Lawyers' Risk Management Newsletter
November 2021

CLYDE&CO

Is Counseling in Connection with Medical and Recreational Marijuana a Crime?

In this article we review whether a lawyer may ethically assist a client's business in medical and recreational marijuana to the extent authorized under state law.

To date, 36 states and 4 territories permit medical use of cannabis products and 18 states, two territories and the District of Columbia permit recreational use of marijuana. *State Medical Marijuana Laws*, NCSL, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last updated July 14, 2021).

Nevertheless, marijuana is still classified as a Schedule I controlled substance under the federal Controlled Substances Act (CSA), which makes it illegal to manufacture, distribute, or dispense a controlled substance. However, federal policy has largely been to prosecute individuals or entities in compliance with a state's *medical* marijuana statute. *See generally United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016); CA Eth. Op. 2020-202 (2020) ("[C]ompliance 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 counseling or assisting such conduct may itself be a federal crime.").

On July 8, 2021, the New York State Bar Association (NYSBA) issued Opinion 1225, advising that an attorney may assist clients in complying with the state's recreational marijuana laws because "a decade of federal forbearance in the enforcement of federal narcotics laws has been equally applied to state laws legalizing recreational marijuana and to state laws legalizing medical marijuana." Opinion 1225 adds that New York's complex regulatory system for recreational marijuana justifies that federal forbearance and attorneys will promote the participation and creation of an effective regulatory system. Accordingly, given the federal forbearance to date in enforcing federal narcotics law, an attorney will not be in violation of New York Rule 1.2(d), which reads as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

A majority of jurisdictions have issued similar ethics opinions addressing whether an attorney may advise and/or provide legal services to clients operating a marijuana business in compliance with that jurisdiction's marijuana law without violating Rule 1.2—typically concluding that the attorney must advise the client that such activities may violate federal law. See NYSBA 1177 (2019); RI Op. 2017-01 (2017); MD Op. 2016-10 (2016); WA Op. 201501 (2015); MN Op. 23 (2015); IL Op. 14-07 (2014); NYSBA Op. 1024 (2014); CT Op. 2013-02 (2013); AZ Op. 11-01 (2011).

Other states have amended their versions of Rule 1.2 (AK Rule 1.2(f); IL Rule 1.2(d)(3); NH Rule 1.2(d); NJ Rule 1.2(d); OR Rule 1.2(d)) or added language to the Comment to Rule 1.2 to resolve the issue. (AK Rule 1.2, cmt. [5]; CA Rule 1.2.1, cmt. [6]; CO Rule 1.2, cmt. [14]; IL Rule 1.2, cmt. [10]; MD Rule 19-301.2, cmt. [12]; NM Rule 1.2, cmt. [11]; NV Rule 1.2, cmt. [1]; VT Rule 1.2, cmt. [14]; WA Rule 1.2, cmt. [18]); *but see In re Motion to Amend 2021-3* (Ga. June 21, 2021) (denying motion by the State Bar of Georgia to amend Rule 1.2).

Finally, three jurisdictions have expressly stated that they will not bring disciplinary proceedings against attorneys providing services to clients in compliance with that state's marijuana laws. *See* Minnesota Statute § 152.32(2)(3)(i); Board Adopts Medical Marijuana Advice (Florida, June 15, 2014); Massachusetts BBO/OBC Policy on Legal Advice on Marijuana (March 29, 2017).

By contrast, there are states that have opined that an attorney may not advise and/or provide legal services to a client in order to comply with that jurisdiction's marijuana laws. SD Op. 2020-

07 (2020); OH Op. 2016-6 (2016); PA Op. 2015-100 (2015); HI Op. 49 (2015)) CT Op. 2013-02 (2013). However, three of those states have since amended their versions of Rule 1.2(d) to create an exception (CT Rule 1.2(d)(3); HI Rule 1.2(d); OH Rule 1.2(d)(2); PA Rule 1.2(e)). Therefore, practitioners must be apprised of the latest opinions, rules, or statutes addressing the issue in their jurisdiction.

New York Opinion 1225 is also notable because it joins a handful of opinions that have addressed whether a lawyer's more active and direct involvement in the cannabis industry and/or a lawyer's personal cannabis use violates Rule 8.4. New York Rule 8.4 states, in pertinent part:

> A lawyer or law firm shall not:
>
> (b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
>
> ***
>
> (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

Opinion 1225 opines that marijuana growth and consumption that falls within New York law and federal forbearance is not in violation of Rule 8.4, but warns that excessive use may adversely impact a lawyer's ability to competently and diligently represent a client as required by Rules 1.1(a) and 1.3 and may require mandatory withdrawal from representation under Rule 1.16(b)(2). Referencing comments [2] and [4] to New York Rule 8.4, Opinion 1225 also concludes that there is no "indifference to legal obligation" and, in fact, a "reasonable good faith belief that no valid obligation exists" to comply with federal narcotics laws when such activities are authorized by New York State law. In this respect, Opinion 1225 is similar to other state bar ethics opinions have concluded that using or distributing marijuana in conformance with state law would not violate Rule 8.4(b) even if the conduct would violate federal law. PA Op. 2016-017 (2016); WA Op. 201501 (2015); CT Op. 14-08 (2014); CO Op. 124 (2012). However, these states addressed medical marijuana consumption, and it appears that only one other state has advised that recreational use is permissible. WA Op. 201501 (2015).

By contrast, some jurisdictions have found any consumption of marijuana will be in violation of Rule 8.4. *In re Disciplinary Proc. Against Inglimo*, 2007 WI 126, ¶ 54, 305 Wis. 2d 71, 98, 740 N.W.2d 125, 138 ("Just as using marijuana with a client violates [Rule 8.4], delivering marijuana to a client also reflects adversely on a lawyer's fitness."); NV Rule 8.4, cmt. [1]; SC Op. 19-03 (2019); OH Op. 2016-6 (2016); ND Op. 14-02 (2014).

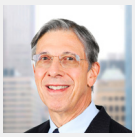
For jurisdictions that permit a personal investment or use, the consensus appears to be that an attorney must be in compliance with the state law and not engage in conduct that would otherwise be prohibited by the Rules of Professional Conduct.

Further information

If you would like further information on any issues raised in this update please contact:

J. Richard Supple, Jr.

Partner, Clyde & Co LLP
+1 212 710 3914
rick.supple@clydeco.us



Anthony E. Davis

Of Counsel, Clyde & Co LLP
+1 212 710 3976
anthony.davis@clydeco.us

Janis M. Meyer

Of Counsel, Clyde & Co LLP
+1 212 710 3942
janis.meyer@clydeco.us

Nataniel Arabov

Associate, Clyde & Co LLP
+1 212 710 3944
nataniel.arabov@clydeco.us

Aaron Lawson

Associate, Clyde & Co LLP
+1 212 702 6778
aaron.lawson@clydeco.us

CC_NABD_October 2021