



# Ethical Issues in the Cannabis Industry

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If marijuana is illegal under federal law,  
is providing counsel or assistance to  
marijuana clients an ethical violation?



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## Federal Law

Marijuana is illegal for all purposes, under all circumstances according to federal law.

Under federal criminal law, marijuana is a Schedule I narcotic, whose manufacture, possession and distribution is prohibited and for which there is no approved medical use.

Individuals and entities are forbidden by federal law not only from violating these laws and principles, but also, under principles of accessorial liability, from intentionally aiding and abetting others in violating the narcotics law, counseling others to violate the narcotics law, or conspiring with others to violate the narcotics law.

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## But wait! Federal Legalization(?!)

- 2018 Farm Bill (enacted Dec. 20, 2018)
  - Amended Controlled Substances Act § 102(16) (21 U.S.C. § 802(16)) (“CSA”)
- “Marihuana” does not include “hemp” as defined under 1946 Act. (Farm Bill § 12619)

**H = MJ ≤ 0.3% THC**

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## Federal Legalization(?!)

- 2018 Farm Bill (enacted Dec. 20, 2018)
  - Amends the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621, et seq.) (“1946 Act”)
- Defines “hemp”: the plant *Cannabis sativa L.* and **any part of that plant** (includes seeds and derivatives, extracts, cannabinoids, isomers, acids, salts, growing or not . . .
  - . . . with THC concentration of “not more than” 0.3% (dry weight) (1946 Act § 297A(1))

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## Federal Legalization(?!)

- 2018 Farm Bill (enacted Dec. 20, 2018)
  - Establishes a federal regulatory program (1946 Act § 297C)
  - More stringent state/tribal law not preempted (1946 Act § 297B)
  - States/tribes cannot prohibit transportation/shipment of hemp (Farm Bill § 10114)

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## State Legalization

- 32 states, D.C., Guam and Puerto Rico have comprehensive medical marijuana programs
- 10 states and D.C. have recreational/adult use programs
- Legal cannabis represents one of the fastest growing industries in the U.S.
  - ~10B in legal sales in 2017

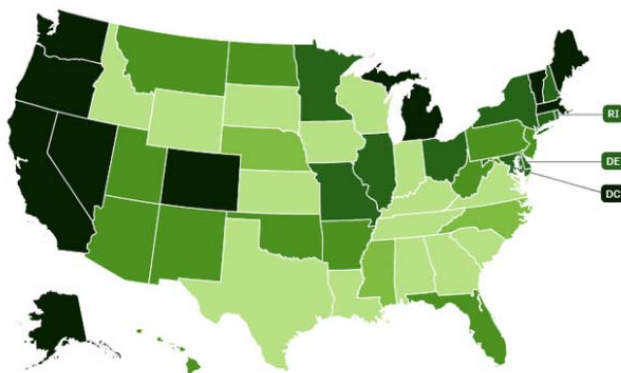
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## Marijuana Legalization – State by State

Note: Vermont and Washington, DC, do not allow marijuana sales for recreational purposes.

■ Legalized ■ Medical and decriminalized ■ Medical ■ Decriminalized ■ Fully illegal



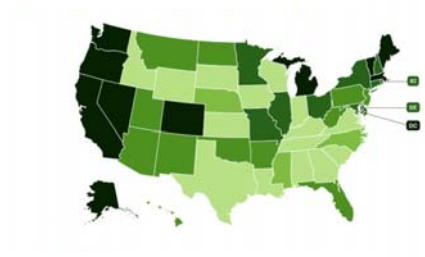
Source: Marijuana Policy Project  
Credit: German Lopez

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## Federal Laws vs. State Laws

State Law



Federal Law



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## New York Medical Marijuana Law

- Compassionate Care Act (2014)
- Authorizes medical marijuana within New York State
  - Department of Health/Bureau of Narcotics Enforcement
  - Ten registered organizations are currently authorized to grow, manufacture, transport, and dispense
  - Certain health care providers can become certified to recommend medical marijuana to patients
  - Individuals with certain serious conditions, with serious symptoms, can become certified patients upon registering with the state if they have a certified provider's recommendation
    - Qualified conditions are limited to cancer, HIV/AIDS, ALS, Parkinson's, MS, damage to nervous tissue/spinal cord with intractable spasticity, epilepsy, IBS, neuropathies, Huntington's, PTSD, chronic pain, seizures, and any condition for which an opioid could be prescribed

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## Cannabis Clients

- Two general categories of clients:
  - Plant touching clients
    - Companies that directly manufacture, distribute or sell marijuana in compliance with state law
  - Ancillary clients
    - Third parties that help plant touching companies operate or refer customers to them (e.g. doctors, bankers, investors, lawyers, landlords, accountants, etc.)
- Overall consensus across U.S.:
 

***As a matter of public policy, attorneys should be allowed to provide cannabis-related entities with legal services as permitted in their respective states.***

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## Cannabis Clients

- Overall consensus across U.S.:
 

***As a matter of public policy, attorneys should be allowed to provide cannabis-related entities with legal services as permitted in their respective states.***
- E.g., Colorado RPC Rule 1.2, Comment [14]:
 

*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.*

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## Cannabis Clients

- Providing legal services to both ancillary and plant touching clients has become permissible under many state laws and ethics opinions, but could still be considered a violation of federal law.
- Most states do not prohibit attorneys from advising clients on content/interpretation of state marijuana laws – but there are generally limitations on the scope of ethical counsel.

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## New York Rules of Professional Conduct

Lawyers **may advise** clients about the lawfulness of their proposed conduct **and assist** them in complying with the law, but lawyers may not knowingly assist clients in illegal conduct.

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## New York Rules of Professional Conduct

Rule 1.2(d) provides: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.”

Rule 8.4(b), which forbids illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer, is also implicated in the course of representing cannabis clients.

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## New York Ethics Opinion 1024 (9/29/2014)

In light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with the state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.

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## How Do We Get There? Federal Non-Enforcement

Ogden Memo – 2009

U.S. Attorneys vested with “plenary authority with regard to federal criminal matters within their districts” (USAM 9-2.110). In exercising this authority, U.S. Attorneys are “invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority” (*id.*).

BUT federal resources should not be focused on individuals whose actions are in clear and unambiguous compliance with state law.

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## Continued. . .

### Cole Memo – 2013

Confirms non-enforcement policy; provides enforcement priorities

- Preventing distribution to minors
- Preventing revenue from going to criminal organizations
- Preventing diversion to states where marijuana is illegal
- Preventing legal activity from being used as cover for illegal activity
- Preventing violence and use of firearms
- Preventing drugged driving and other adverse public health consequences
- Preventing growing of marijuana on public lands
- Preventing marijuana use/possession on federal property

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## New York Ethics Opinion Reasoning

Our Ethics Opinion is based on federal non-enforcement.  
 “If federal enforcement [policy] were to materially change,  
 this Opinion might need to be reconsidered.”

Enter Jeff Sessions. . .



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Sessions Memo – 1/4/2018; Cole Memo rescinded



Say goodbye to your weed!

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## What Now?

- Limited protection similar to Cole in the federal budget
  - Rohrabacher-Farr Amendment
  - No DOJ funds may be used to prevent states from implementing state medical marijuana laws
  - *U.S. v McIntosh*, 833 F.3d 1163 (9th Cir. 2016)
    - Rohrabacher-Farr prohibits DOJ from spending \$ on actions that prevent MMJ states from giving practical effect to their state laws
    - At a minimum, DOJ may not prosecute individuals who engaged in conduct permitted by state MMJ laws

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## What Now?

- Significant anchor of NY Ethics Opinion is gone
- Enforcement activities have generally not changed
- But, the Sessions Memo is concerning, and
- ***No protection for adult use programs***
  - ***Which New York is actively considering . . .***

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## What's Next?

- NYSBA Committee on Standards of Attorney Conduct, Annual Meeting
  - Proposed amendment, Rule 1.2(d) and proposed new Comment [10A].
  - If approved, then to NYSBA House of Delegates
  - If approved, then to Appellate Divisions

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## What's Next?

### Proposed amendment, Rule 1.2(d):

*A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client, and may counsel **or assist** a client in conduct expressly permitted by New York law that may violate federal or other law, provided that the lawyer advises the client about that federal or other law and its potential consequences.*

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## What's Next?

### Proposed new Comment [10A] :

*Occasionally, conduct expressly authorized by New York law may violate federal law or the law of another jurisdiction. In such cases, a lawyer may counsel or assist a client engaging in the conduct violative of federal or other law, but to provide effective representation, the lawyer should also advise the client about that federal or other law and its potential consequences. If the lawyer assists the client in engaging in such conduct, the fact that the lawyer has complied with these Rules may not shield the lawyer from possible consequences for violation of the law or legal ethics rules of that other jurisdiction.*

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## What to Tell Clients – DISCLAIM!

- All marijuana is illegal under federal law
  - Explain penalties for violations
- No advice given is intended to assist in the violation of federal laws
- Someone may allege our communications are not privileged – and they could be right
- I have the right to terminate this engagement if there is a material change in federal law or enforcement policy

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## What to Tell Clients – DISCLAIM!

- Medical marijuana is a bit of a misnomer
- Perfect compliance with state law doesn't change illegality under federal law
- A loose connection is enough to get in hot water (landlord, banker, accountant, other vendor)
- Banking is a nightmare; explain issues relating to accepting and paying money
- Even if you are not prosecuted, the federal government can seize your assets
- You may not be able to get good insurance coverage, if any

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## What to Tell Clients – DISCLAIM!

- If you have a license, you could lose your license
- My advice may not protect you, and I may be a witness against you
- You cannot deduct your business expenses
- Bankruptcy is not an option



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