Legal Ethics

Ethics Opinions

OPINION 2015-1

[Issue date: June 2015]

ISSUE:

May a California lawyer ethically represent a client in respect to a medical marijuana enterprise in California?

DIGEST:

A California attorney may ethically represent a California client in respect to lawfully forming and operating a medical marijuana dispensary and related m permissible under state law, even though the attorney may thereby aid and abet violations of federal law. However, the attorney should advise the client c liability under federal law and relevant adverse consequences and should be aware of the attorney's own risks.

STATEMENT OF FACTS:

Lawyer receives a telephone call from a client who says she wants to open a medical marijuana dispensary and wants assistance negotiating a lease anc financing, a use permit, and a business license. Client says she will only sell to customers who have *bona fide* recommendations from medical doctors ar her own inventory in California.

DISCUSSION:

This fact scenario presents a clear example of the difference between ethical conduct, on the one hand, and illegal conduct or conduct that may subject o discipline, on the other. The lawyer may operate within the bounds of California law and advise the client about her rights under California law, but the lav accused of aiding conduct that is illegal under federal law. We conclude that the lawyer may ethically represent the client, even if doing so might violate fe the Rules of Professional Conduct.

To borrow a phrase from *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 362: "This request is terra incognita," as are "the many con aspects of the current tension between California marijuana laws and those of the federal government." We know of no other area in which a lawyer may represent a client in a matter that is legal under California law, but illegal under federal law.

A. Federal Law

Federal law makes it a crime to grow, sell, or possess marijuana. *See, e.g.*, 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812, Schedule I (c), (d). Possessio marijuana for personal use is a federal misdemeanor. 21 U.S.C. § 844a(a). However, manufacture, distribution, possession with intent to distribute attempts and conspiracies to do so involve penalties that vary with the type and quantity of drug and other factors. 21 U.S.C. §§ 841(b), 846 & 960 For example, a statutory range of five to forty years applies to offenses involving at least 100 kilograms of marijuana or 100 plants, while 1,000 kilog of marijuana or 1,000 plants can range from ten years to life. 21 U.S.C. §§ 841(b)(1)(A), (B) & 960(b)(2). A doctor may not prescribe marijuana be is a Schedule I drug. However, a doctor may recommend use of marijuana and discuss treatment options with patients, even though that might lea illegal conduct. *Gonzales v. Raich* (2005) 545 U.S. 1, 14-15; *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 636-38, *cert. denied sub. nom. Walter Conant* (2003) 540 U.S. 946. In addition to, or in lieu of, imprisonment or fines, the Department of Justice may seek civil forfeiture of property from owner, landlord, mortgage holder or other person or entity who has an interest in property connected with an illegal activity. *See*, *e.g.*, 21 U.S.C. § 8

In addition, "aiding and abetting" a violation of federal marijuana laws is a crime. *Conant v. Walters*, *supra*,309 F.3d at 635 (citing *U.S. v. Gaskins* (9 1988) 849 F.2d 454, 459) (setting forth elements of "aiding and abetting"). Thus, if the lawyer represents or counsels the California client in comply state law in the situation posed, he or she nevertheless could be prosecuted under federal law for aiding and abetting the client's violation. Repres client in connection with medical marijuana may expose the lawyer to risks under other federal statutes. *See*, *e.g.*, 18 U.S.C. § 2(a) ("Whoever com offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); and 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

The Department of Justice has given guidance about its priorities for the enforcement of the Controlled Substances Act, and characterized as low p individuals who are in "clear and unambiguous compliance" with state medical-marijuana laws. *See*, *e.g.*, James M. Cole, U.S. Dep't of Justice, Off Deputy Attorney General, Guidance Regarding Marijuana Enforcement, (Aug. 29, 2013), ; James M. Cole, U.S. Dep't of Justice, Office of Deput Attorney General, Guidance Regarding Marijuana Related Financial Crimes, (February 14, 2014), . Nevertheless, violation of the act is still a cri under federal law and is still subject to discretionary enforcement.

B. Conflicting California Law

California law obviously conflicts with federal law because possession, sale, and cultivation of marijuana for medical purposes will not be prosecute the state. Proposition 215 added the Compassionate Use Act of 1996 as section 11362.5 to the Health & Safety Code, providing in relevant part:

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

Effective in 2004, Senate Bill 420, the Medical Marijuana Program Act (Health & Safety Code sections 11362.7 to 11362.83) supplemented the Compassionate Use Act by, for example, creating a state-approved medical marijuana identification card program, setting the quantity of marijuana qualified patient or primary caregiver can possess, and creating certain immunities from state marijuana laws. Thus, California state law permits sa use of marijuana under certain circumstances, even though doing so remains a crime under federal law.

C. No Preemption of California Law

"The Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land." U.S. Constitution, Art. VI, ¶ 2. However, federal preemption of marijuana laws is limited:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provisio operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Thus, California may regulate marijuana as long as state law does not positively conflict with the Controlled Substances Act.

Neither Proposition 215 nor the Medical Marijuana Program Act positively conflicts with the Controlled Substances Act because they do not "legaliz medical marijuana. They exercise the state's power not to punish certain marijuana offenses under state law if a physician has recommended its us treat a serious medical condition. They are not preempted by the Controlled Substances Act. *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070, *review granted and opinion superseded sub nom.* (*Pack v. S.C.* (Cal. 2012) 136 Cal.Rptr.3d 665); *Qualified Patients Assn. v. City of Anaheim* (2010 Cal.App.4th 734, 756-63; *City of Garden Grove v. Superior Court*, *supra*, 157 Cal.App.4th at 371-373, 381-382; *but see Emerald Steel Fabricators, Bureau of Labor and Industries* (2010) 348 Or. 159, 172 (employers not obliged to accommodate employees' use of medical marijuana; federal law preempts state legislation); and *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926-30 (Compassionate Use Act shields med marijuana users from criminal liability under state law but does not require employers to accommodate use of medical marijuana, which is illegal ur federal law).

Conversely, the legality of possession and use under California law does not bar enforcement of the federal Controlled Substances Act. *Gonzales v Raich*, *supra*, 545 U.S. at 63 ("[e]nforcement of the CSA can continue as it did prior to the Compassionate Use Act.") (Thomas, J. dissenting). Fede on this subject can be enforced regardless of the California statutes. *See* *U.S. v. Cannabis Cultivators Club*(N.D. Cal. 1998) 5 F.Supp.2d 1086, 110 ("Proposition 215 does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it me exempts certain conduct by certain persons from the California drug laws."); *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 79

D. Clients Need Representation Regarding Activities Permissible Under State Law.

Like any other business venture, a client that embarks on a medical marijuana venture may need a lawyer's advice and assistance, but the issues i in the legal representation are complicated by the dissonance between state and federal laws. For example:

- California law does not permit the unfettered cultivation, possession, sale, or use of medical marijuana. A client who wants to engage in permissible activities may need a lawyer's advice on applicable statutes and regulations, such as: What persons or entities may cultivate, dispense, recommend use of, or possess marijuana and in what quantities? May they be compensated and, if so, in what amounts?
- A financial institution may refuse to grant a loan or line of credit to fund a client's business that is related to marijuana. [1]
- A client may need assistance negotiating a lease, particularly if a prospective landlord wants to prohibit use of real property for illegal activities fears seizure by federal authorities. [2]
- The dispensary will need a seller's permit. *See* June, 2007, Cal. Bd. Of Equalization Special Notice at www.boe.ca.gov.
- Who will draft contracts for the purchase of the marijuana inventory?
- If the client will conduct a cash-only business, then she may need representation in negotiating arrangements to lower the risks associated with handling large amounts of cash. [3]
- The marijuana enterprise may need legal advice and representation to obtain a use permit or zoning variance.
- The client will also need tax advice. Unlike other business ventures, marijuana sellers may not deduct expenses such as employee salaries, re mortgage payments, legal fees, state taxes, or equipment depreciation. 26 U.S.C. § 208E; *see* Dep't of Treasury, Internal Revenue Serv. (Dec 16, 2010) at http://www.irs.gov/pub/irs-wd/11-0005.pdf.
- Health care providers and their patients may also need legal advice.

Even if California residents comply with state laws regarding medical marijuana, they risk prosecution or civil or criminal forfeiture under federal law None of these issues is easily resolved. If they can skirt federal enforcement activities, they need representation by lawyers to ensure compliance w state laws, ordinances, and regulations and to minimize the risks of criminal prosecution and exposure under federal laws and policies.

E. Lawyers Should Not Be Subject to Professional Discipline for Representing Clients on Matters Relating to Medical Marijuana that Com with State Law.

We do not believe that the State Bar Act or California Rules of Professional Conduct should be used to discipline lawyers whose clients seek advice how to comply with state or local laws when the client's proposed conduct may violate the Controlled Substance Act. Provided that the client limits her activities to those that comply with state law, and provided that the lawyer counsels against otherwise violating the Controlled Substances Act, a should be permitted to advise and represent a client regarding matters related to medical marijuana under state law.

A lawyer who advises or assists a California resident regarding cultivation, sale, manufacture, distribution, or use of marijuana may be assisting the in violating federal laws. One of the duties of a lawyer is to support the laws of the United States and of California. Bus. & Prof. Code § 6068(a). W a lawyer to do when those laws conflict? We believe that the lawyer may advise, assist, and represent the client in complying with state and local la and ordinances while, at the same time, counseling against conduct that may invite prosecution for violation of federal laws.

To paraphrase Justice Lewis Powell, a duty of a lawyer "is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State." *Application of Griffiths* (1973) 413 U.S. 717, 724, n. 14. In this case, assisting the clier comply with California law may conflict with the interests of the United States. A lawyer, however, may advise the client on her legal rights and oblig and may explain the practical implications and liabilities created by the laws. Without legal representation, those who want to engage in transactior related to medical marijuana may not fully understand their rights, duties, and liabilities. If, as a matter of ethics or policy, the bar were to refuse to represent people regarding medical marijuana, then non-lawyers would be deprived of essential legal representation.

We do not believe that California Rule of Professional Conduct 3-210 should be interpreted to prohibit a lawyer from representing the client concern conduct permissible under Proposition 215 or the Medical Marijuana Program Act, but prohibited by federal law. Rule 3-210 states:

> A member shall not advise the violation of any law . . . unless the member believes in good faith that such law . . . is invalid.

However, this situation is unique. Rule 3-210 did not anticipate it. We know of no other subject in which California law permits what is forbidden by penal law. This state's public policy conflicts with federal law. Even if the lawyer does not believe that the federal laws regarding marijuana are inva conclude that he or she may advise and assist the client in complying with state laws.

Assisting the client who wants to comply with state and local laws is not the same as advising the client to violate federal laws. A lawyer should tell client that the proposed activities will violate federal laws and may warn the client of the associated risks. But that lawyer may concurrently advise t client how to comply with state and local laws and ordinances that permit such activities. For example, the lawyer may assist the client in accomplis other tasks but advise against, and refuse to assist the client in, purchasing marijuana in another state or selling to minors because such conduct is likely to result in criminal prosecution by the federal government and may violate state law too. *See, e.g.*, James M. Cole, U.S. Dep't of Justice, Off Deputy Attorney General, Guidance Regarding Marijuana Related Financial Crimes, (February 14, 2014), (discussing prosecution priorities) anc & Saf. Code § 11361 (use of minor in marijuana activities or sale to minor unlawful).

We also believe that a lawyer's assistance to a client who wants to comply with the Compassionate Use Act should not be considered an act of mor turpitude because it does not suggest that the lawyer is dishonest, untrustworthy, or unfit to practice. *Cf.*, Bus. & Prof. Code § 6106 (allowing disba or suspension for commission of acts involving moral turpitude, dishonesty or corruption). To the contrary, the public's adoption of the Compassiona Act suggests that a lawyer who assists a client in complying with it is fulfilling a public service.

Nevertheless, a lawyer should be aware that he or she is assuming the risk that the State Bar's Office of Chief Trial Counsel may disagree with our interpretation of Rule 3-210 or of Business & Professions Code section 6106 and seek to discipline the lawyer who represents this client, just as the will risk federal prosecution for aiding and abetting.

We conclude that, by telling the client about the risks, but concurrently assisting the client to carry on a business that is expressly permitted by Calif laws, the lawyer would be fulfilling his or her ethical duties to the client. "[T]here is a responsibility on the bar to make legal services available to tho need them. The maxim, 'privilege brings responsibilities,' can be expanded to read, exclusive privilege to render public service brings responsibility assure that the service is available to those in need of it." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and Organized Bar*, 12 U.C.L.A. L. Rev. 438, 443 (1965). Canon 2 of the American Bar Association Code of Professional Responsibility was "A Lawyer Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." EC 2-1 stated:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. [citations omitted].

If Rule 3-210 were interpreted to prohibit lawyers from representing clients involved with medicinal marijuana activities that are permissible under California law and public policy, then we would be adding "the Bar Association won't let us represent you" to such barriers to legal representation as money or failure to recognize that a layperson may need a lawyer. Such concerted refusal to represent clients who need representation would brin bar into disrepute.

A client should not have to wait until he or she is a defendant in a prosecution or forfeiture action before obtaining legal advice. "The obligation to pr legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among tho unaccustomed to business affairs and who are fearful of the ways of the law that such advice is often most needed. If it is not received in time, the valiant and skillful representation in court may come too late." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1216 (

F. Comparison Under Model Rule 1.2(d)

The lawyer's duties under California Rule of Professional Conduct 3-210 differ from a lawyer's duties in a state that has adopted American Bar Ass Model Rule 1.2(d). Model Rule 1.2(d) contains a broader proscription and does not just prohibit a lawyer from advising a client to violate the law. It "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 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 scope, meaning or application of the law." Our Rule 3-210 [4] does not expressly proscribe assisting a client in conduct that the lawyer knows is permissible under state law, but criminal under federal law. We do not opine that a lawyer may assist a client to violate a law where both federal an laws prohibit the act, but the situation presented here does not violate both sets of laws. Even if Model Rule 1.2(d) applied in California, we do not l that it should deprive California residents of candid advice and advocacy. An ethical lawyer should not be limited to the bare words of a disciplinary deciding upon commitments to the client or duties to the public. Bar associations interpreting this issue under their state versions of Model Rule 1.2 have issued inconsistent, and sometimes, inconclusive, ethics opinions.

Among those that opine that legal assistance is prohibited are:

- Maine Professional Ethics Commission Opinion 199 advised that, absent an amendment to the rules of professional conduct or federal law, a lawyer "may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law." However

said that “the Rule forbids attorneys from counseling a client to engage in the (marijuana) business or to assist the client in doing so.” Me. Prof Ethics Comm., Op. #199 (2010) (advising clients concerning Maine’s Medical Marijuana Act).

- Connecticut Bar Association Informal Opinion 2013-02 gave similar advice and left to individual lawyers the burden of deciding whether it woul permissible to advise clients about complying with the state law. On March 24, 2014, Connecticut amended its version of Rule 1.2(d) effective 2015 to permit a lawyer to advise or assist a client with conduct permitted by that state’s law “provided the lawyer counsels the client about the legal consequences . . . under other applicable law . . . .” Con. Prof’l Ethics Comm., Informal Op. 2013-02 (2013) (providing legal services to cli seeking licenses under the Connecticut medical marijuana law).

Among those that opine that legal assistance is permitted are:

- State Bar of Arizona concluded that an Arizona lawyer may ethically assist a client in engaging in medical marijuana in compliance with Arizona law, provided that (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client’s proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client’s activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation. Ariz. Ethics Comm. Op. 11-01 (2011) (a lawyer may ethically counsel a client in legal matte expressly permissible under the Arizona Medical Marijuana Act).

- Colorado Bar Association said that, under Rule 1.2(d), an attorney may represent and advise a client about the consequences of marijuana rel activities; may advise a client about establishing, interpreting, enforcing, or amending zoning, local ordinances, or legislation; and may advise about the tax consequences of growing or selling marijuana. It asked the Colorado Supreme Court to amend its rules of professional conduct. Colo. Ethics Comm. Formal Op. 125 (2013) (extent to which lawyers may represent clients regarding marijuana-related activities). On March 24 2014, the Court adopted Comment [14]: “A lawyer may counsel a client regarding the validity, scope, and meaning of [Colorado’s Constitutiona marijuana provision] and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and t statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the cl regarding related federal law and policy.”

- New York State Bar Association Committee on Professional Ethics concluded that a lawyer may assist a client in conduct designed to comply v state medical marijuana law. However, that opinion was carefully limited and seems to depend upon the United States Department of Justice guidance restricting enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana. [5] (N.Y. Comm. On Prof’l Ethics Op. 1024 (2014) (counseling clients in illegal conduct; medical marijuana law).
- Washington has two opinions. In one, King County Bar Association essentially stated that an attorney is not subject to discipline as long as the client’s conduct is permitted under state law and as long as the client is informed about federal law and the Cole Memorandum. It also opined an attorney is not subject to discipline because he owns an interest in a marijuana dispensary. Although that might be a federal crime, it does r reflect “adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer.” King County Bar Association Ethics Advisory Op. (Oct. 2013 (opinion on I-502 and rules of professional conduct). In the second, Washington State Bar Association said a lawyer could advise a client abou the nuances of state law as long as he did not do so in furtherance of an effort to violate or mask a violation of state marijuana law. Wash. Stat Bar Ass’n, Comm. on Prof’l Ethics Proposed Advisory Op. 2232 (2014) (providing legal advice and assistance to clients under Washington stat marijuana law I-502). Both opinions proposed amending the Rules of Professional Conduct. Effective December 9, 2014, the Washington Supreme Court added Comment [18] to Rule 1.2: "At least until there is a change in federal enforcement policy," a lawyer who counsels or ass a client regarding conduct permitted under Washington Initiative 502 does not without more, violate RPC 1.2(d).

Some additional states have legislated or enacted policies to protect lawyers:

- At the request of the Nevada bar, on May 7, 2014, the Nevada Supreme Court adopted a comment to Rule 1.2 to the effect that a lawyer may counsel and assist a client in complying with that state’s medical marijuana law and must also advise about federal law and policy. We underst that the matter is under further study. Nev. Supreme Ct. Order ADKT 0495 (order regarding an amendment to Rule of Professional Conduct 1.2 regarding medical marijuana).
- The Florida Bar has adopted a policy protecting lawyers from discipline if they advise clients under Florida law, as long as they advise clients a federal law. *See* http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/575b2ba3c91f53dd85257cf200481980!OpenDocu
- Minnesota’s medical marijuana statute includes immunity for attorneys. *See* Minn. Stat. Ann. § 152.32(i) (“An attorney may not be subject to disciplinary action by the Minnesota Supreme Court or professional responsibility board for providing legal assistance to prospective or register manufacturers or others related to activity that is no longer subject to criminal penalties under state law”).
- The Massachusetts Board of Bar Overseers and the Massachusetts Office of the Bar Counsel have adopted a policy under which they will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related feder law and policy. See http://www.mass.gov/obcbbo/marijuana.pdf

G. Additional Considerations

If the lawyer decides to represent the client, he or she should counsel the client not to violate state laws; should only assist the client in conduct tha conforms with state law; should warn the client about the risks of prosecution under federal laws; and should advise the client how to minimize the r prosecution under federal laws consistent with the discussion above.

The lawyer should warn the client that, if the client endeavors to violate California law or to act in ways that invite federal prosecution, then the lawy withdraw from the representation. *See* Rule of Professional Conduct 3-700(C)(1)(b) (withdrawal permitted if continued employment is likely to resul

violations of the Rules of Professional Conduct). If the client seeks to pursue conduct that is illegal under state law, or if the lawyer discovers after that the client inadvertently violated state laws, then the lawyer may withdraw, but is not required to do so. *Ibid*.

In addition, the lawyer should counsel the client about limitations on confidentiality. One of the duties of a California lawyer is to "maintain inviolate confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068(e)(1). The lawyer should the client that their communications may not be privileged in the event of litigation. The "crime fraud" exception to the attorney-client privilege applie lawyer's services are obtained to help the client to plan or to commit a crime. Evid. Code § 956. The client's mere disclosure of his or her intent to a crime is privileged. *People v. Clark* (1990) 50 Cal.3d 583, 621-23. But where the client seeks legal assistance to plan or to perpetrate a crime, th privilege is eviscerated. *Ibid*. Thus, the lawyer should warn the client that, if the client becomes involved in civil or criminal litigation, there is a risk communications between them will not be held to be privileged and thus be subject to disclosure in testimony.

The exception in section 6068(e)(2) is not limited to a client who intends to commit a violent criminal act or to an intent to commit an act that may imminently cause bodily injury. Accordingly, a lawyer may (but is not required to) disclose a client's confidential information to prevent either a clien third party's criminal act that the lawyer reasonably believes is likely to result in the death of or substantial bodily harm to an individual. Section 606 Rule Prof. Conduct 3-100(B). If it is reasonable under the circumstances, the lawyer should warn the client that, if the lawyer concludes that the clie intended conduct is likely to cause death or bodily injury to a purchaser, then the lawyer may have discretion to disclose the client's confidential information. If a lawyer finds himself or herself in such a situation, the lawyer should comply with Rule 3-100(C) and first attempt to dissuade the clie inform the client of the lawyer's decision to reveal the information. Further, any disclosure must be no more than is necessary to prevent the crimin Rule 3-100(D).

CONCLUSION

We conclude that a lawyer may ethically represent the client on the facts presented consistent with California Rule of Professional Conduct 3-210, provided that the legal advice and assistance is limited to activities permissible under state law and the lawyer advises the client regarding possible under federal law and other potential adverse consequences under state and federal laws.

Nevertheless, because of the risks to both lawyer and client, we recommend that the Bar Association of San Francisco urge the Rules Revision Commission, the Board of Trustees of the State Bar and the Supreme Court to adopt rules and propose legislation that would protect the lawyer fro discipline under these circumstances and propose an amendment to the Evidence Code to preserve the attorney-client privilege under these circumstances.

1. A bank may also seek a lawyer's advice about whether to lend or to provide other services to a marijuana-related entity. May a bank allow its credit ca be used to purchase marijuana? A financial institution could face prosecution under federal law for aiding and abetting a business that is lawful under sta unlawful under federal law. Even if the bank does not provide such services, it will need guidance about its duties. For example, banks have a duty to file Activity Reports ("SARs") about any transaction involving $5,000 or more if the bank has reason to suspect the money is derived from illegal activity. Ban maintain anti-money laundering activities. There are different levels of SARs related to marijuana. If a bank's due diligence leads it reasonably to believe marijuana business does not implicate any DOJ priority or state law, it may file a "Marijuana Limited" SAR. That form only requires the financial institution the client's identifying information and explain to law enforcement that diligence uncovered no suspicious activity. However, if the bank concludes that the engaged in activities identified as a priority in the Cole Memorandum or that violate state law, then the bank must file a more detailed "Marijuana Priority" Department of the Treasury, Financial Crimes Network, FIN 2014 – G001, available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.

2. The landlord will also need a lawyer's advice.

3. May an armored car service perform services for a marijuana dispensary? Will it face the risk of forfeiture or other liability? It, too, may need a lawyer'

4. Rule 3-210 is derived from former Rule 7-101 and former Rule 11. When the current rule was amended in 1989 and 1992, the Commission for the Rev Rules of Professional Conduct did not recommend adopting Model Rule 1.2(d) because the consensus was that the California rule adequately stated the of California respecting a lawyer advising the violation of law.

5. The usefulness of the opinion appears narrowed by its premise that the administration will not prosecute such cases. The federal government does se the prohibition against medical marijuana dispensaries, even after the Cole memoranda. *See, e.g.*, forfeiture action against real property in *United States Property and Improvements Located at 1840 Embarcadero, Oakland, California*, Northern District of California Case No. C 12-3567 MEJ; complaint to enj and defendants' successful motion to dismiss in *City of Oakland v. Eric Holder, et al.*, Northern District of California Case No. C 12-05125 MEJ; and pendi *City of Oakland v. Holder*, 9th Circuit Court of Appeals Case No. 13-15391, which we understand is now under submission. The conduct of a medical ma dispensary is a violation of federal criminal law whether the Department of Justice decides to pursue a given matter or not and regardless of the defenses Californians need legal advice regardless of whether the Department of Justice decides to prosecute a case.

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