Let's Be Blunt: Legal Ethics in the Cannabis Industry

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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.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a) (2). Whether the lawyer is obligated to prosecute

the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former

client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b) (1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized,

paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the

person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Rules for Client Trust Account Records.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's

crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

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Legal Sidebar

Recent Developments in Marijuana Law

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Marijuana and other products derived from the cannabis plant are regulated under both federal and state law. In recent years, a significant divide has developed between federal and state regulation. Under the federal Controlled Substances Act (CSA), marijuana is strictly regulated and may not legally be used for medical or recreational purposes. In contrast, a substantial majority of states have relaxed state law prohibitions on medical or recreational marijuana.

The fall of 2022 saw several key developments in federal and state marijuana regulation. In October 2022, President Joe Biden granted clemency to certain low-level federal marijuana offenders and directed the Attorney General to review the status of marijuana under federal law. While some observers consider President Biden's grant of clemency to represent a significant change in federal marijuana policy, as a legal matter it did little to alter the growing disparity between federal and state marijuana regulation. Then, in November 2022, voters in five states considered ballot initiatives to legalize recreational marijuana at the state level, two of which were adopted. Congress also subsequently enacted the Medical Marijuana and Cannabidiol Research Expansion Act, which aims to facilitate research on marijuana and cannabidiol (CBD). Legislators and commentators have proposed a number of other legal reforms that would alter federal marijuana regulation and potentially reduce the divergence between federal and state law.

This Legal Sidebar provides an overview of the legal status of marijuana under federal and state law and then discusses recent developments including the grant of clemency for federal marijuana possession offenses, November 2022 state ballot initiatives related to marijuana, and the enactment of federal legislation to expand marijuana and CBD research. The Sidebar concludes with an overview of selected legislative proposals related to marijuana.

The Legal Status of Marijuana

Under federal law, unless a statutory exemption applies, most cannabis and cannabis derivatives are classified as *marijuana*, a Schedule I controlled substance under the CSA. (The CSA generally uses an alternative spelling, "marihuana," but this Sidebar uses the more common spelling.) The CSA imposes a comprehensive regulatory framework on certain drugs and other substances—whether medical or recreational, legally or illicitly distributed—that pose a significant risk of abuse and dependence. The framework broadly aims to protect public health from those risks while ensuring that patients have access to pharmaceutical controlled substances for medical purposes. To advance those goals, the CSA (1)

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requires entities engaged in legitimate activities involving controlled substances to register with the government and take steps to prevent diversion and misuse and (2) imposes criminal penalties for various unauthorized activities involving controlled substances.

Substances become subject to the CSA through placement in one of five lists, known as Schedules I through V. A lower schedule number carries greater restrictions, so controlled substances in Schedule I are subject to the most stringent controls. Schedule I controlled substances have no currently accepted medical use, and it is illegal to produce, dispense, and possess such substances except in the context of federally approved scientific studies. By contrast, substances in Schedules II through V have accepted medical uses and may be dispensed for medical purposes, generally by prescription.

A substance can be placed in a CSA schedule, moved to a different schedule, or removed from control under the CSA either by legislation or through an administrative rulemaking process overseen by the Drug Enforcement Administration (DEA) and based on criteria set out in the CSA. Congress placed marijuana in Schedule I in 1970 when it enacted the CSA. Since that time, DEA has denied multiple petitions from stakeholders seeking to move marijuana to a less restrictive schedule or remove the substance from control under the CSA. In 2018, Congress amended the CSA to provide that *hemp*—defined to include cannabis products containing no more than 0.3 percent of the psychoactive cannabinoid delta-9 tetrahydrocannabinol (THC)—is not a controlled substance subject to the CSA. (Hemp products remain subject to regulation under other provisions of federal law.)

In addition to the federal CSA, each state has its own controlled substances laws. As a general matter, state controlled substances laws often mirror federal law and are relatively uniform across jurisdictions, but there is not a complete overlap between drugs subject to federal and state control. Marijuana regulation is one area where the gap between federal and state controlled substance laws is particularly salient. In contrast to the stringent federal control of marijuana, in recent decades most of the states have changed their laws to permit the use of marijuana (or other cannabis products) for medical purposes. In addition, at the time of writing, 21 states and the District of Columbia have removed certain state criminal prohibitions on recreational marijuana use by adults.

Notably, however, states cannot fully legalize marijuana, because states cannot change federal law. So long as marijuana is a Schedule I controlled substance under the CSA, all activities involving marijuana prohibited by that statute are federal crimes anywhere in the United States, including in states that have legalized medical or recreational marijuana under state law.

While the current state-legal marijuana industry generally operates in violation of the CSA, certain factors mitigate the disparity between federal and state law. An appropriations rider enacted every year since FY2015 prohibits the Department of Justice (DOJ) from using taxpayer funds to prevent states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." In addition, DOJ may exercise prosecutorial discretion to decline to prosecute marijuana offenses not covered by the appropriations rider. While official DOJ policy has varied somewhat across Administrations, recent presidential Administrations have not prioritized prosecution of state-legal activities involving marijuana.

Federal Clemency for Marijuana Possession

On October 6, 2022, President Biden issued a proclamation granting "a full, complete, and unconditional pardon" to "all current United States citizens and lawful permanent residents" who had committed or been convicted of simple possession of marijuana under the CSA or a related provision of the D.C. Code. President Biden's invocation of the clemency power means that persons who committed simple possession of marijuana before the date of the proclamation may not be prosecuted or punished for the offense under the relevant provisions of the CSA or the D.C. Code. (Although the District of Columbia

has its own criminal code, its criminal justice system has some overlap with the federal system and is subject to the President's clemency power.)

Several factors limit the scope of the pardon. First, it applies only to violations of federal and D.C. law and does not affect other state law marijuana offenses. In announcing the pardon, President Biden also encouraged state governors to take similar steps but, under the United States' federalist system of government, the President has no direct power to change state law or compel the states to adopt federal policies. While some governors have taken similar steps or expressed willingness to do so, in some states, governors cannot independently grant clemency.

Second, the pardon applies only to simple possession of marijuana, not to other marijuana-related CSA offenses such as manufacture, distribution, or possession with intent to distribute or to other federal crimes. Federal prosecutions of simple possession of marijuana are relatively uncommon. The U.S. Sentencing Commission (USSC) reports that about 7,700 people subject to the pardon were convicted of only simple possession since FY1992, none of whom are currently in federal custody. (Additional individuals not subject to the pardon were convicted during that period.) In FY2021, 117 people subject to the pardon were convicted of only simple possession. A smaller number of people were convicted of possessing marijuana and possessing other illicit drugs or committing other crimes. Those people would remain liable for the other offenses. Shortly after the pardon was announced, the USSC issued policy priorities including "consideration of possible amendments to the [Sentencing] Guidelines Manual relating to criminal history to address … the impact of simple possession of marihuana offenses."

Third, the pardon by its terms "does not apply to individuals who were non-citizens not lawfully present in the United States at the time of their offense." According to a 2016 USSC report, the vast majority of federal marijuana possession arrests occur at the border between the United States and Mexico. Among offenders sentenced for marijuana possession in FY2013, the USSC reports that over 94% of those arrested at the border were not U.S. citizens. To the extent those individuals were not lawfully present in the country, they would not benefit from the pardon.

Fourth, the pardon applies only to offenses committed before the proclamation. The Supreme Court has explained that the President may issue a pardon "at any time after [an offense's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." While DOJ is currently not prioritizing prosecuting low-level marijuana offenses, the October 2022 pardon does not prevent prosecution of *future* offenses if the current Administration or a future Administration adopts a different policy.

Fifth, the pardon may not remove all legal consequences of marijuana possession, because it does not expunge convictions. Moreover, some collateral consequences of marijuana-related activities do not depend on a person being charged with or convicted of a CSA violation.

Finally, and most fundamentally, the pardon does not change the status of marijuana under federal law. The President lacks the power to make such a change unilaterally. In announcing the grant of clemency, President Biden directed the Attorney General to review the classification of marijuana under the CSA, which is one way the federal government could change the status of the substance consistently with relevant separation-of-powers principles and the CSA's procedural requirements. Any agency action in response to that directive would likely occur through notice-and-comment rulemaking, subject to judicial review and applicable international treaty obligations.

Notwithstanding the foregoing limitations, some commentators have described the October 2022 pardon as a significant development in national marijuana policy that may restore some civic rights to those who benefit from it. Some have expressed concerns that the pardon might benefit offenders who committed more serious offenses but pleaded guilty to simple possession or that relaxing controls on marijuana may generally lead to an increase in crime. Others advocate for further pardons, expungements, and legal reforms to decriminalize marijuana.

State Ballot Initiatives

Recent years have seen numerous states repeal criminal prohibitions on medical and recreational marijuana use. Despite some failures, marijuana legalization proposals have regularly appeared in state legislatures and on state ballots and, where successful, have significantly changed the legal landscape. That trend continued in the 2022 elections, where on November 8, 2022, voters in five states considered ballot measures that would relax state controls on recreational marijuana.

Two of the measures were adopted. In Maryland, voters approved a ballot initiative to amend the state constitution to legalize the use of marijuana by persons 21 or older and direct the state legislature to enact laws regulating and taxing marijuana-related activities within the state. In Missouri, voters approved a ballot initiative to amend the state constitution to remove cannabis from the state schedules of controlled substances and provide that cannabis "shall hence forth be considered a food and not a controlled substance or a drug, by Missouri law." Among other things, the Missouri measure provided that cannabis use could not be grounds for denial of housing, employment, or possession of a firearm.

Three of the November 2022 marijuana initiatives were unsuccessful. In Arkansas, voters rejected a ballot initiative to amend the state constitution to legalize the use of recreational marijuana by persons 21 or older subject to licensing, regulation, and taxation by state authorities. In North Dakota, voters disapproved a ballot initiative to amend state law to remove hashish, marijuana, and THC from the state schedules of controlled substances; allow persons over the age of 21 to use, possess, and transport up to two ounces of prepared marijuana; and provide for state regulation and taxation of marijuana businesses. In South Dakota, voters rejected a ballot initiative to amend state law to, among other things, legalize the use, possession, or distribution of up to an ounce of marijuana by persons 21 or older. South Dakota voters previously voted in 2020 to amend the state constitution to legalize recreational marijuana, but state courts struck down the measure for failure to comply with procedural requirements.

All of the states where voters considered recreational marijuana ballot measures in November 2022 had previously enacted laws authorizing the use of medical marijuana. Medical marijuana laws remain in effect in the three states where voters declined to adopt recreational marijuana measures. As noted above, state laws legalizing medical or recreation marijuana or other controlled substances at the state level do not affect the status of marijuana under federal law.

Marijuana and CBD Research

The CSA authorizes scientific research involving Schedule I controlled substances such as marijuana and imposes stringent controls on such research. Some have expressed concerns that the CSA places too many restrictions on marijuana research, including limiting the type and amount of marijuana that researchers can use. (For many years, there was only one registered manufacturer that legally produced marijuana for research, though DEA recently approved additional marijuana manufacturers.) CBD is not a controlled substance but is regulated by the Food and Drug Administration (FDA) under the Federal Food, Drug, and Cosmetic Act.

On December 2, 2022, President Biden signed into law the Medical Marijuana and Cannabidiol Research Expansion Act (H.R. 8454), which aims to ease requirements for research involving marijuana and CBD. Title I of the Act creates specialized, expedited procedures for DEA approval of marijuana research and manufacture of marijuana for research purposes. Title II authorizes CSA registrants to "manufacture, distribute, dispense, or possess marijuana or cannabidiol ... for purposes of medical research for drug development or subsequent commercial production." It also directs DEA to register applicants to manufacture or distribute CBD or marijuana for the purpose of commercial production of FDA-approved drugs in accordance with CSA requirements. Title III provides that it shall not be a violation of the CSA for physicians to discuss "the currently known potential harms and benefits of marijuana and marijuana

derivatives," including CBD, with patients and their guardians. Title IV directs the Secretary of Health and Human Services to submit to certain congressional committees a report on the potential therapeutic effects of CBD and marijuana on serious medical conditions; potential effects of marijuana on the body, brain development, and cognitive abilities; and barriers to researching marijuana or CBD in states that have legalized the use of such substances.

Federal Legislative Proposals

Numerous proposals before the 117th Congress would change how the federal government regulates marijuana. Congress has broad power to regulate marijuana or relax federal regulation of the substance as part of its authority over interstate commerce.

Several recent proposals would remove marijuana from control under the CSA. For instance, the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act, H.R. 3617) would remove marijuana and THC from control under the CSA and require expungement of past convictions for many federal marijuana offenses. Among other things, it would also remove some collateral consequences for marijuana-related activities, impose a 5% tax on cannabis products, and use revenues from the tax to fund certain grant programs for disadvantaged individuals and "individuals most adversely impacted by the War on Drugs." The MORE Act passed the House in April 2022 and is currently pending before the Senate.

Another descheduling proposal, the Cannabis Administration and Opportunity Act (S. 4591), would remove from Schedule I marijuana and THC derived from the cannabis plant. It would also provide for expungement of certain past marijuana convictions, but it would retain federal criminal liability for cannabis-related activities not authorized under the law of the states where they occur. In addition, among other things, it would provide guidance for regulation of cannabis products under the Federal Food, Drug, and Cosmetic Act. It would also impose a 10%-25% tax on cannabis products and use revenues from the tax to fund programs including small business development, community reinvestment, and opioid abuse treatment. Other legislative proposals from the 117th Congress would also remove marijuana from control, allow for expungement or sealing of certain federal marijuana convictions, or facilitate expungement of state convictions.

In the alternative, some proposals would continue to regulate marijuana as a controlled substance but would move it to a less restrictive schedule, potentially allowing it to be dispensed by prescription for medical purposes. Several legislative proposals from the 116th Congress would have left marijuana in Schedule I but limited enforcement of federal marijuana law in states that legalize marijuana. In the 117th Congress, the Small and Homestead Independent Producers Act of 2022 (H.R. 8825) would allow shipment of marijuana within and between states that have legalized the substance.

Some proposals would address specific legal consequences of marijuana's Schedule I status. For example, the SAFE Banking Act of 2021 (H.R. 1996/S. 910), which passed the House in April 2021, seeks to protect depository institutions that provide financial services to cannabis-related businesses from regulatory sanctions. Other proposals would seek to ensure access to insurance and other financial resources, further facilitate federally approved clinical research involving marijuana, or enable veterans to access information about or use medical marijuana. Additional proposals would remove collateral legal consequences of marijuana-related activities for individuals in areas such as immigration, gun ownership, and federally assisted housing.

While most recent proposals would relax federal regulation of marijuana, Congress could also impose more stringent controls. As one example, the Welfare for Needs not Weed Act (H.R. 4536) would prohibit the use of benefits under the Temporary Assistance for Needy Families block grant at any store that offers marijuana for sale. Other proposals would seek to address the issues of workplace impairment or driving under the influence of marijuana and other substances.

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