Thinking of Representing Someone in the Cannabis Industry?

SAFE DISPENSING OF LEGAL ADVICE

by Kim D. Ringler and Lisa D. Taylor

In a growing trend, more than half of the states in the country, along with the District of Columbia, have decriminalized marijuana-related activity to varying degrees. Many states, including New Jersey, New York and Florida, legalized marijuana for limited medicinal purposes such as treating glaucoma. For example, the New Jersey Compassionate Use Medical Marijuana Act[1] went into effect in 2010. A few jurisdictions, including Colorado, Washington State, California, the District of Columbia and most recently Vermont, have enacted broader laws permitting recreational marijuana use by adults. These changes in public policy reflected in state statutes prompt clients in the cannabis marketplace to reach out for informed legal advice. Attorneys representing these clients need to consider how to safely and ethically dispense legal advice given the head-on conflict between state statutes and controlling federal law.

Federal law still classifies marijuana, including medical marijuana, as an illegal substance under the Controlled Substances Act (CSA).[2] Under federal law, marijuana is classified as a Schedule I drug, which by definition means it has a high potential

for abuse and no valid medical uses. Violations of the CSA can result in penalties of up to 20 years in prison. Marijuana-related commerce or usage activity permitted under state law remains illegal and subject to criminal prosecution under federal law, creating a host of challenges for lawyers.

In 2008 and 2009, as medical marijuana became permissible in some states, the U.S. Department of Justice issued guidance to federal prosecutors regarding prosecutorial discretion and enforcement of the CSA as it pertained to marijuana in those jurisdictions. On Aug. 29, 2013, Deputy Attorney General James M. Cole issued formal guidance regarding the contradicting laws entitled "Guidance Regarding Marijuana Enforcement to all United States Attorneys," known as the Cole memo. It stated that while prosecution was subject to discretion, prosecutorial resources should not be expended when "an operation is demonstrably in compliance with a strong and effective state regulatory system."

The Cole memo brought comfort to the developing marijuana industry, although some risk remained not just for businesses producing, processing and selling marijuana, but for attorneys representing those businesses.

The Cole comfort effect was short lived. The risks to marijuana-related business and attorneys were sharply exacerbated on Jan. 4 of this year, when the Department of Justice issued a memo from Attorney General Jeff Sessions, known as the Sessions memo. This memo nullified the Cole memo and stated that "previous nationwide guidance specific to marijuana enforcement is unnecessary and rescinded, effective immediately." It emphasized that not only was the cultivation, distribution and possession of marijuana illegal under federal law, but also that such activities could trigger prosecution for other crimes, such as money laundering. The Sessions memo reflected a strict policy: "Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime." Subsequently, President Donald Trump was reported as advising Colorado Senator Cory Gardner that rescission of the Cole memo would not impact Colorado's legal marijuana industry,[3] and that he would support a legislative initiative to permit states to make decisions about whether or not to legalize marijuana.[4] However, as of the writing of this article, no such legislation has been enacted.

As a result of the contradictions in play, lawyers representing cannabis businesses now risk prosecution for aiding and abetting illegal activity under federal law.

The risks of prosecution at the federal level were further diminished by a provision in the Department of Justice appropriations bill to protect medical marijuana programs by de-funding prosecution efforts. Currently known as the Rohrabacher-Blumenauer Amendment, and applied to each budget cycle since 2014, the provision bars the use of federal funds to prevent implementation of lawful state medical marijuana programs.[5] The amendment in force as of this writing is set to expire Sept. 30 of this year.

As a result of the contradictions in play, lawyers representing cannabis businesses now risk prosecution for aiding and abetting illegal activity under federal law. In addition, lawyers face potential disciplinary exposure notwithstanding the adoption of amendments to the Rules of Professional Conduct (RPCs) in New Jersey to address this precise issue.

Implicated Ethics Rules

Representation of cannabis-related businesses in New Jersey calls into play numerous ethics rules for attorneys.

First and most relevant is RPC 1.2(d) as recently amended, effective Sept. 1, 2016. The rule prohibits lawyers from counseling or assisting a client in illegal, criminal or fraudulent conduct, including preparing documents violative of law. The recent amendment, however, states, "[a] lawyer may counsel a client

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regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy."

This forward-thinking revision created a safe harbor for New Jersey lawyers, with respect to New Jersey disciplinary actions. It does not eliminate the risk of charges of professional misconduct brought by another jurisdiction where a lawyer may also be admitted, or by the United States courts' disciplinary systems, which could, in turn, trigger reciprocal disciplinary proceedings in New Jersey. Nor does the revised RPC insulate lawyers practicing on a limited basis in New Jersey or New Jersey lawyers practicing, under RPC 5.5-type arrangements, out of state.

However, revised RPC 1.2(d) enormously reduces the risk for professional disciplinary consequences flowing from advising clients on legal medical marijuana matters in New Jersey.

Other pertinent ethics rules include the following:

> RPC 1.1 (competence)—the duty to be aware of the potential conflict between State and federal laws and advise the client appropriately, as referenced above in the newly amended RPC 1.2(d).
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> RPC 1.2(a) (consultation with the client as to the scope of representation)—whether the lawyer can shelter beneath the client's judgment of legal risk when advising on the legality or illegality of certain contemplated actions.
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> RPC 1.2(c) (limiting the lawyer's scope of representation)—providing limited (and correct) advice but delineating boundaries of the lawyer's involvement.
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> RPC 1.6 (confidentiality of information)—crime/fraud abrogation of privilege, duty of the lawyer to speak out to address a potential violation of law.

RPC 1.6 pertaining to preserving confidentiality of information relating to the representation of a client merits extra consideration because of the potential ethical pitfalls implicated by the rule. While protecting client confidences and secrets, on the one hand, the RPC also mandates disclosure of otherwise protected information to prevent a crime or illegal act. Potentially, attorney-client communication centered on proposed conduct constituting criminal activity under federal law foregoes the confidentiality normally attached to such communication. This exception from disclosure protection includes all information relating to the arguably illegal enterprise—business plans, proprietary information, strategy and so forth. The mandate to disclose illegal action creates a potential nightmare for lawyer and client alike. RPC 1.6(b)(1), the crime-fraud exception, substantially eviscerates RPC 1.2(d).

Responses of State Bar Regulators

Like New Jersey, an increasing number of states have adopted policies or amended their ethics rules to mitigate attorneys' exposure.

In June 2014, the board of governors of the Florida bar adopted a policy recommended by the Florida Disciplinary Procedure Committee against disciplining Florida lawyers for advising clients about using marijuana or operating such a business. The policy states "[t]he Florida Bar will not prosecute a Florida Bar member solely for advising a client regarding the validity, scope, and meaning of Florida statutes regarding medical marijuana or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy."

The Florida Disciplinary Procedure Committee did not amend its rules; thus, the Florida Bar Rule 4-1.2, which states that "a lawyer shall not counsel the client to engage or assist the client in conduct the lawyer knows or reasonably knows is criminal," still applies. The new policy applies only to Florida attorneys advising clients about Florida law, and does not protect against exposure in other jurisdictions.

A number of other states have also adopted comments to Rule 1.2 to address representation of clients in the cannabis industry. For example, on March 24, 2014, the Colorado Supreme Court adopted Comment 14 to Rule 1.2 of the Colorado Rules of Professional Conduct. Comment 14 states "[a] lawyer may counsel a client regarding the validity, scope, and meaning of Colorado Constitution Article XVIII, Secs. 14 & 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." Similarly, on May 7, 2014, the Supreme Court of Nevada adopted Comment 1 to Nevada Rule of Professional Conduct 1.2, which states "[a] lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution Article 4, Section 38, and NRS Chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including 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."

Also in 2015, both Alaska and Hawaii amended their versions of Rule 1.2 by incorporating new language to address the issue of representation. Alaska Rule of Professional Conduct 1.2(f), adopted in June 2015, states that "[a] lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage

in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy."

Hawaii Rule of Professional Conduct 1.2(d) was amended on Oct. 20, 2015, to add language stating that a lawyer "may counsel or assist a client regarding conduct expressly permitted by Hawaii law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct."

In 2015, the Washington State Bar Association issued Advisory Opinion 201501 and Comment 18 to Washington Rule of Professional Conduct 1.2 in order to allow Washington lawyers to assist clients involved in marijuana enterprises. Comment 18 states "[a]t least until there is a 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." However, in February of this year the Committee on Professional Ethics of the Washington State Bar Association (which like the Florida bar and unlike New Jersey's system of regulation, is an integrated bar and is responsible for attorney discipline) formed a subcommittee to examine other states' rules and consider a proposal to amend Comment 18 and revise Advisory Opinion 201501. As set forth in the minutes of Feb. 9, the reason for this is that "the predicate for the opinion and the comment have changed due to the recent shift in federal enforcement policy [*i.e.,* rescission of the Cole memo and issuance of the Sessions memo]." As of this writing, the matter was still under consideration.

In many jurisdictions, including New Jersey, the rules pertaining to professional conduct have been amended so attorneys are less exposed to professional discipline merely as a consequence of representing a client who does business in the cannabis industry. Only time and developing federal enforcement practices will tell whether those changes sufficiently insulate lawyers from charges of professional misconduct based on counseling illegal activity at the federal level. Firms enthusiastically promoting cannabis advice to potential clients in the industry should be wary of the serious risks present in these unsettled times.

Other Issues to Be Considered

Because federal law classifies all marijuana, including medical marijuana, as an illegal substance, most businesses engaged in any aspect of the product, including growth, distribution and sale, are cash businesses. This reality creates numerous challenges for the businesses and numerous areas of potential exposure for attorneys representing these businesses.

Most marijuana businesses utilize cash because banks are heavily regulated and responsible for monitoring behaviors that may indicate money laundering. Banks will not transact business with companies engaging in any business considered illegal under federal law. Interacting with marijuana businesses could run afoul of numerous federal statutes, including the CSA.

As a result, marijuana services usually do not have access to checking or savings accounts, loans or any type of card services; even credit and debit cards are unavailable because a merchant must have a bank account to accept deposited receipts.

Motivated by concerns raised primarily by state and local law enforcement over the public safety risks associated with businesses that handle significant amounts of cash, the United States Departments of Justice and Treasury, along with members of Congress, have slowly begun to initiate efforts to address this difficulty.

On Feb. 14, 2014, the Financial Crimes Enforcement Network (FinCEN) branch of the United States Treasury Department issued guidance to banks outlining how they could transact business with marijuana services, entitled "Bank Secrecy Act—BSA Expectations Regarding Marijuana-Related Businesses." Banks are required to file a suspicious activity report (SAR) whenever they encounter transactions that could indicate money laundering, and the FinCEN guidance outlines rules for reporting transactions by any marijuana-related business. The guidance does not change the filing requirement; therefore, banks are still required to file SARs when handling transactions for cannabis businesses. However, the FinCEN guidance allows a filing to state the bank does not believe any illegal activity beyond the marijuana trade was taking place.

However, aside from the fact that the filing requirement is burdensome, banks have expressed concern that the FinCEN plan does not expressly protect banks that work with state-compliant marijuana businesses. As a result, they have remained reluctant to accept these businesses as customers to avoid potential lender liability.

Because regulations governing credit unions differ from the regulations pertaining to banks, a few credit unions will serve the marijuana industry. Credit unions that will accept customers in the cannabis business will usually only provide banking services such as deposit accounts, but will not provide financing.

In February, the Fourth Corner Credit Union received conditional approval from the Federal Reserve Bank of Kansas City to establish a master account in order to have the ability to do business with the Federal Reserve system. However, receiving even the conditional approval required a lawsuit, which went

to the 10th Circuit of the U.S. Court of Appeals. Moreover, the Fourth Corner Credit Union will not do business with customers that "touch" marijuana—such as growers or dispensaries—they will only do business with those serving cannabis businesses—such as landlords, accountants and lawyers.

In order to ease the banking challenges, Treasury Secretary Steve Mnuchin told the House Ways and Means Committee in February that issuing updated marijuana banking guidance is at the "top of the list," and that "we're working on it as we speak," but as of this writing updated banking guidance has not been issued. Many marijuana-related businesses still must rely on cash and have no access to the banking system. This situation creates risk and obligations for attorneys.

Reporting of Cash Transactions

One banking financial issue lawyers may face in connection with the cannabis industry is the obligation to report certain cash transactions. Pursuant to Treasury Department regulations, any person who receives more than $10,000 in cash as one transaction or a series of related transactions while conducting their trade or business must file an IRS Form 8300. The $10,000 payment has to be reported if it is one lump sum over $10,000, two or more related payments that total in excess of $10,000 or payments as part of a transaction that cause the total cash received within a 12-month period to total more than $10,000. A transaction is defined as the underlying event resulting in the transfer of cash. An example would be the engagement of an attorney for a particular matter.

Form 8300 must be filed within 15 days after the cash is received. If there are subsequent payments made with respect to a single transaction or two or more related transactions, the business is required to file the form when the total amount paid exceeds $10,000. Then, every time the payment exceeds an aggregate in excess of $10,000, the business must file another Form 8300 within 15 days of the payment that causes the additional payments to total more than $10,000. The form also requires providing the taxpayer identification number of the person providing the cash.

Failure to file a Form 8300, also known as a currency transaction report, can have serious consequences, as attorneys Goldie Sommer and Edward Englehart learned. In Feb. 2013, both attorneys, who then practiced together in Fairfield, plead guilty in federal court to conspiring to structure a currency transaction to avoid reporting large amounts of currency. The criminal complaint charged them with violations of 31 U.S.C. § 5324(a)(3) and 5324(d)(1), alleging they had conspired with each other and a client to make cash deposits and avoid reporting them to the Internal Revenue Service.[6] In connection with their client's real estate transaction, they made numerous deposits, totaling $354,000, into their attorney trust account, in large, even dollar amounts, and failed to file currency transaction reports.

The charge to which Sommer and Engelhart ultimately pleaded guilty carried a maximum penalty of five years in prison and a $250,000 fine. The district court imposed a two-year term of probation with six months of location monitoring, and fines of $20,000. The prosecutor asked that no sentence of incarceration be imposed because of their "acceptance of responsibility" and efforts to "do the right thing after the fact." By a slim margin, based on mitigating factors including their respective 30 years of practice, the New Jersey Supreme Court suspended both Sommer and Englehart from the practice of law for a period of one year, retroactive to the date they had been temporarily suspended from practice pending further discipline.[7] However, two members of the Disciplinary Review Board had recommended the suspension take effect prospectively (thus not granting credit for the suspension already served); and one member voted for disbarment.[8] Thus, while Sommer and Englehart both received relatively less harsh criminal and disciplinary penalties than they might have received, their experience is a cautionary tale of the severe consequences of failing to report cash transactions.

Exposure to Criminal Forfeiture and Prosecution as an Accomplice to a Criminal Transaction

In addition to the risks and requirements surrounding cash receipts, the potential criminal forfeiture and seizure by the federal government of attorney's fees paid for services associated with controlled substances are another worry for lawyers involved with the cannabis industry. Federal law codified at 21 U.S. Code § 881(a)(6) specifically and broadly provides that "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter…shall be subject to forfeiture to the United States and no property right shall exist in them."

In view of these laws, an attorney may provide valuable legal services to a cannabis business and be forced to disgorge and forfeit fees paid for those services.

Moreover, because marijuana is illegal under federal law, a lawyer representing a client in a transaction involving marijuana could be charged as an accomplice to a criminal transaction. 18 U.S. Code § 2 provides that "[w]hoever

commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal" and "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Lawyers who transgress the cash receipts reporting requirements or succumb to fee disgorgement/forfeiture may find themselves subsequently facing ethics charges predicated on those federal transgressions. Entering the cannabis marketplace, even as counsel, is fraught with risk for the unwary.

Conclusion

Lawyers representing clients operating marijuana businesses or clients doing business with cannabis businesses face challenges aplenty. Lawyers in New Jersey may take a measure of comfort in the revised RPC 1.2(d), but they risk federal criminal and resulting disciplinary exposure predicated on criminal acts with or without a finding of guilt. In addition to the burden of reporting fees paid in cash in a timely manner, they face possible forfeiture of those professional fees however paid, cash or otherwise. Seeking up-to-date guidance from legal ethics mavens about best practices mitigates the evolving risks in this fast-changing area of practice. ⚖

Endnotes

1. N.J.S.A. 24:61-1 *et seq*.
2. 21 U.S.C. §812(b)(1) and (c)(10).
3. https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html?noredirect=on&utm_term=.34bb9990811e.
4. https://www.nytimes.com/2018/06/08/us/politics/trump-marijuana-bill-states.html.
5. SEC 538 of the Consolidated Appropriations Act of 2018.
6. *US v. Edward Engelhart and Goldie Sommer,* 11-6728 (Nov. 4, 2011).
7. Supreme Court of New Jersey, D-71 (May 16, 2014).
8. Docket DRB 13-271 and Docket DRB 13-272 (Feb. 11, 2014).