawyer counsels the client about the legal consequences under other applicable law.”<sup>20</sup> Shortly thereafter, Maine’s Professional Ethics Commission mirrored Connecticut’s approach and amended its version of Rule 1.2(e).<sup>21</sup> Lastly, on September 20, 2016, Ohio’s Supreme Court amended its RPC so that lawyers could counsel medical marijuana clients.<sup>22</sup>

A majority of the states that permit the use of marijuana in some manner have obtained guidance about working with marijuana clients from their respective Supreme Courts, Bar Associations, or Ethics Committees. Lawyers practicing in states where the

*continued on p. 8*

---

## Dazed and Confused...

*continued from p. 7*

Rules of Professional Conduct have been amended are afforded the most protection. Those lawyers practicing in states that have yet to address this issue or where only non-binding opinions have been issued are still at risk of violating conduct rules. The chart below lists the actions taken by each state that permits a form of marijuana:

<b>Conduct Rules Amended</b>
Alaska, Colorado, Connecticut, Hawaii, Illinois, Nevada, Maine, Oregon, Ohio, Pennsylvania, and Washington.
<b>Opinions Issued or Pending</b>
Arizona, Arkansas, California, Delaware, Florida, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, and District of Columbia

In 2011, the State Bar of Arizona concluded that lawyers could both advise and assist clients operating under the state medical marijuana statute as long as the federal government maintained its current enforcement policy and no court concluded that the CSA preempted the Arizona medical marijuana law.<sup>23</sup> The State Bar of Arizona, in an ethics opinion proposed the following comment to Rule 1.2(d):

(1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Medical Marijuana Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the attorney reasonably concludes that the client's activities or proposed activities comply with the state's requirements; and (3) the attorney advises the client regarding possible federal law implications of the proposed conduct.<sup>24</sup>

In reaching its conclusion, the State Bar of Arizona stressed the importance of having access to legal counsel and the role attorneys serve in assisting clients with complying with Arizona's law.<sup>25</sup> While an ethics opinion like that issued in Arizona may give

some comfort to lawyers as they give counsel on issues related to marijuana, an amendment to the Rules of Professional Conduct is essential to provide true clarity.

The Washington Supreme Court, in November 2014, adopted comment 18 to Rule 1.2, which provides:

At least until there is a subsequent change of federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, Ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders and other state and local provisions implementing them.

In Colorado, the state's Supreme Court adopted a similar comment to Rule 1.2(d), as follows:

A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitutional article XVIII, §§ 14 and 16, and may assist a client 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. In these circumstances the lawyer shall also advise the client regarding related federal law and policy.

To date, the trend towards authorizing lawyers to counsel clients has continued, however, only Alaska, Colorado, Connecticut, Hawaii, Illinois, Nevada, Maine, Oregon, Ohio, Pennsylvania, and Washington have settled this issue for their lawyers by actually amending their respective conduct rules. With the exception of Minnesota, the ethical concerns of lawyers advising clients involved the marijuana industry remain unanswered.<sup>27</sup>

*continued on p. 9*

---

## Dazed and Confused...

*continued from p. 8*

### Conclusion

The marijuana industry has an estimated annual worth of \$5.4 billion. But the dichotomy between the CSA and state legalization has caused many lawyers to shy away from this new industry. Until the CSA is amended, each state should amend its Professional Conduct Rules so that lawyers can counsel clients without worrying about ethical violations. This is important because lawyers are in the best position to guide industry participants on how to comply with the state laws that govern the marijuana industry. ■

---

<sup>1</sup> State Medical Marijuana Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES (August 2, 2017) <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>

<sup>2</sup> Melia Robinson, *It's 2017: Here's where you can legally smoke weed now*, BUSINESS INSIDER, (Jan. 8, 2017) <http://www.businessinsider.com/where-can-you-legally-smoke-weed-2017-1>.

<sup>3</sup> Decriminalization is typically understood to mean that there will be no arrest, prison time or criminal record for possession of marijuana for personal use.

<sup>4</sup> 21 U.S.C. §§ 841, 844.

<sup>5</sup> ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.2(d).

<sup>6</sup> 21 U.S.C. § 812(b).

<sup>7</sup> 21 U.S.C. § 812(c); Trevor Hughes, *DEA could reclassify marijuana, allowing doctors to conduct more research*, USA TODAY (May 24, 2016), <http://www.usatoday.com/story/news/2016/05/21/dea-could-reschedule-marijuana-allowing-doctors-conduct-more-research/84670716/>.

<sup>8</sup> John Hudak & Grace Wallack, *How to reschedule marijuana, and why it's unlikely anytime soon*, BROOKINGS INSTITUTION (Feb. 13, 2015), <https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/>.

<sup>9</sup> DEA HEADQUARTERS NEWS, <https://www.dea.gov/divisions/hq/2016/hq081116.shtml> (last visited Mar. 31, 2017).

<sup>10</sup> 21 U.S.C. § 841(b)(1)(A), (b)(1)(D).

<sup>11</sup> James M. Cole, *Guidance Regarding Marijuana Enforcement*, U.S. DEPARTMENT OF JUSTICE (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Christopher Ingraham, *What the future of marijuana legalization could look like under President Trump*, THE WASHINGTON POST (Nov. 9, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/09/what-the-future-of-marijuana-legalization-could-look-like-under-president-trump/>.

<sup>15</sup> See *supra* note 10; see also John A. Gilbert, Jr. & Larry K. Houck, *GAO Recommends Better Monitoring of Federal Marijuana Enforcement Priorities; DOJ and DEA Officials Report on Marijuana Enforcement*, [http://www.fdalawblog.net/fda\\_blog\\_hyman\\_phelps/2016/02/gao-recommends-better-monitoring-of-federal-marijuana-enforcement-priorities-doj-and-dea-officials-r.html](http://www.fdalawblog.net/fda_blog_hyman_phelps/2016/02/gao-recommends-better-monitoring-of-federal-marijuana-enforcement-priorities-doj-and-dea-officials-r.html) (last visited Mar. 31, 2017).

<sup>16</sup> See *supra* note 4.

<sup>17</sup> *Id.*

<sup>18</sup> Maine Board of Overseers of the Bar Opinion 199 (2010); Connecticut Bar Association Professional Ethics Commission Informal Opinion 2013-02 (2013).

<sup>19</sup> OHIO ETHICS OPINION 2016-6, [http://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2016/Op\\_16-006.pdf](http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2016/Op_16-006.pdf) (last visited Mar. 31, 2017).

<sup>20</sup> Jay Stapleton, *Judges Vote To Allow Lawyers To Represent Medical Marijuana Growers*, Connecticut Law Tribune, <http://www.ctlawtribune.com/id=1202661028491?keywords=Jay+stapleton&publication=Connecticut> (last visited Mar. 31, 2017).

<sup>21</sup> Maine Board of Overseers of the Bar Opinion 214 (2016), [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=683190](http://www.mebaroverseers.org/attorney_services/opinion.html?id=683190) (last visited Mar. 31, 2017).

<sup>22</sup> AMENDMENTS TO THE OHIO RULES OF PROFESSIONAL CONDUCT, [http://www.supremecourtohio.gov/ruleamendments/documents/Medical%20Marijuana%20Amendment%20\(FINAL\).pdf](http://www.supremecourtohio.gov/ruleamendments/documents/Medical%20Marijuana%20Amendment%20(FINAL).pdf) (last visited Mar. 31, 2017).

<sup>23</sup> State Bar of Arizona, Formal Opinion 11-01 (2011), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710> (last visited Mar. 31, 2017).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> WASH. RULES OF PROF'L CONDUCT RULE 1.2(d) cmt. 18, [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.rulesPDF&groupNa me=ga&setName=RPC&pdf=1](http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupNa me=ga&setName=RPC&pdf=1) (last visited Mar. 31, 2017).

<sup>27</sup> MINN. STAT. ANN. § 152.32(2)(i)(2014) (Minnesota passed a law that protects attorneys from ethical violations stemming from counseling marijuana clients).