

Let's Be Blunt: Legal Ethics in Cannabis Law

By: Nate Rulis

Ethical Challenges Facing Lawyers Advising Cannabis Industry Clients

- **Conflict with Federal Law**

Lawyers must advise clients on how to comply with state laws while also ensuring they do not violate federal law.
- **Adhering to State Bar Regulations**

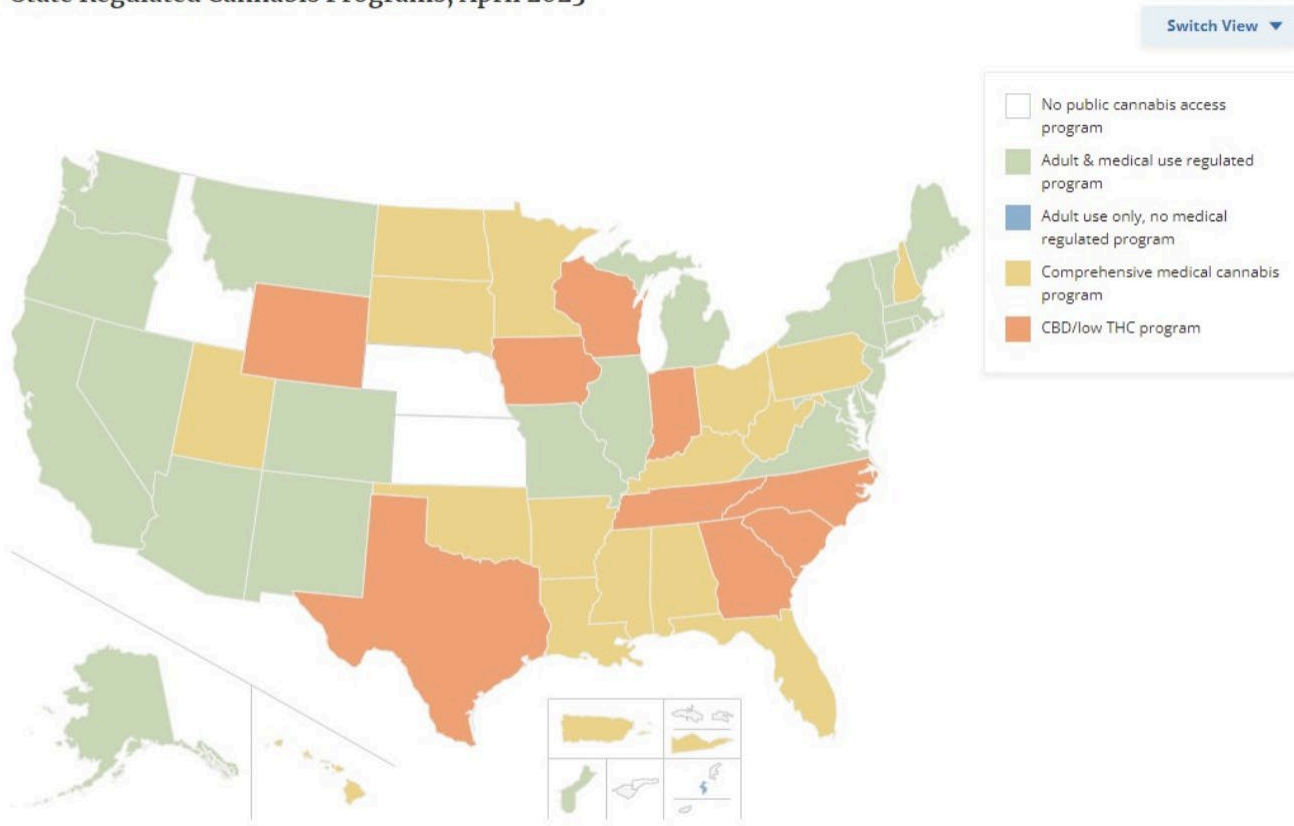
Lawyers must stay informed about state regulations to ensure they are in compliance.
- **Maintaining Privilege & Client Confidentiality**

Lawyers must balance their duty to maintain confidentiality with their clients' desire for privacy.
- **Providing Accurate Advice**

Lawyers must stay up-to-date on the latest developments to provide effective counsel to their clients.
- **Avoiding Conflicts of Interest**

Lawyers must be careful to ensure that their previous work does not create a conflict of interest when representing a cannabis client.

State Regulated Cannabis Programs, April 2023



Conflict with Federal Law

- Controlled Substances Act (“CSA”) of 1970, 21 U.S.C. § 812 (2018)

"Marijuana is a Schedule I substance with high potential for abuse, no accepted medical use, and lack of accepted safety for use under medical supervision."
- RICO (attorney as co-conspirator)

Attorney may be held liable as a co-conspirator under the RICO Act.
- Federal courts likely unavailable for enforcement of contracts/diversity jurisdiction

Federal courts may not be available to enforce contracts due to diversity jurisdiction.
- Bankruptcy

In re CWNevada LLC, 602 B.R. 717 (Bankr. D. Nev. 2019): Bankruptcy protection not available to cannabis business.
- Exception: hemp-related business covered under 2018 Farm Bill

Hemp-related businesses are excluded from the CSA under the 2018 Farm Bill.

The Legal Status of Marijuana in the United States

Marijuana is classified as a Schedule I substance under the Controlled Substances Act, meaning that it has a high potential for abuse and is not accepted for medical use in the United States. Despite this, marijuana remains a popular recreational drug with many people advocating for its legalization.

<https://www.dea.gov/sites/default/files/2023-03/Marijuana-Cannabis%202022%20Drug%20Fact%20Sheet.pdf>



Adhering to State Bar Regulations: An Overview of Ethical Guidelines for Lawyers Advising Clients in the Cannabis Industry



Scope of Representation (Model Rules 1.2 & 8.4)

How do lawyers advise clients about operating in an industry that is considered illegal under federal law?



Competence (Model Rule 1.1)

In a sea of varying state-specific regulations, how do lawyers comply with their duties to provide competent advice?



Conflicts of Interest (Model Rules 1.7, 1.8, and 1.9)

When representing multiple operators, how do lawyers ensure to avoid conflicts?



Communication (Model Rule 1.4)

Are lawyers aware -- and letting their clients know -- that their communications may not be privileged?

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.

Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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.

Complying with Model Rule 1.2: What Lawyers Need to Know

Lawyers must comply with Model Rule 1.2, which states that they cannot advise clients to engage in criminal activity, even if it is legal under state law. This means that lawyers must abide by federal law, even if the client's business is legal under state law.

So how do lawyers comply with Model Rule 1.2?



Steps Taken To Address RPC 1.2 & Comment By States



Nevada RPC 1.2 & Comment

Nevada has adopted RPC 1.2 & Comment to address this issue.



Oregon RPC 1.2(d)

Oregon has adopted RPC 1.2(d) to address this issue.



California Rule 1.2.1 & Comment 6

California has adopted Rule 1.2.1 & Comment 6 to address this issue.

Many states have taken steps to address this issue.
Nevada, Oregon, and California are just a few examples.

Navigating the Conflict between California and Federal Cannabis Laws

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

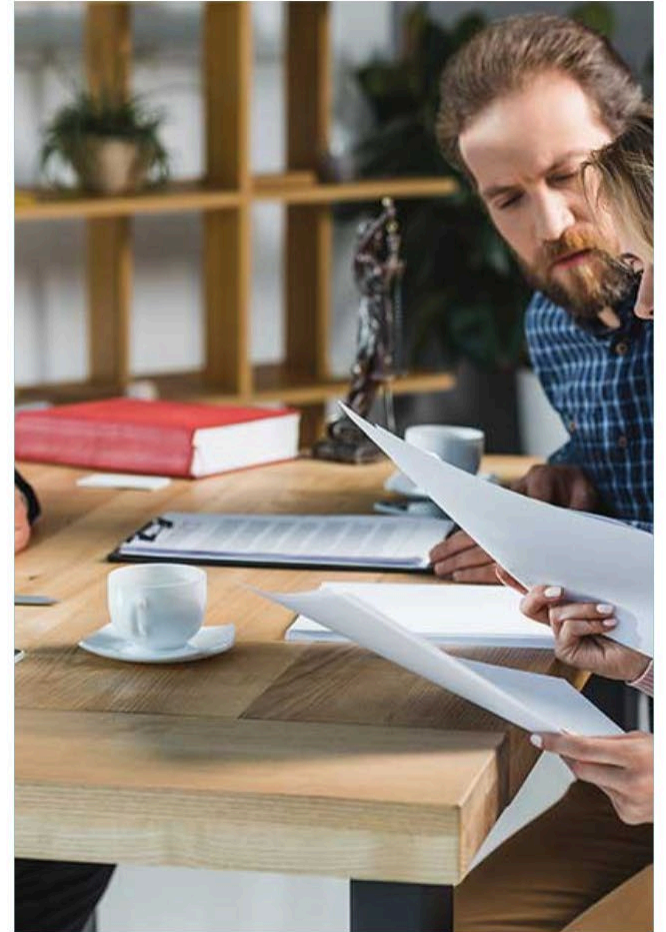
Under the Rules of Professional Conduct, a lawyer may ethically advise a client concerning compliance with California's cannabis laws and may assist the client in conduct permitted by those laws, despite the fact that the client's conduct may violate federal law. Such advice and assistance may include 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.

Comparing Advisory Opinions on Complying with Rule of Professional Conduct 1.2

State	Year of Advisory Opinion	Opinion
Ohio State Bar Association	2016	Prohibited from providing legal services to clients seeking to establish and operate medical marijuana businesses because marijuana remains illegal under federal law.
Supreme Court of Georgia	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 criminal or fraudulent, and to assist clients in such conduct, so long as the conduct is not a crime under Georgia law.”

Know Your State Regulations to Best Serve Cannabis Industry Clients

Attorneys must be aware of the applicable state laws and regulations that not only govern the cannabis industry, but also their professional responsibilities, in order to provide legal services to their clients.



Model Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Model Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Legal Competence in the Cannabis Industry

Lawyers must be knowledgeable and up-to-date on the laws and regulations governing the cannabis industry in order to provide competent advice. It is important for lawyers to stay informed of any changes in the industry to ensure they are providing accurate and reliable advice.

Lawyers should also get to know their state regulators in the cannabis industry. Each state's regulations are unique, and so are the regulators.



Model Rules 1.7, 1.8., & 1.9: Conflicts of Interest

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.

Topical News Story: Oregon Secretary of State just resigned following cannabis consulting scandal. Story came out that she'd entered a \$10,000-per-month contract with the owners of an Oregon cannabis chain at the same time her office audited state regulations on cannabis businesses.

Model Rule 1.4: Communications

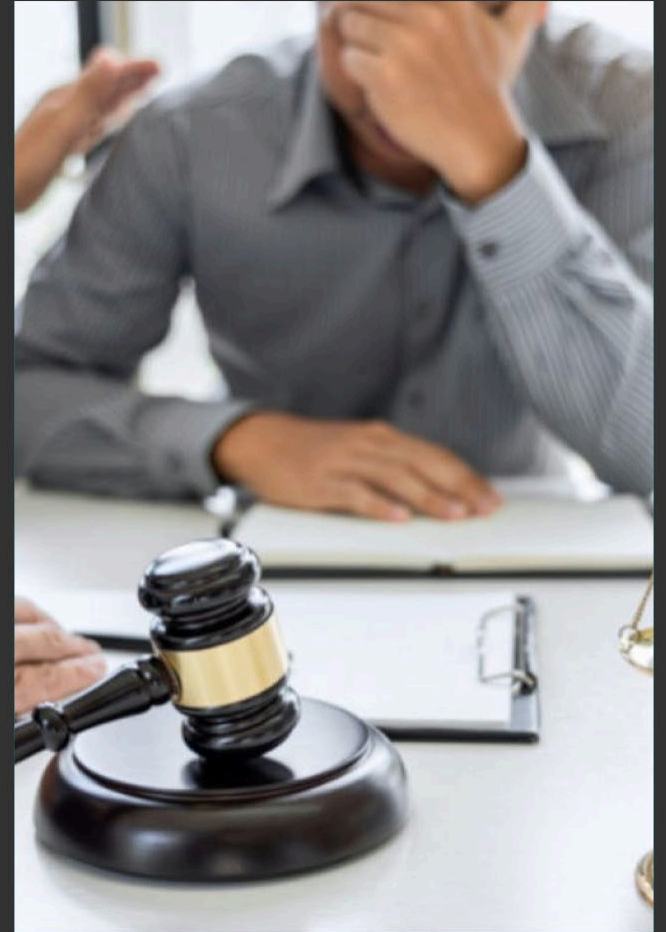
(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) 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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Maintaining Privilege & Client Confidentiality

Lawyers must maintain the confidentiality of their clients, even if the client's business involves activities that are illegal under federal law. This means that lawyers cannot disclose any information about their clients or their clients' businesses without the client's consent.



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.

The 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.

Addressing Issues Upfront: Tips and Strategies



Familiarize yourself with state laws

Understand the regulations and rules of professional conduct in your state



Contact regulators

Seek assistance on interpretations and clarification from regulators



Engagement Agreements

Create agreements to address issues upfront

By following these steps, you can ensure that you are addressing (potential) issues in a timely and effective manner.

Sample Engagement Letter Language



Political & Legislative
Landscape



Certification of All
Attorney's Fees
Originating from Legal
Source



Federal Regulation



Attorney-Client Privilege
Exception.

Topics for Additional Discussion & Consideration

- Advising MSOs on company-wide initiatives

Providing guidance and support to multi-state operators on corporate strategies and objectives

- Lobbying for legislative or regulatory amendments and changes

Engaging in advocacy efforts to influence policy decisions at the state and federal level

- Banking

Navigating the complexities of banking regulations for cannabis businesses

- Anticipating federal legislative changes and/or re-scheduling

Staying abreast of potential changes to federal laws and regulations related to cannabis

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

Providing counsel on the legal implications of hemp, CBD, Delta-8, and Delta-9 products

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>