THE ETHICS OF CANNABIS LEGAL REPRESENTATION

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OVERVIEW

- Scope of Representation
- Conflict of Interest
- Lawyer as a business partner
- Corporations as clients
- Advising clients
- Supervising associates and other staff
- Unauthorized practice of law
- Criminal law considerations
- Attorney Ownership of Cannabis Businesses
- Attorney Cannabis Use

SCOPE OF REPRESENTATION

- 1.2(d): Scope of Representation
  - 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.

SCOPE OF REPRESENTATION: STATE VARIATION

- **Colorado (Comment 14 to RPC 1.2):** May counsel client about the Colorado constitution and assist client with conduct permitted by the CO constitution and law but must also advise the client about federal illegality.
- **Oregon (in RPC):** "Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana related laws… the lawyer shall also advise the client regarding related federal… law."

SCOPE OF REPRESENTATION: STATE VARIATION

- **Hawaii (1.2(d) rule change):** May provide legal advice about the medical marijuana act and must advise clients to about possible consequences under Federal law.
- **Ohio (1.2(d)(2) rule change)**: May provide legal advice about the state marijuana laws and marijuana businesses and must advise clients to about possible consequences under Federal law.

SCOPE OF REPRESENTATION: STATE VARIATION

- **Nevada (Comment 1 of Rule 1.2)**: May provide legal advice about the state medical marijuana laws and marijuana businesses and must advise clients to about possible consequences under Federal law. Attorneys must still advise clients about Federal law and enforcement
- **Washington (Comment 201501)**: May provide legal advice, may operate marijuana businesses, and may consume marijuana. Attorneys should still advise clients of Federal illegality.
- **Maine (Ethics Opinion 215)**: Rule is not a bar to advising clients about Maine marijuana laws. Attorneys must still advise clients about Federal law and enforcement.

SCOPE OF REPRESENTATION: STATE VARIATION

- **Massachusetts (Board of Overseers Announcement)**: Must advise clients of Federal law but can advise clients about how to comply with state marijuana law as well.
- **New York (Ethics Opinion 1024)**: Rule 1.2 does not prohibit lawyers from providing advice regarding compliance with state marijuana laws. Attorneys must still advise clients about Federal illegality.

SCOPE OF REPRESENTATION: STATE VARIATION

- **Florida (Board Policy)**: "The 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."
- Each state is different, and opinions and rules are changing rapidly. States such as Ohio went from prohibiting lawyers from giving marijuana advice to amending their rules to permit such advice in a matter of months. You should do research about your state's requirements and refresh on any changes often.

CONFLICT OF INTEREST

- Rule 1.7(a): A lawyer cannot represent one client if:
  - (1) The representation of the client will be directly adverse to another client
  - (2) The client's representation will be materially limited by the lawyer's responsibilities to someone else
  - (b) Despite a conflict of interest, a lawyer can still represent a client if:
    - (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client
    - (2) The representation is not prohibited by law;
    - (3) Representation does not involve one client's claim against another represented client
    - (4) Each client still gives consent.

LAWYER AS A BUSINESS PARTNER

- Rule 1.8(A)(1-3): A lawyer can not enter into a business transaction w/ a client, nor can they own interest adverse to a client, unless:
  - Transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client
  - Client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction
  - Client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction

CORPORATIONS AS CLIENTS

- Rule 1.13(A): Organization as Client
  - “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

ADVISING CLIENTS

- Rule 1.4(a)(5): Communication When a Violation of the Rules of Professional Conduct
  - A lawyer shall “consult 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.”

ADVISING CLIENTS

- Rule 2.1: Advisor
  - In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. When rendering advice, a lawyer refer to the law, but can consider other aspects such as moral, economic, social and political factors that may be relevant to the client's situation

  Colorado addition

  - A lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

SUPERVISING ASSOCIATES AND OTHER STAFF

- Rule 5.1(a)(b): Responsibilities of a Partner or Supervisory Lawyer
  - Partner in a law firm, or any lawyer with managerial authority in a firm, must make reasonable efforts to ensure that the firm has measures that give reasonable assurance that lawyers will conform to the Rules of Professional Conduct
  - A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct

UNAUTHORIZED PRACTICE OF LAW

- Rule 5.5(A)(1) and (2): Unauthorized Practice of Law
  - A lawyer cannot practice law without a license for the particular jurisdiction
  - Lawyer can not practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction.

CRIMINAL LAW CONSIDERATIONS

- Operates similar to representing clients in other criminal matters.
  - May defend clients who violate laws, including federal law.
  - Must conduct defense within the bounds of the RPC, as with any other criminal defense
- In states that do not allow representation for marijuana licensing or business issues, be careful to isolate the criminal matter from other compliance issues and licensing advice.

ATTORNEY OWNERSHIP OF CANNABIS BUSINESSES

- Varies by state.
- Generally, this increases your risk since you are committing any offenses directly rather than simply advising.
- Washington guidance: Lawyer may own and operate an independent business in compliance with I-502 and the CPPA without violating the RPC.
- Many states do not have guidance on this issue.
  - For states without clear guidance on the issue, it is advisable to refrain from direct ownership or employment with marijuana businesses.

ATTORNEY CANNABIS USE

- This is fairly unclear and could develop in different ways.
- **Washington**: attorneys can use cannabis as long as consumption does not interfere with lawyers' ability to provide competent legal advice and otherwise comply with ethical obligations
- **California**: AB 1159 says that an attorney can use medical or recreational marijuana without it reflecting badly on his or her moral character
- **Oregon**: Not much information on Oregon laws on this, but a lawyer may counsel about marijuana-related laws.
- **Colorado**: An attorney can use marijuana without violating laws of ethics.
- Attorneys cannot use cannabis in any state in which it is illegal for recreational and medical use, such as Texas.



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