

There are several ethical problems that lawyers may face when advising cannabis dispensary clients on how to operate their businesses, including:

1. **Conflict with Federal law:** One of the primary ethical issues that lawyers face when advising cannabis clients is the conflict between federal and state laws. Cannabis is still illegal under federal law, which means that lawyers must advise their clients on how to comply with state laws while also ensuring they do not violate federal law. This can create a challenging situation for lawyers, as they must balance their clients' needs with their own ethical obligations.
2. **Adhering to state bar regulations:** Finally, lawyers must also adhere to state bar regulations when advising cannabis clients. Many states have specific rules and regulations governing the practice of law in the cannabis industry, and lawyers must stay informed about these regulations to ensure they are in compliance.
3. **Maintaining privilege & client confidentiality:** Lawyers have a duty to maintain client confidentiality, which can be particularly challenging when advising cannabis clients. Because the cannabis industry is still stigmatized in many parts of the country, clients may be concerned about their legal representation becoming public knowledge. Lawyers must balance their duty to maintain confidentiality with their clients' desire for privacy.
4. **Providing accurate advice:** Lawyers have an ethical obligation to provide accurate advice to their clients, which can be difficult in the rapidly evolving legal landscape surrounding cannabis. Laws and regulations governing the industry can change quickly, and lawyers must stay up-to-date on the latest developments to provide effective counsel to their clients.
5. **Avoiding conflicts of interest:** Lawyers must also avoid conflicts of interest when advising cannabis clients. For example, a lawyer may have previously represented a law enforcement agency that has taken a stance against cannabis legalization. In such a case, the lawyer must be careful to ensure that their previous work does not create a conflict of interest when representing a cannabis client.

Overall, lawyers advising cannabis industry clients face a range of ethical challenges, including conflicts with federal law, adhering to state bar regulations, maintaining confidentiality, providing accurate advice, and avoiding conflicts of interest. It is important for lawyers to be aware of these challenges and to take steps to address them in their legal practice.

Conflict with Federal Law:

1. Controlled Substances Act (“CSA”) of 1970, 21 U.S.C. § 812 (2018)¹
 - “Marijuana is a Schedule I substance under the Controlled Substances Act, meaning that it has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision.” Department of Justice/Drug Enforcement Administration Drug Fact Sheet – Marijuana/Cannabis, October 2022, <https://www.dea.gov/sites/default/files/2023-03/Marijuana-Cannabis%202022%20Drug%20Fact%20Sheet.pdf>
 - RICO (attorney as co-conspirator)
2. Federal courts likely unavailable for enforcement of contracts/diversity jurisdiction
3. Bankruptcy
 - *In re CWNevada LLC*, 602 B.R. 717 (Bankr. D. Nev. 2019), the Court decided that bankruptcy protection was not available to this cannabis business:

Dismissal of debtor limited liability company’s Chapter 11 case based on abstention was warranted, where debtor was directly engaged in a marijuana-related business which, although authorized under Nevada law, was not authorized under the Controlled Substances Act. Debtor had not identified an approved depository institution to open its required debtor in possession accounts, debtor did not have independent counsel to advise debtor in bankruptcy proceedings, there appeared to be no consensus amongst debtor’s management in favor of Chapter 11 relief, and upon dismissal, parties could return to state court where receivership application, among other matters, may be fully addressed.

Exception: hemp-related business covered under 2018 Farm Bill (excluding hemp from CSA)

¹ But consider the recent January 27, 2023 California Department of Cannabis Control (“DCC”) request for opinion from the California Attorney General’s Office regarding whether California may work with other states to negotiate agreements allowing, as a matter of state law, for commercial cannabis activity between California cannabis licensees and licensees in those other states. In that request, the DCC writes that “The Controlled Substances Act could not constitutionally prohibit *California* from legalizing and regulating commercial cannabis activity with out-of-state licensees.” (emphasis added).

Adhering to State Bar Regulations:

Lawyers advising clients in the cannabis industry need to be aware of several ethical rules that govern their conduct. These rules likely vary depending on the jurisdiction, but here are some general guidelines:

1. Scope of Representation (Model Rules 1.2 & 8.4):
 - Criminal activity: Lawyers cannot advise clients to engage in criminal activity, even if that activity is legal under state law. This means that lawyers cannot advise clients to violate federal law, even if the client's business is legal under state law – So how do lawyers comply with Model Rule 1.2?
 - E.g.: money laundering. Lawyers must avoid participating in any money laundering activities related to their clients' business activities. This means that lawyers must take steps to ensure that any funds they receive from clients are not derived from illegal activities.
 - Many states have taken steps to address this:
 - Nevada RPC 1.2 & Comment
 - Oregon RPC 1.2(d)
 - California Rule 1.2.1 & Comment 6²
 - Compare with:
 - Ohio State Bar Association's Board of Governors issued an advisory opinion in 2016 stating that Ohio lawyers are prohibited from providing legal services to clients seeking to establish and operate medical marijuana businesses because marijuana remains illegal under federal law.³
 - Supreme Court of Georgia Opinion in 2021 denying a motion to amend Rule of Professional Conduct 1.2 to permit Georgia lawyers to “counsel clients to engage in conduct that the lawyer knows is

² See also The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2020-202:

Under the Rules of Professional Conduct, 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 [...] 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.

³ Ohio's Rule of Professional Conduct 1.2 was subsequently changed to specifically permit Ohio attorneys to counsel or assist client's “regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes...”

- criminal or fraudulent, and to assist clients in such conduct, so long as the conduct is not a crime under Georgia law.”
 - It’s important for attorneys to research the applicable state laws and bar rules and regulations regarding the provision of legal services to clients in the cannabis industry.
- 2. Competence (Model Rule 1.1): Lawyers must be competent in the area of law in which they are providing advice. This means that lawyers must have a good understanding of the state and federal laws governing the cannabis industry, as well as any regulations and rules governing the industry.
- 3. Conflicts of interest (Model Rules 1.7, 1.8, and 1.9): Lawyers must avoid conflicts of interest when advising clients in the cannabis industry. For example, a lawyer cannot represent both a cannabis business and a law enforcement agency that is investigating that business. But more and more, as the cannabis industry develops, the conflicts of interest analysis attorneys need to undertake in representing clients resembles similar analyses in the general business realm.
- 4. Communication (Model Rule 1.4): Lawyers must communicate clearly and honestly with clients. They must provide accurate information and avoid making any false or misleading statements.

Overall, lawyers representing and advising clients in the cannabis industry must be mindful of their ethical obligations and ensure that their conduct is consistent with these obligations.

Maintaining Privilege & Client Confidentiality:

Confidentiality: Lawyers must maintain client confidentiality, even if the client's business involves a substance that is illegal under federal law. The lawyer cannot disclose any information about the client or the client's business without the client's consent.

1. The Privilege:
 - The privilege extends only to confidential communications concerning legal advice between attorney and client that are kept confidential by the client
 - The client must be seeking legal advice or assistance
 - Attorney must be acting in a professional legal capacity
 - Communication(s) must relate to the legal advice sought
 - Client must intend for communication(s) to be confidential
 - Client controls the privilege, preventing disclosure by the client or attorney
 - Client may waive the privilege intentionally or by disclosing communication(s) to third parties or to persons without a need to know.

2. Crime Fraud Exception:
 - A client's communication to her attorney isn't privileged if she made it with intent to commit or cover up a crime or fraud.
 - The client's intent determines whether the exception applies
 - Communications about past crimes/frauds are typically privileged, while communications about ongoing or future ones may not be.
 - Where crime-fraud exception applies, the attorney can be subpoenaed to disclose the contents of the communications.

Providing Accurate Advice:

Each state governs and regulates its cannabis industry in its own unique way. This comes back to the issue of competence (Model Rule 1.1) and being able to provide accurate advice. Each states regulations—and the way its regulators handle applications, licensing, discipline, etc. is different. This means that lawyers must have a good understanding of the state and federal laws governing the cannabis industry, as well as any regulations and rules governing the industry.

Avoiding Conflicts of Interest:

1. Terms/Definitions for Conflicts Analysis Under Model Rules
2. Key terms used in conflict analysis under ABA MRPC that are undefined:
 - “directly adverse”
 - “significant risk”
 - “materially limited”
 - “a personal interest of the lawyer”
 - “matter” (*see* Model Rule 1.9 Cmt [2])
3. Model Rule 1.7 – Conflict of Interest: Current Clients
4. Model Rule 1.8 – Current Clients: Specific Rules
5. Model Rule 1.9 – Duties to Former Clients

Suggestions on Addressing Issues Upfront

1. Get familiar with your state's laws, regulations, and rules of professional conduct
2. Contact regulators for assistance on interpretations and clarification
3. Engagement Agreements

- Sample Language:

Political & Legislative Landscape. Client agrees to assume all risks associated with any and all adverse political and legal developments that impact or could impact Client's ability to perform or operate its intended plans legally. Such risks include, but are not limited to any regulatory, economic, policy, or legal changes. If for any other reason, Client's business objectives become frustrated, client also assumes all such risk.

By signing Firm's engagement letter, Client acknowledges that Firm has advised Client that marijuana, for medical uses or otherwise, remains ILLEGAL under federal law, and under state law if not possessed/grown/processed/sold in strict compliance with all applicable state laws. Firm is not advising Client, in any manner, that Client should violate federal law, nor is Firm instructing Client on how to violate federal law. Attorney's advice is limited to State law issues and rights.

Certification of All Attorney's Fees Originating from Legal Source. It is improper for attorneys to accept any money from clients that they know or should know is derived from illegal sources, such as drug proceeds or other illegal sources. Client affirms and attests that all money paid to Firm comes from a legal source.

Federal Regulation. Client acknowledges that it is fully aware that possessing, using, distributing and selling marijuana are all federal crimes and neither the forms, documents or legal advice provided by Firm is intended to assist Client in violating federal law, nor will Firm in any way assist Client in complying with federal law. Furthermore, Client notes that licensing and regulatory schemes at the city, county and state level are rapidly changing.

Attorney-Client Privilege Exception. Firm must maintain Client's secrets in confidence at all times. Our communications are privileged and may not be revealed by Firm to anyone. However, under the "crime fraud" exception to the attorney-client privilege, if Client becomes involved in civil or criminal litigation, there is a risk that the communications between us will not be held to be privileged. By signing below, Client acknowledges that it is aware that our communications could be subject to disclosure.

Topics for Additional Consideration

Advising multi-state operators (“MSOs” on company-wide initiatives

Lobbying for either legislative or regulatory amendments and changes

Banking

Anticipating federal legislative changes and/or re-scheduling

Advising clients on issues relating to hemp, CBD and/or Delta-8 & Delta-9

Additional Resources

- *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Mar. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>
- Leafly Staff, *Where Is Cannabis Legal?*, LEAFLY (Jan. 17, 2020), <https://www.leafly.com/news/cannabis-101/where-is-cannabis-legal>
- Memorandum from James M. Cole, Deputy Attorney Gen., on Guidance Regarding Marijuana Enforcement to all U.S. Attorneys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>
- Memorandum from Jefferson B. Sessions III, Attorney Gen., on Marijuana Enforcement to all U.S. Attorneys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>
- Karen E. Boxx, *Tiptoeing Through the Landmines: The Evolution of States' Legal Ethics Authority Regarding Representing Cannabis Clients*, 43 SEATTLE UNIV. L. REV. 935 (2020).
- Dennis A. Rendleman, *Ethical Issues in Representing Clients in the Cannabis Business: "One Toke Over the Line?"*, 26 PROF. LAWYER NO. 1 (July 2, 2019).
- Peter R. Jarvis, *Marijuana Legal Ethics 101: Asking the Right Questions**, DRI Professionalism Perspectives, Volume 20, Issue 1, https://www.hklaw.com/-/media/files/insights/publications/2019/05/marijuana101drivolume20issue1_jarvis.pdf?la=en
- Michelle Rindels, *Nevada Bar has not sanctioned any lawyers for involvement in marijuana industry*, NEV. INDEP. (Nov. 18, 2019), <https://thenevadaindependent.com/article/nevada-bar-has-not-sanctioned-any-lawyers-for-involvement-in-marijuana-industry>