Marijuana: to advise or not to advise, that is the question

January 15, 2016
Le Sheraton
Montreal, QC, CA

Faculty:
Michael Kennedy, Esq.
T.J. Donovan, Esq.
Jake Perkinson, Esq.
VBA YLD Thaw

- Legal Ethics Related to Vermont’s Marijuana Laws
  - Michael Kennedy
  - Jacob Perkinson
  - Thomas J. Donovan
Initial Thoughts

1. Do you know Vermont’s law on personal possession and use of marijuana?
2. Do you know the difference between decriminalization and legalization?
3. A client asks for advice on obtaining a business license to distribute marijuana. What ethical concerns jump to mind, if any?
4. What if you have another client who has already retained you to seek a business license to distribute marijuana?
5. A client uses medical marijuana. Client failed a drug test at work, but not as a result of using at work. Employer intends to fire client. Issues?
6. A lawyer you know uses medical marijuana. Any issues?
Rules of Professional Conduct

• Which rules apply to lawyers who provide legal advice on marijuana-related issues?
Which rules apply?

• ALL OF THEM!
Particularly Pesky Rules

- Which rules have caused the most concern/debate insofar as to their application to lawyers who provide legal advice on marijuana-related issues?
Particularly Pesky Rules

- Rule 1.2(d)
- Rule 8.3(a)
- Rule 8.4(b)
Rule 1.2(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 law.”
Rule 8.4(b)

• “It is professional misconduct for a lawyer to engage in a ‘serious crime,’ defined as illegal conduct involving any felony, or any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a ‘serious crime.’”
Rule 8.3(a)

• “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”
Controlled Substances Act

• Schedule I

Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. Some examples of Schedule I drugs are:

heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote
October 2009 – The Ogden Memo

• DOJ Memo to US Attorneys

• DOJ committed to enforcement of the Controlled Substances Act in all States

• DOJ also committed to efficient use of limited resources

• Focus on significant traffickers

• Individuals in clear & unambiguous compliance with state laws on medical use of marijuana should not be a priority
However........

• No state can authorize violations of federal law

• Clear & unambiguous compliance with state law does not create a legal defense to violations of the Controlled Substances Act

• Memo does not preclude prosecution, even when there is clear & unambiguous compliance with state law, if prosecution serves important federal interest
Finally.....

• Claims of compliance with state law may mask trafficking operations.

• Commercial enterprises that unlawfully market & sell marijuana for profit remain an enforcement priority
July 2010 – Maine Advisory Opinion

• What are the general parameters within which an attorney may, consistent with the ethics rules, represent or advise clients under Maine’s new Medical Marijuana Act?
Maine Advisory Opinion

• Upon passage of Medical Marijuana Act, questions arose as to interplay with federal prohibition against distribution of marijuana.

• Those questions were made “more problematic” by the Ogden Memo and its mixed message
Maine Advisory Opinion

• Maine’s rules prohibit lawyers from counseling a client to engage, or assisting clients, in conduct that is criminal.

• Lawyers may, however, discuss legal consequences of any proposed course of conduct with a client.

• Maine’s rules, though, don’t draw a distinction between federal and state crimes, or between crimes that are enforced and those that are not
Maine’s Conclusion

• “We cannot determine which specific actions would run afoul of ethics rules. We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk of harm.”
February 2011 - Arizona

• In 2010, Arizona voters approve Arizona Medicinal Marijuana Act.

• Question:

  May lawyers ethically advise clients with respect to activities that comply with the Act, including assisting clients in acquiring business licenses under the Act and representing those clients before state agencies on licensing issues?
Arizona

• Act raises issues.

• Ogden memo “leaves unclear extent to which federal prosecutors will pursue violations of federal law for conduct that complies fully with Arizona law.”

• Not clear whether federal court action will preempt Arizona Act
Arizona Says.....

• We don’t care that things aren’t clear.

• “It is important that lawyers have the ability to counsel and assist their clients about activities that are in compliance with the Act – and traditional at the heart of the lawyer’s role.....”
Arizona Says Further

• Advising clients on the consequences of their acts IS NOT THE SAME as assisting them to commit those acts
Arizona Concludes

• If client wants legal advice under state law, and
• If lawyer advises client that there might be implications under federal law, and
• And if client, fully informed of risks, chooses to proceed under state law, then
• The lawyer may ethically provide such legal services as are necessary to assist the client to engage in conduct that is permissible under state law.
The Plot Thickens

- July 29, 2011
- DOJ releases the Cole Memorandum
- "COLE I"
- Another memo to US Attorneys
COLE I

- In Ogden, we suggested it might not be a good use of resources to prosecute individuals who are using medical marijuana or on caregivers who are supplying it, as long as the users & caregivers were in clear & unambiguous state law

- We never suggested that you should ignore commercial cultivation of marijuana
COLE I

• Increase in states that have authorized commercial cultivation, sale, distribution and use of marijuana “for purported medical purposes.”

• Some cultivation operations generate millions of dollars in revenue & “mask” trafficking operations
COLE I

• “The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”
COLE I

• “Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act.”

• They may “also be in violation of federal money laundering laws and other federal financial laws.”
2012 - Colorado Gets in the Game

- February – Decision 124 – ethical implications of a lawyer’s personal use that is legal under state law, but might violate federal law.

- April – Decision 125 – ethical implications of advising clients on activities that are legal under state law, but might violate federal law
Opinion 124: Question

- May a lawyer who, under Colorado law, may cultivate, possess, and use small amounts of marijuana solely to treat a debilitating medical condition may do so without violating the Colorado Rules of Professional Conduct?
Opinion 124 - Answer

- Yes.
- Violates federal law, we get that.
- Thus, violates Rule 8.4(b), which doesn’t draw distinction between state and federal law.
- But, 8.4(b) requires nexus between criminal act and lawyer’s honesty, trustworthiness, or fitness.
- Complying with state’s medical marijuana provision does not provide the nexus
Opinion 124: Caveat

• But, while use on its own might not violate rules, it’s a violation if used to the point of impairment.

• Also, if a lawyer knows that another lawyer who is using medical marijuana has become so impaired as to pose a danger to clients, the lawyer may have to report that lawyer to the appropriate authority.

• Missing hearings, missing deadlines, failing to make filings.
Opinion 125 - Question

• Does a lawyer violate the Rules of Professional Conduct by counseling or assisting clients in legal matters related to the cultivation, use, or sale of medical marijuana that is legal under Colorado law?
Opinion 125 - Answer

• Might not need to answer. Issue is more theoretical than practical. We know of no lawyer who has been prosecuted for advising clients on matters that are legal in Colorado but illegal under federal law.

• But, we’ll answer. If only to prevent the ethics rules from becoming a source of confusion instead of a source of guidance.
Opinion 125 - Answer

• Some advice is ok, other advice isn’t.
Opinion 125 – Advice that’s OK

• Advice related to client’s past conduct

• Advice related to rules & regulations implementing Colorado law

• Arguing or lobbying for certain rules & regulations

• Advice related to consequences of use & commerce under Colorado or federal law
Opinion 125 – Advice that’s not OK

• “The Committee further concludes that, for good or ill, under the plain language of Rule 1.2(d), it is unethical for a lawyer to counsel a client to engage, or assist a client, in conduct that violates federal law.”
Opinion 125 – Not OK

- It violates Rule 1.2(d) for a lawyer to draft or negotiate:
  - contracts to facilitate the purchase and sale of marijuana, or
  - leases for properties or facilities, or contracts for supplies, that the clients intend to use to cultivate, distribute, or sell marijuana,
  - even though such transactions comply with Colorado law and even though the law or transaction may be so complex that a lawyer’s assistance would be useful.
  - Such transactions violate federal law
Opinion 125 - Upshot

- Between the advice that’s ok and the advice that isn’t "lies a range of conduct in which the application of Rule 1.2(d) is unclear."
Opinion 125

• What lies in between?

• Tax law – if tax planning assists a client to violate federal law

• Family Law – custody order that outlines parents’ agreement as to permissible use of marijuana

• A lot more we haven’t thought of
Connecticut Jumps In . . .

• Connecticut Opinion 2013-2 addresses whether lawyer may ethically advise client on issues arising under Connecticut’s Palliative Use of Medicinal Marijuana Act
but not too deep

• Rules 1.2(d) and 8.4(b) do not draw a distinction between state & federal crimes, or crimes that are enforced and those that are not.

• CT leaves it to individual lawyers to draw the line between permissible advice on state law and impermissible assistance to clients in conduct that violates federal law.
August 2013 – Return of the Feds

• Cole Strikes Again
• Another Memo to US Attorneys
• Cole II
Cole II

• The illegal distribution and sale of marijuana is a serious crime that raises significant revenue for large scale criminal enterprises, gangs, and cartels.

• DOJ remains committed to prosecuting those groups
Cole II

• DOJ also remains committed to an efficient allocation of resources

• DOJ will continue to prioritize its resources
COLE II

Sets forth eight “priority factors” for prosecuting marijuana offenses:

• 1. Prevent access by minors
• 2. Prevent revenue diversion to criminals, cartels and gangs
• 3. Prevent product from crossing state borders
• 4. Prevent use of authorized activity as a cover for illegal activity
• 5. No guns or violence
• 6. Prevent drugged driving or other adverse public health consequences
• 7. No growing on public lands
• 8. No use on federal property.
Cole II – Otherwise

• If it’s within those priorities:

• “the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics law.”
• “The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement.”
Cole II

• In deciding how to use limited resources, US Attorneys should consider strength of state’s regulatory schemes, even if such schemes allow for large-scale cultivation operations that generate significant revenue.

• Size and revenue are not necessarily proxies for trafficking.
Lawyers Need Answers: Colorado Acts

• Proposed Rule 8.6

  – Bar Counsel proposes to exempt lawyers from disciplinary prosecution for counseling or assist a client in conduct that is permitted by the Colorado Constitutional amendments on the medical and personal use of marijuana
Colorado Supreme Court: Here’s your answer

• We reject proposed Rule 8.6
However....

- March 2014, Colorado Supreme Court adopts comment 14 to Rule 1.2(d).

- “A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.”
Department of Treasury

• February 2014
• Memo from Treasury’s Financial Crimes Reporting Network
• Guidance on the Bank Secrecy Act and expectations regarding Marijuana-Related Businesses
Treasury Memo

Recognizes need for state legal cannabis businesses to have access to banking services.

Essentially green-lights banking activity where the eight factors in Cole I are not negatively indicated.

Requires Treasury regulations to be followed.
• Provides two levels of reporting: “Marijuana Limited” for activities banks believe are in compliance with Cole I and “Marijuana Priority” for activities they believe are in violation.

• Banks have not stepped forward because it essentially requires them to guarantee the good behavior of their customers.
October 2014 - Illinois

Question 1:

May a lawyer provide legal advice & services to client engaged in medical marijuana business that is legal under state law but remains a crime under federal law?
Illinois

Yes.

Given the conflict between state & federal law, and the federal accommodation in Cole II, legal advice is far better than forcing such clients & businesses “to proceed by guesswork.”

However, tread carefully. Make sure it’s not a front for traffickers and remember that the feds can change their mind at any time.
Illinois

- Question 2

- May a lawyer counsel a municipal government concerning zoning regulations for cultivation centers and dispensaries?
Illinois

• Answer – this isn’t even a close call. Enacting zoning regulations is not a crime, no matter what builders, property owners, and occupants might be authorized to do under those regulations.
Omnibus Budget Act of 2014:

• SEC. 538. None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.
2015 - Alaska

• Personal Use by Attorney

  – Ok, so long as consistent with state law and does not result in impairment
  – Can’t deal, traffic, or provide to minors
2015 - Alaska

• Advising Clients on Forming a Marijuana Business that is Legal under State Law?

• Ok, so long as also advise that the state law conflicts with federal law.
2015 - Alaska

- Can a lawyer draft the LLC paperwork, invest financially in the business, or work there?
2015 - Alaska

• No “principled line” between giving advice and drafting documents. So that’s ok.

• As for investing or working there, lawyer should exercise caution and not become directly involved in operating a business that remains illegal under federal law.
2014 - Washington

• Washington Supreme Court adopts Comment 18 to Rule 1.2.

  “At least until there is a subsequent change of federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders and other state and local provisions implementing them.”
Washington

• Prior to that, in 2012, Washington had passed Initiative 502.

• Law authorized possession, use, and sale of small amounts of marijuana, and provided regulatory & tax scheme.
Washington

• In 2014, Washington passed another law, the Cannabis Patient Protection Act

• Lawyers wondered whether Comment 18 to Rule 1.2 applied to CPPA as well
2015 – Washington Advisory Opinion Answers the Question

Yes.

Lawyers may ethically advise clients as to interpretation of each of Washington’s marijuana-related acts, but may not give advice on how to conceal conduct that would violate state or federal law.

CAVEAT: as long as federal enforcement policy remains unchanged
2015 – Washington Advisory Opinion

Opinion addressed two other issues:

1. May a lawyer ethically buy, posses, or marijuana in amounts legal under state law?

2. May a lawyer run a marijuana-related business that is legal under state law?
1. Personal use is okay. No reason to interpret the rules as prohibiting lawyers from engaging in conduct that is legal for everyone else.

   Caveat – impairment.

2. Operating marijuana-related business is okay. Lawyers are free to engage in business to same extent as members of the public.

   Caveat – Rule 1.8, if going into business with a client.