



## ETHICS: LEGAL MARIJUANA SALES AND THE RESULTING ETHICAL MORASS

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### **What a long, strange trip it's been: Ethical Issues for Attorneys Providing Services to the Cannabis Industry**

*W. Scott O'Connell*

It is estimated that in 2018, the legal cannabis industry generated more than \$10 billion and employed more than a quarter of a million people.<sup>1</sup> Industry research indicates that marijuana companies raised \$13.8 billion in funding. Fueling that investment is the reality that a wide swath of industries are preparing for a future in the cannabis economy. Soft drink and alcohol manufacturers are considering future products with this now legal substance. Congress is considering legislation to provide banks with a safe harbor for providing services to those in the industries from financial services to soft drink manufacturers are actively assessing how the explosion of this product will impact their products and services.

### **Federalism and the current conflict between federal and state law**

As of October 1, 2019, 34 states have legalized the medical use of marijuana. Thirteen additional states have legalized the medical use of low THC marijuana. Also, thirteen states have legalized the recreational use of marijuana. Yet, it remains a federal criminal violation to possess, use, sell or distribute it. This conflict between state and federal law on the legal status of marijuana creates special problems for attorneys who must comply with the applicable rules of professional responsibility. Model Rule of Professional Responsibility 1.2(d) states:

A lawyer shall not counsel a client to engage, or assist

a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope meaning or application of the law.

Given this ethical restriction, how can an attorney provide counsel on business activities that violate federal law? With no meaningful efforts to change the criminal federal implications, in 2013, the Department of Justice developed a policy intended to address this conflict. The so-called Cole Memorandum announced a new federal policy limiting the enforcement priorities of prosecutors to limited areas of state cannabis operations were legalized (i.e., distribution to minors, preventing revenue from going to criminal enterprises, diversion to non-legalized states, cover for trafficking in other illegal activity).<sup>2</sup> With this in place, DOJ provided some assurance that commercial and recreational cannabis activity legal under state law would not be prosecuted under federal law.

On the basis of the Cole Memorandum, many states issued ethical opinions, orders and/or rule changes to affirm, in substance, that compliance with state cannabis law would not violate Model Rule 1.2(d). These opinions can be found here:

- Arizona Ethics Opinion 11-01, Scope of Representation
- California Proposed Formal Opinion 17-0001, Advising a Cannabis Business, is accepting comment until October 18, 2019
- Colorado Ethics Opinion 124, a Lawyer's Use of

<sup>1</sup> New Frontier Data. [Is there more to this citation?]

<sup>2</sup> The Cole Memorandum is available here: <https://justice.gov/isopa/resources/3052013829132756857467.pdf>

## Marijuana

- Colorado Ethics Opinion 125, The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (WITHDRAWN)
- Connecticut Bar Association Informal Opinion 2013-02, Providing Legal Services to Clients Seeking Licenses under the CT Medical Marijuana Law
- Maine Ethics Opinion 199, Advising Clients concerning Maine's Medical Marijuana Law
- Maine Ethics Opinion 215, Attorneys' Assistance to clients under Rule 1.2
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- New York State Bar Ethics Opinion 1024, Counseling clients in illegal conduct; medical marijuana law
- State Bar Association of North Dakota Ethics Opinion 14-02, marijuana use by attorneys living in MN
- Ohio Board of Professional Conduct Advisory Opinion 16-006, Ethical Implications for Lawyers under Ohio's Medical Marijuana Law – use in conjunction with rule 1.2
- Rhode Island Supreme Court Ethics Advisory Panel Opinion 2017-01, Legal Services Medical Marijuana
- Washington Bar Association Advisory Opinion 201501, Providing Legal Advice and Assistance to Clients Under WA State Retail Marijuana Law

While the Cole Memorandum provided some needed guidance, it was not the same as a repeal of the applicable federal law. That distinction, and the fragility of this situation, came into sharp focus on January 14, 2018 when then Attorney General William Sessions rescinded in large measure the Cole Memorandum guidance. The stated rationale for this action was that pre-existing and well-established general principles of prosecutorial and investigative discretion provide sufficient guidance for marijuana enforcement. As a result, US Attorneys were advised to consider, generally, federal law enforcement priorities, including the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.<sup>3</sup> This action added confusion and uncertainty on what would be prosecuted and whether Model Rule 1.2(d) applied once again was a barrier for lawyers to provide legal services to cannabis related activities legal under state law.

Congress is contemplating several pending bills that may once again address how to reconcile the continued

conflict on the legality of cannabis between and among the states and the federal government.

## **Suggested best practices to manage risk until the conflict is resolved**

1. Stay current on the law. The legal landscape is changing quickly. Information is getting stale very quickly. If your business touches the cannabis industry, getting regular updates about material development is necessary. Many law firms, including Nixon Peabody, provide these Alerts. See Exhibit 1 attached.
2. Require state ethics opinion on Model Rule 1.2(d). Because attorneys must not only comply with the law, but conform conduct to the applicable ethical rules, obtaining clarity on what legal cannabis related activity will not provoke a Model Rule 1.2(d) violation is critical. Without such an opinion, any legal services to the cannabis industry is performed at high risk to maintaining professional standing.
3. Due diligence on client. Whether you are an in-house or outside lawyer, perform and document due diligence on the parties involved with the cannabis-related activity. Bad actors or unworthy clients acting beyond the scope of what is legal creates material risk. Manage that risk by learning who is involved, how they are complying with the applicable limitations, and not otherwise using legal counsel in ways that break the law.
4. Policy on permissible activity. Being clear with all stakeholders on what is permissible activity and what is not is crucial. In-house and outside counsel need to educate and inform their clients on the limitations on permissible activity in each state.
5. Compliance program. Implementing a compliance program that actively and reliably assesses conformance with the permissible activity is very valuable. Clients that actively work to ensure compliance and self-correction always fair better in government enforcement activities than those who do not. Plans that exist on paper and are not actively worked provide virtually no value.
6. Employee consent. An important risk management consideration is making sure that in-house or outside attorneys are not working on cannabis-related matters without their knowing consent. Providing a waiver that lays out the permissible activities, the reliance on state law and related ethics opinions as well as identifying the risks of an unexpected but possible exercise of federal prosecutorial discretion is important. Considering what to do with those who do not consent is also important to mitigate any retaliation claim for refusal to work on matters that

<sup>3</sup> The DOJ's January 14, 2018 Memorandum on Marijuana Enforcement can be found here: <https://www.justice.gov/opa/press-release/file/1022196/download>

may violate federal law. See Exhibit 2.

7. Insurance review. Ensure that any cannabis-related activity in which you engage is covered by

### **House of Representatives pass the SAFE Banking Act with an eye toward a more secure financially regulated cannabis industry**

*Robert Fisher, Scott Seitz, Henry J. Caldwell*

Recently, the House of Representatives passed the Secure and Fair Enforcement (SAFE) Banking Act ("SAFE Act" or "Act"), which provides much needed regulatory and legal clarity for how the cannabis industry interacts with the U.S. financial sector. The goal of the SAFE Act is two-fold. First, it seeks to provide cannabis-related businesses ("CRBs") greater access to financial services by safeguarding federally chartered depository institutions from exposure to a wide range of risks and liabilities. Second, by providing CRBs greater access to financial services, the Act strives to promote a safer and more secure operation of CRBs that, at least up until this point, have largely been reliant on cash.

Because marijuana is a Schedule I drug under the Controlled Substances Act, federally chartered depository institutions have been and still remain wary of taking on CRB clients or pursuing cannabis-related opportunities. The SAFE Act, however, is designed to taper those concerns. For example, the Act provides depository institutions a number of safeguards that prohibit federal banking regulators from:

- limiting or terminating deposit or share insurance solely because a depository institution provides financial services to a cannabis-related business;
- prohibiting or discouraging the provision of financial services to a cannabis-related business;
- recommending or encouraging depository institutions

### **House Financial Services Committee advances legislation that would permit banks to provide financial services to legal cannabis businesses**

*Lori B. Green, Rudy S. Salo*

Last week, the House Financial Services Committee voted to advance the SAFE (Secure and Fair Enforcement) Banking Act, which would permit banks and other institutions to provide financial services to the current primarily cash-based state-legal cannabis industry, such

your applicable insurance tower. The presence of potential federal criminal activity could be a basis to disclaim coverage.

not to offer financial services to an account holder solely because the account holder is affiliated with a cannabis-related business; or

- taking any adverse or corrective supervisory action on a loan made to a person solely because the person either owns such a business or owns real estate or equipment leased or sold to such a business.

Notably, the Act also provides broad protections against violations of federal anti-money-laundering laws, if the money in question stems from state-authorized cannabis sales. If passed, CRBs looking to shift gears from operating exclusively on a cash-only basis would likely gain crucial access to financial services necessary to enable business growth and stability. For example, the SAFE Act would offer business owners in the cannabis space access to FDIC-insured bank accounts, small business loans, electronic-payment processing, and employee benefit plans—privileges that other non-cannabis businesses currently enjoy. The SAFE Act would also allow CRBs to reduce the amount of liquid cash flowing through their businesses, which will reduce security and insurance costs.

It is important to note that the passing of the SAFE Act in the House has no immediate impact on the status quo of the cannabis and banking industries. The Act still needs to pass through the Senate, where it is likely to face heavier opposition. The Senate Banking Committee is expected to hold a vote by the end of this year. Nixon Peabody will continue to track the legislative progress of the SAFE Act as well as other developments related to cannabis reform and provide updates to our clients and readers.

as dispensaries, growers and other cannabis-touching businesses. The SAFE Banking Act was introduced by Representatives Ed Perlmutter (D-CO) and Denny Heck (D-WA) with 132 Democratic and 12 Republican co-sponsors. The Act has also found support from major financial services industry associations, such as the American Land Title Association and the Council of Insurance Agents and Brokers.

Because cannabis is still a Schedule 1 drug, many

federal institutions have refused to accept funds from businesses involved in cannabis, including relatively rudimentary financial services such as holding deposits and transmitting funds. This refusal has made the legal cannabis industry a primarily cash-based business, meaning that market participants may only accept cash from their customers, and must pay their suppliers, employees and even their taxes in cash. Legal cannabis businesses also routinely have large amounts of cash on hand: a busy retail dispensary may realize over a million dollars per month in revenue, which has led many to rely on private security and armed guards to help safeguard their cash hoard and protect their businesses from robbery and other crimes.

Many supporters of the SAFE Banking Act, including an organization representing banks, are not directly supporting the legalization of cannabis, but rather recognize the conflict between state and federal law exposes the everyday public safety concerns of cannabis-businesses that are forced to deal with large amounts of cash.

Although many observers expect the SAFE Banking Act to ultimately pass the House, it is unclear whether and when the Republican-controlled Senate may act on the bill. A spokesperson for Senate Banking Committee

Chairman Mike Crapo (R-ID) has previously declined to comment when asked whether the Senate committee would take up the bill.

Among other concerns, many conservatives in the Senate have taken issue with the SAFE Banking Act's definition of "financial services" to be provided to cannabis businesses, finding that the definition is aimed at providing services to consumers and not to commercial enterprises, which seems to defeat the purpose of the bill. Michael Williams, founder of the Williams Group, a public policy consulting firm, also noted that the SAFE Banking Act faces opposition from certain Democrats for not taking sufficient steps toward federal cannabis legalization, while certain Republicans oppose the bill based on their historic resistance to cannabis legalization. "It's a weird juxtaposition because you've got Democrats who are making the argument that Republicans usually make on the states' rights and you've got Republicans who say well no, the federal government should be the decider in this because either [cannabis is] legal or it's not" said Mr. Williams.

Nixon Peabody will continue to monitor the SAFE Banking Act as it progresses through the House and Senate and will provide subsequent alerts as developments in the cannabis industry continue.

***“What a long, strange trip it has been”***

**Ethical issues for attorneys providing services to the Cannabis Industry**



**W. Scott O'Connell**

## **The Growing Legal Cannabis Industry**

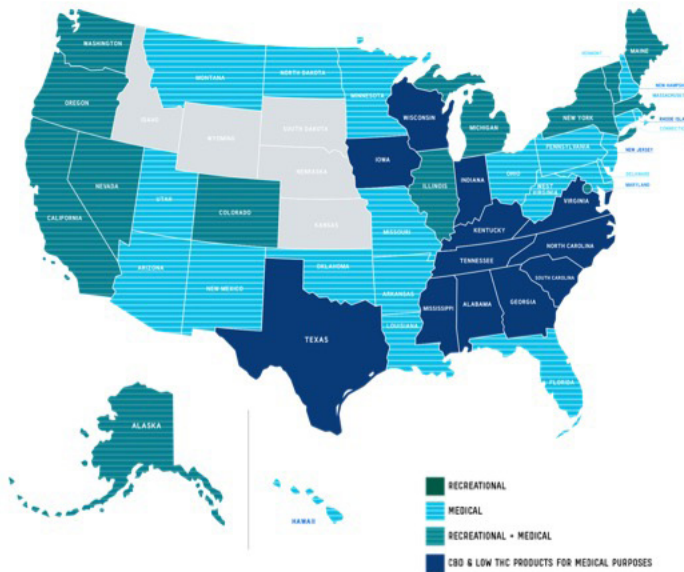
Medical – 34 states

Medical (Low THC) – 13 states

Recreational – 13 states



Where  
Cannabis is  
Legal...  
and NOT



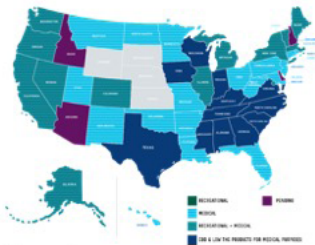
Pending Legislation / Ballot Measures

— **Arizona:** voter referendum for recreational use [submitted to state legislative council for review](#); if approved will appear on 2020 ballot.

— **Delaware:** [HB 110](#) to legalize recreational use is pending in the state legislature.

— **Idaho:** [petition for medical use approved](#) and circulating to collect signatures; if approved, will appear on 2020 ballot.

— **New Hampshire:** HB 481 delayed in senate. Action expected in January 2020.



## US Territories

For an overview, see the [Marijuana Policy Project](https://mpp.org)

- Northern Mariana Islands
- Guam
- Puerto Rico
- Virgin Islands
- American Samoa

Source: [mpp.org](https://mpp.org)



**Marijuana Policy Project**  
*We Change Laws*



Menu

U.S. Territory Policy

Policy

Last update: January 22, 2019

## Federal Law



## Federal Law

### 21 U.S.C. § 811—Federal Controlled Substances Act

- Possession, use, sale and distribution are federal crimes
- Marijuana is a Schedule 1 drug deemed to have no medical value (as is heroin), which has a high potential for abuse and cannot be safely proscribed
- Cocaine and methamphetamines are Schedule 2 drugs deemed to have some medical use
- 

### 18 U.S.C. § 371—

- Conspiring to violate federal criminal law is a crime

### 18 U.S.C. §§ 1956 and 1957

Anti-money laundering

### Supremacy Clause

- Preemption of inconsistent state laws

## Impacted Market Actors



## Primary Cannabis Businesses

- Plant cultivation
- Product production
- Distribution
- Sales
- Dispensaries
- Transportation
- Storage facilities



## Secondary Businesses that Support the Legal Cannabis Industry

- Legal services
- Banking
- Insurance
- Accounting and taxes
- Management consulting
- Finance and investment
- Human relations
- Real estate
- Public relations and marketing
- Technology
- Logistics



## Special Issues for Attorneys



## Model Rule of Professional Responsibility 1.2(d)

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## Application of Federal law

### Cole Memorandum | August 2013

Announced new federal policy limiting the enforcement priorities of prosecutors to limited areas of state cannabis operations were legalized (i.e., distribution to minors, preventing revenue from going to criminal enterprises, diversion to non-legalized states, cover for trafficking in other illegal activity).

### AG Sessions Reversal of the Cole Memorandum | January 4, 2018

The DOJ rescinded in large measure the Cole Memo guidance. Its stated rationale is that pre-existing and well-established general principles of prosecutorial and investigative discretion provide sufficient enough guidance for marijuana enforcement. As a result, US Attorneys are advised to consider, generally, federal law enforcement priorities, including the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community. See Dep't of Justice, Memorandum on Marijuana Enforcement (Jan. 14, 2018).

### AG Barr's Statements Supporting STATES Act

## Take away

*Exercising discretion not to prosecute is not the same as legalization. The decision could change at a moment's notice.*

## Ethics Opinions

The ABA recently published a [good overview of ethics opinions](#), rules of professional conduct, and similar guidance.

Source: [American Bar Association](#)



/ ABA Groups / Center for Professional Responsibility / Publications  
/ The Professional Lawyer / The Professional Lawyer Volume 26, Number 3

July 02, 2019 FEATURE

### Ethical Issues in Representing Clients in the Cannabis Business: "One token over the line?"

By Dennis A. Rendleman

Share this:



One token over the line sweet Jesus One token over the line Sittin' downtown in a railway station One token over the line Awaitin' for the train that goes home, sweet Mary Hopin' that the train is on time Sittin' downtown in a railway station One token over the line!

For state opinions, please follow these links:

- [Arizona Ethics Opinion 11-01](#), Scope of Representation
- [California Proposed Formal Opinion 17-0001](#), Advising a Cannabis Business, is accepting comment until October 18, 2019
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- [Washington Bar Association Advisory Opinion 201501](#), Providing Legal Advice and Assistance to Clients Under WA State Retail Marijuana Law

## Take Aways

- Stay current on law
- Require state ethics opinion
- Due diligence on client
- Policy on permissible activity
- Compliance program
- Employee consent
- Insurance review

## Best Practice

- ①
- ②
- ③





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Scott O'Connell is a trial attorney and litigation strategist focused on complex commercial disputes involving high financial and reputational exposure. He has considerable experience leading class action and aggregate litigation as well as parallel government enforcement and regulatory proceedings, most notably involving health service, financial service, energy or manufacturing companies. He has been lead counsel on more than 60 trials, arbitrations, evidentiary injunction proceedings and related appeals in federal and state courts around the country. Scott provides clients with customized and value-driven strategies for resolving cases on their terms.

In addition to an active practice, Scott serves as chair of Nixon Peabody's 300+ person Litigation Department. He is also a member of the firm's management and compensation committees. He maintains an active docket of pro bono cases specifically related to the prevention of domestic violence and providing needed access to justice. Scott received the Frederick Douglass Human Rights Award from the Law Office of the Southern Center for Human Rights for successful representation of a Guantanamo Bay detainee in the case *Rimi v. George W. Bush*, United States District Court for the District of Columbia, No. 1:05-CV-02427.

### **Services**

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- Complex Commercial Litigation
- Government Investigations & White Collar Defense
- Appellate
- NP Trial®
- Financial Services

### **Recognition**

- Named "Lawyer of the Year" by Best Lawyers® for: Bet-the-Company-Litigation, Manchester (2020); Appellate Practice, Boston (2019); Litigation—Health Care, Manchester (2018); Litigation—Securities, Boston (2016); Litigation—Banking and Finance, Boston (2014); Litigation—Securities, Boston (2013)
- Recognized in The Best Lawyers in America® for work in: Appellate Practice; Bet-the-Company Litigation; Commercial Litigation; Litigation—Banking and Finance; Litigation—Health Care; Litigation—Municipal; Litigation—Securities; Mass Tort Litigation/Class Actions—Defendants; Product Liability Litigation—Defendants
- Chambers USA: America's Leading Lawyers for Business (2008 to present)
- "New England Super Lawyer" in Securities Litigation and/or Class Action-Mass Torts (2007 to present)
- Litigation Star in Benchmark Litigation (MA and NH) (2008 to present)
- AV peer rating from Martindale-Hubbell (2004 to present)

### **Education**

- Cornell Law School, J.D., 1991, (Editor, Law Review, Chancellor, Moot Court Board)
- St. Lawrence University, B.A., 1987, cum laude
- Harvard Business School, 2008, "Leading Professional Service Firms"