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Legal Ethics for Counsel Advising Cannabis Businesses

CONTINUING LEGAL EDUCATION: LEGAL ETHICS



— LAW OFFICES OF —
OMAR FIGUEROA

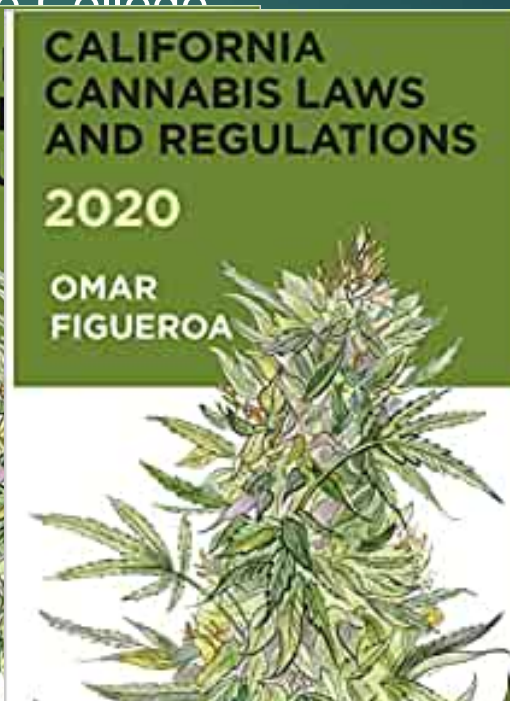
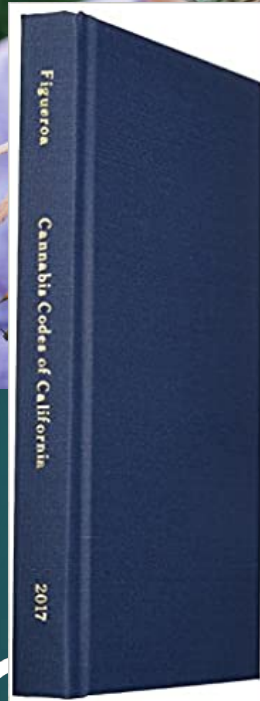
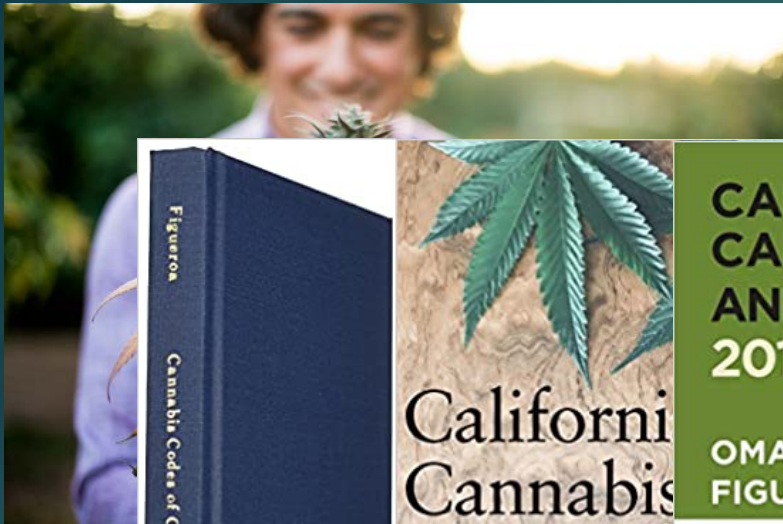
NAPA COUNTY
BAR ASSOCIATION

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Topics

- Overview of Rule 1.2.1 of the Rules of Professional Conduct and Comment 6
- Evidence Code: Attorney Client Privilege
- COPRAC Opinion

May a lawyer provide advice and assistance to a client with respect to conduct permitted by California's cannabis laws, despite the fact that the client's conduct, although lawful under California law, might violate federal law?

- Truthfulness to Third Parties
- Advising Clients Regarding Conflict of Laws
- Q & A

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Introduction: Rules of Professional Conduct

- California Rules of Professional Conduct
 - "1992" Rules vs. Current Rules, effective Nov. 1, 2018

RULES OF PROFESSIONAL CONDUCT CROSS-REFERENCE CHART

"1992" Rules of Professional Conduct <i>Rules effective until October 31, 2018</i> (Rule Number and Title)	Current Rules of Professional Conduct <i>Except as noted, rules effective on November 1, 2018</i> (Rule Number and Title)
3-210 Advising the Violation of Law	1.2.1 Advising or Assisting the Violation of Law
3-300 Avoiding Interests Adverse to a Client	1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to the Client

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Rule 1.2.1 Advising or Assisting the Violation of Law

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(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*

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Rule 1.2.1 Advising or Assisting the Violation of Law

Rule 1.2.1 Advising or Assisting the Violation of

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

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(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*

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Rule 1.2.1 Advising or Assisting the Violation of Law

- Comment 6 to Rule 1.2.1

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California

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Rule 1.2.1 Advising or Assisting the Violation of Law

- Comment 6 to Rule 1.2.1

or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

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Rule 1.1 Competence

Rule 1.4 Communication with Clients

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Evidence Code: Attorney-Client Privilege

- California Evidence Code sets forth the Attorney-Client Privilege at § 952.
 - Crime-Fraud Exception to the Privilege at Evidence Code § 956

956. (a) There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

- AB 1159 added an exemption to the crime-fraud exception for cannabis-related legal services rendered in compliance with state and local laws provided the lawyer also advises the client on conflicts with respect to federal law:

(b) This exception to the privilege granted by this article shall not apply to legal services rendered in compliance with state and local laws on medicinal cannabis or adult-use cannabis, and confidential communications provided for the purpose of rendering those services are confidential communications between client and lawyer, as defined in Section 952, provided the lawyer also advises the client on conflicts with respect to federal law.

(Amended by Stats. 2017, Ch. 530, Sec. 2. (AB 1159) Effective January 1, 2018.)

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COPRAC Formal Opinion

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) at its February 28, 2020 meeting approved for publication a formal opinion which interprets the Rules of Professional Conduct.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT**

May a lawyer provide advice and assistance to a client with respect to conduct permitted by California's cannabis laws, despite the fact that the client's conduct, although lawful under California law, might violate federal law?

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COPRAC Formal Opinion: Digest

DIGEST:

A lawyer may ethically advise a client concerning compliance with California's cannabis laws and may assist the client in conduct permitted

A lawyer may ethically advise a client concerning compliance with California's cannabis laws and may assist the client in conduct permitted federal law. Such advice and assistance may include the provision of legal lawful under California law (e.g., incorporation of a business, tax advice, employment advice, contractual arrangements and other actions necessary to the lawful operation of the business under California law).

the potential for criminal liability and the penalties that could be associated with a violation of federal law. Where appropriate, the lawyer must also advise the client of other potential impacts on the lawyer-client relationship, including on the attorney-client privilege, that could result from the fact that the client's conduct may be prohibited under federal law.

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COPRAC Formal Opinion: Digest

DIGEST:

A lawyer may ethically advise a client concerning compliance with

However, a lawyer may not advise a client to violate federal law or provide advice or assistance in violating state or federal law in a way that associated with a violation of federal law. Where appropriate, the lawyer must also advise the client of other potential impacts on the lawyer-client relationship, including on the attorney-client privilege, that could result from the fact that the client's conduct may be prohibited under federal law.

associated with a violation of federal law. Where appropriate, the lawyer must also advise the client of other potential impacts on the lawyer-client relationship, including on the attorney-client privilege, that could result from the fact that the client's conduct may be prohibited under federal law.

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Takeaways from COPRAC Formal Opinion

- Lawyers may “render all the services that lawyers customarily provide to business clients, including”
 - “entity formation”
 - “applying for permits or other regulatory approvals”
 - “negotiating and drafting in connection with all forms of business transactions, and”
 - “general business and regulatory counseling”
- “The lawyer’s permission to assist is not, however, unlimited. It, too, is conditioned upon the lawyer having provided information about the conflict between state and federal law in the manner required by the rule.” (p.9)
- “Moreover, the lawyer’s permission to assist, like the permission to give advice, does not extend to assistance in evading detection or prosecution under state or federal law.”



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COPRAC: Hypothetical Facts

STATEMENT OF FACTS

A lawyer has been asked to advise and assist a client who plans to conduct a business engaged in growing, distribution and/or the sale of cannabis within the State of California. The client

A lawyer has been asked to advise and assist a client who plans to conduct a business engaged in growing, distribution and/or the sale of cannabis within the State of California. The client seeks advice and assistance that will enable the client to comply with California laws, which permit, regulate and tax such activities, including obtaining any required permits and dealing with state and local regulatory authorities. The client would also like advice and assistance with respect to related business activities, including business formation, financing, supply chain contracts, real estate, employment law, and taxation.

client in establishing offshore bank accounts into which the proceeds of the business may be placed; and (3) be compensated for the provision of legal services by acquiring an interest in the client's business in lieu of fees.

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COPRAC: Hypothetical Facts

In addition, the lawyer representation, including any amount required to

fund, against the possibility of the client in establishing off placed; and (3) be comp

any amount required to cover legal placed; and (3) be compensated the client's business in lieu of the client's business in lieu of fees.



g several will: (1) hold the client's assets in a trust account, as a "rainy day" fund, against the possibility of the client in establishing off placed; and (3) be compensated the client's business in lieu of the client's business in lieu of fees.



nt, as a "rainy day" fund, against the possibility of the client in establishing off placed; and (3) be compensated the client's business in lieu of the client's business in lieu of fees.



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COPRAC : Analysis of Hypothetical Facts

C. Counseling and Assistance: Analysis of the Statement of Facts

Based on this background, we conclude that the lawyer in the Statement of Facts may, consistent with the California Rules of Professional Conduct and the Business and Professions Code, provide advice and assistance to any client whom the lawyer believes to be engaged in a use of cannabis. The lawyer may also provide such advice and assistance in interpreting any other relevant California law, including generally applicable laws relating to entity formation, contracting, real estate, employment and taxation. Accordingly, the lawyer may both advise and assist the client in, among other things, obtaining regulatory approvals necessary to conduct a cannabis business, completing transactions, and other steps reasonably required to make the business profitable in compliance with California law.

California law.



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COPRAC: Forbidden Assistance

The lawyer may not, however,

conduct that enables the client to

The lawyer may not, however,

in conduct that enables the client to

evade detection or prosecution

general law. The client's request that the

lawyer permit the client to create

and keep it in the lawyer's trust account

to protect against the risk of a federal seizure of the client's assets,

falls into that category since

it seems principally intended to conceal those assets from federal law enforcement.

Depending

on, among other things, the client's intent,

the client's request for assistance in establishing

forbidden category as well. If the

client expects forbidden assistance, the

lawyer must advise the client of

lawyer's conduct imposed by the Rules of

Professional Conduct and the S

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COPRAC: Forbidden Assistance

forbidden category as well. If the lawyer knows that the client expects forbidden assistance, the lawyer must advise the client of the limitations on the lawyer's conduct imposed by the Rules of Professional Conduct and the State Bar Act. Rule 1.4(a)(4).

Rule 1.4 Communication with Clients

(a) A lawyer shall:

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Rule 1.0.1 Terminology

(f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's* knowledge may be inferred from circumstances.

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COPRAC: Interest in Business in Lieu of Fees

Finally, the protections of rule 1.2.1 and Comment [6] do not extend to the client's proposal to compensate the lawyer for rendering legal services by giving the lawyer an interest in the

Finally, the protections of rule 1.2.1 and Comment [6] do not extend to the client's proposal to compensate the lawyer for rendering legal services by giving the lawyer an interest in the client's business in lieu of fees. Simply put, those provisions cannot be read to authorize a lawyer to acquire an interest in a cannabis business, or to participate on an ongoing basis in such a business, if such acquisition or participation violates federal criminal law. As explained above, the terms of rule 1.2.1 and Comment [6], read together, permit lawyers to "counsel" or "assist" clients whose cannabis-related business activities may violate federal law. Both the text of rule and the text of the Comment are concerned exclusively with the scope of prohibited and permitted counseling and assistance. Neither says anything about whether a lawyer may

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COPRAC: Intro

Lieu of Fees

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

Finally, the protections of rule 1.7.1
Rules themselves do not
lawyer's acceptance of the
discipline under rule 8.4
beyond the scope of this

Rules themselves do not end

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n of federal law, would support
ections 6068(a) and 6106 is

der what circumstances a

6068. It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

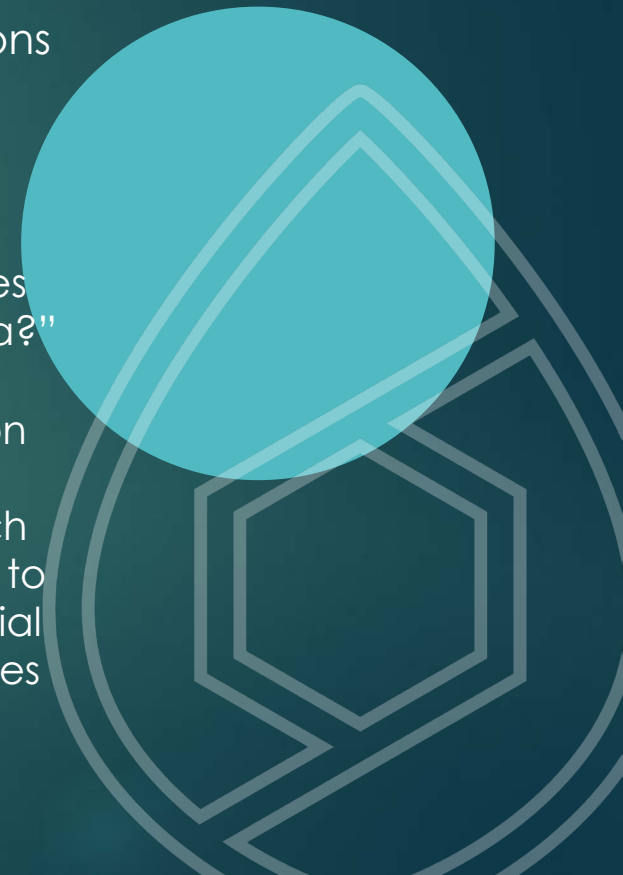
6106. The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.

If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor.

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Judicial Investment in Cannabis Businesses

- California Supreme Court Committee on Judicial Ethics Opinions
 - CJEO Formal Opinion 2017-010, Issued April 19, 2017
("Extrajudicial Involvement in Marijuana Enterprises")
- Question Presented:
 - "Is it ethical under the California Code of Judicial Ethics for a judicial officer to have an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana?"
- Summary of Conclusions:
 - "A violation of federal law violates a judge's explicit obligation to comply with the law and is an activity that involves impropriety or the appearance of impropriety. Moreover, such extrajudicial conduct may cast doubt on a judge's capacity to act impartially. Therefore, the committee advises that a judicial officer should not have an interest in an enterprise that involves the sale or manufacture medical or recreational marijuana."



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Investing in Client Businesses (Generally)

- Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client
 - “A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:
 - (a) the transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction of acquisition are fully disclosed or transmitted in writing to the client in a manner that should reasonably have been understood by the client;

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

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Rule 1.8.1 (continued)

- Rule 1.8.1 (b) “Business Transactions with a Client and Pecuniary Interests Adverse to a Client”
 - “the client either is represented in the transaction or acquisition by an independent lawyer of the client’s choice or the client is advised in writing to seek the advice of an independent lawyer of the client’s choice and is given a reasonable* opportunity to seek that advice; and”

[2] For purposes of this rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition; and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client’s consent.

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Rule 1.8.1 (continued)

- Rule 1.8.1(c) “Business Transactions with a Client and Pecuniary Interests Adverse to a Client”
 - “the client thereafter provides informed written consent to the terms of the transaction or acquisition, and to the lawyer’s role in it. ”

[6] This rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

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Additional Ethical Considerations



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COPRAC Opinion: Competence

Competence. The duty of competence requires that the lawyer apply the “(i) learning and skill,

Competence. The duty of competence requires that the lawyer apply the “(i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service.” Rule 1.1(b). Competent representation of a regulated cannabis business requires specialized learning: notably, mastering a novel, complex, and rapidly evolving body of state and local statutes and regulations. In addition, the scope of competent representation will always encompass providing basic information on conflicting federal law to comply with rule 1.2.1 and may often require additional advice going beyond such information. A lawyer who is unable to acquire the full range of required learning and skill through study, or through consulting or associating with another attorney, should limit the representation to those issues that she has or can acquire the requisite learning and skill and advise the client to obtain separate counsel with sufficient learning and skill to represent the client on other issues presented. Rule 1.1.¹¹

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COPRAC: Confidentiality and Privilege

Confidentiality and Privilege. Traditionally, under California law, there is no attorney-client

Confidentiality and Privilege. Traditionally, under California law, there is no attorney-client privilege “if the services of the lawyer were sought or obtained to enable anyone to commit or plan to commit a crime or a fraud.” Evidence Code section 956(a). As described above, the Evidence Code has now been amended to clarify that this crime-fraud exception “shall not apply to legal services rendered in compliance with state and local laws on medical cannabis or adult use cannabis.” Additionally, “confidential communications provided for the purpose of rendering those services” remain privileged “provided the lawyer also advises the client on conflicts with respect to federal law.” (Evid. Code, § 956(b).)

Under this provision, a client whose lawyer has complied with rule 1.2.1 may be able to claim the privilege in a state court proceeding. However, in a federal criminal or forfeiture

lawyer may record conflict between her statutory duty for confidentiality and her California duty, which contains no express exception for compliance with a court order (see rule 1.6 and Bus. &

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COPRAC: Confidentiality and Privilege

Confidentiality and Privilege. Traditionally, under California law, there is no attorney-client

the privilege in a state court proceeding. However, in a federal criminal or forfeiture proceeding, the governing privilege law will be federal, and the federal, rather than the state, crime-fraud exception to the privilege will apply. *United States v. Zolin* (1989) 491 U.S. 554 [109 S.Ct. 2619]. The trigger for that exception is that the lawyer's advice was sought in furtherance of a federal crime. *Id.* To the extent that conduct permitted under state law constitutes a federal crime, there is a risk in a federal proceeding that the tribunal will rule that the attorney-client privilege does not protect confidential communications between lawyer and client, and compel discovery or testimony concerning such communications. In those circumstances, the lawyer may face a conflict between her statutory duty of confidentiality under California law, which contains no express exception for compliance with a court order (see rule 1.6 and Bus. & Prof. Code, § 6068(e)), the lawyer's statutory obligation to obey a court order (Bus. & Prof. Code, § 6103, *In the Matter of Collins* (Review Dept. 2018) 2018 WL 1586275), and the lawyer's own interest in avoiding imprisonment or fines for contempt.

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COPRAC: Confidentiality and Privilege

Confidentiality and Privilege. Traditionally, under California law, there is no attorney-client privilege. "If the services of the lawyer were sought or obtained to enable anyone to commit or

The potential unavailability of the attorney-client privilege under federal law and its consequences should be disclosed to the client at the outset of the representation, because it is information that is "reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b).

Under this provision, the privilege in a state proceeding, the go crime-fraud exception [S.Ct. 2619]. The tri of a federal crime. federal crime, the client privilege does

Rule 1.4 Communication with Clients

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

compel discovery or testimony concerning such communications. In those circumstances, the lawyer may face a conflict between her statutory duty of confidentiality under California law, which contains no express exception for compliance with a court order (see rule 1.6 and Bus. &

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COPRAC: Conflict of Interest

Conflict of Interest. Under rule 1.7(b), a lawyer is required to obtain the client's informed

Conflict of Interest. Under rule 1.7(b), a lawyer is required to obtain the client's informed written consent whenever there is a significant risk that the lawyer's representation of the client, including the lawyer's ability to comply with the duties of competence, confidentiality, and loyalty, will be materially limited by the lawyer's own interests. In addition, rule 1.7(d) requires that the lawyer reasonably believe that, notwithstanding the risk of conflict, the lawyer will be able to provide competent and diligent representation to the client.

Whether the risk of a future conflict is significant depends on both the severity of the conflict and the likelihood that it will arise. Rule 1.7, Comment [4]. A federal criminal investigation or action, targeting either the lawyer or the client, could give rise to a severe and consequential conflict between the lawyer and client, not least because in such matters pressure may be brought against the client and the lawyer to testify against each other and the attorney-client privilege may not be available. Moreover, though federal investigations and prosecutions of

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COPRAC: Conflict of Interest

Conflict of Interest. Under rule 1.7(b), a lawyer is required to obtain the client's informed written consent whenever there is a significant risk that the lawyer's representation of the privilege may not be available. Moreover, though federal investigations of state-licensed cannabis businesses or their lawyers may not have occurred, and current Justice Department policy is that cannabis is governed by "the well-established principles that govern all federal crimes, those facts, the risk of conflict stemming from the threat of federal enforcement under current law cannot reasonably be viewed as insignificant. Accordingly, the lawyer must consider whether the representation can be undertaken, consistent with rule 1.7(d), notwithstanding the significant risk of a future conflict. If the lawyer concludes that rule

those facts, the risk of conflict stemming from the threat of federal investigations and enforcement under current law cannot reasonably be viewed as insignificant. Accordingly, the lawyer must consider whether the representation can be undertaken, consistent with rule 1.7(d), notwithstanding the significant risk of a future conflict. If the lawyer concludes that rule 1.7(d) is satisfied, the lawyer must inform the client of the potential for such conflict pursuant to rule 1.4(a)(1) and rule 1.7(b), and seek the client's informed written consent thereto.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

- (1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law; and
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

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COPRAC: Conflict of Interest

Conflict of Interest. Under rule 1.7(b), a lawyer is required to obtain the client's informed written consent whenever there is a significant risk that the lawyer's representation of the

1.7(d), notwithstanding the significant risk of a future conflict. If the lawyer concludes that rule 1.7(d) is satisfied, the lawyer must inform the client of the potential for such conflict pursuant to rule 1.4(a)(1) and rule 1.7(b), and seek the client's informed written consent thereto.

Rule 1.4 Communication with Clients

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

1.7(d), notwithstanding the significant risk of a future conflict. If the lawyer 1.7(d) is satisfied, the lawyer must inform the client of the potential for such to rule 1.4(a)(1) and rule 1.7(b), and seek the client's informed written consent thereto.

Rule 1.7 Conflict of Interest: Current Clients

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

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Conflict Waivers: Informed Written Consent

- Rule 1.01 defines informed written consent.
 - Informed written consent means that both the disclosures as well as the consent itself must be in writing.

(e) "Informed agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably* foreseeable adverse consequences of the proposed course of conduct.

(e) "Informed consent" means a person's* agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably* foreseeable adverse consequences of the proposed course of conduct.

(e-1) "Informed disclosures and the consent required by paragraph (e) must be in writing.*

(e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.*

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COPRAC: Liability Insurance

Rule 1.4.2 Disclosure of Professional Liability Insurance

Liability Insurance and Banking. Rule 1.4.2(a) states that “a lawyer wh

Liability Insurance and Banking. Rule 1.4.2(a) states that should know that the lawyer does not have professional client of that fact, in writing, at the time of the engagem

obtaining malpractice insurance for a practice representing clients in cannabis law, or they may discover that their insurance policy contains an express exclusion for criminal conduct. If a lawyer is not able to obtain insurance coverage for the lawyer’s cannabis practice, the lawyer must so inform the client pursuant to rule 1.4.2.

(a) A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client’s engagement of the lawyer, that the lawyer does not have professional liability insurance.

those clients into an existing client trust account. If the client’s business needs would normally call for the lawyer to provide safekeeping of the client’s funds or property under rule 1.15, and the lawyer is unable to do so, the lawyer should inform the client pursuant to rule 1.4(a)(3). The lawyer should also comply with any applicable provisions of rule 1.15.

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COPRAC: Liability Insurance and Banking

Lawyers may also find it difficult to find a bank that will allow them to establish a client trust account for a practice which involves representing cannabis businesses or deposit funds from those clients into an existing client trust account. If the client's business needs would normally call for the lawyer to provide safekeeping of the client's funds or property under rule 1.15, and the lawyer is unable to do so, the lawyer should inform the client pursuant to rule 1.4(a)(3). The lawyer should also comply with any applicable provisions of rule 1.15.

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons*

(a) A lawyer shall:

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons*

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

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COPRAC: Organizational Clients and Constituents

Organizational Clients and Constituents. One important goal of California's expanded

Organizational Clients and Constituents. One important goal of California's expanded

regulatory scheme

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Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

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COPRAC: Organizational Clients and Constituents

Organizational Clients and Constituents. One important goal of California's expanded

organization's best lawful interests. Rule 1.13(a). In particular, they should take special care to explain the identity of the client to organizational constituents whenever it is known or reasonably knowable that the interests of the organization and the constituent are adverse.

Rule 1.13(f).

explain the identity of the client to organizational constituents whenever it is known or reasonably knowable that the interests of the organization and the constituent are adverse.
Rule 1.13(f).

Rule 1.13 Organization as Client

(f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows* or reasonably should know* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

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COPRAC: Truthfulness to Third Parties

Truthfulness to Third Parties. Rule 4.1(b) forbids a lawyer from failing “to disclose a material

Truthfulness to Third Parties. Rule 4.1(b) forbids a lawyer from failing “to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,” unless disclosure is barred by the lawyer’s duty of confidentiality. The fact that a business is engaged in commercial cannabis activity—as well as the nature and degree of that engagement—is likely to be a material fact in many transactions between that business and a third party, notably because it has a material impact on the financial, legal, and reputational risks of dealing with the business. Moreover, depending on the circumstances, including the expectations and situation of the third person, the client’s intentional failure to disclose such facts may itself be a form of civil fraud. BAJI No. 1901 (2017). In addition, under rule 1.2.1, given the present conflict between federal and state cannabis regulation, a lawyer may not assist in conduct that is intended to conceal the client’s actions or evade prosecution for them. For all

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COPRAC: Truthfulness to Third Parties

Truthfulness to Third Parties. Rule 4.1(b) forbids a lawyer from failing “to disclose a material conduct that is intended to conceal the client’s actions or evade prosecution for them. For all these reasons, lawyers representing cannabis businesses should be alert to situations where the lawyer’s duty of truthfulness may bar the lawyer from assisting the client in dealings with a third party unless the material facts regarding the client’s business have been disclosed. In such situations, if the client declines to permit disclosure, the lawyer must inform the client of the relevant limitations on the lawyer’s conduct and should evaluate whether withdrawal from the matter is permitted or required under rule 1.16. Rule 1.4(a)(4) and rule 4.1, Comment [5].

Rule 1.16 Declining or Terminating Representation

situations, if the client declines relevant limitations on the lawyer’s conduct, the lawyer must inform the client of the relevant limitations on the lawyer’s conduct and should evaluate whether withdrawal from the matter is permitted or required under rule 1.16.

Rule 1.4 Communication with Clients

[4] Regarding a lawyer’s involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].

Rule 4.2 Communication with a Represented Person*

Rule 4.1 Truthfulness in Statements to Others

[3] Under rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See rule 1.4(a)(4) regarding a lawyer’s obligation to consult with the client about limitations on the lawyer’s conduct. In some circumstances, a lawyer can avoid assisting a client’s crime or fraud* by withdrawing from the representation in compliance with rule 1.16.

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Advising Clients Regarding Conflict of Laws (Federal Illegality)



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Federal Mandatory Minimum Sentences

Federal Trafficking Penalties - Marijuana

DRUG	QUANTITY	1 st OFFENSE	2 nd OFFENSE
Marijuana	1,000 kg or more mixture; or 1,000 or more plants	<ul style="list-style-type: none">• Not less than 10 years, not more than life• If death or serious injury, not less than 20 years, not more than life• Fine not more than \$4 million if an individual, \$10 million if other than an individual	<ul style="list-style-type: none">• Not less than 20 years, not more than life• If death or serious injury, mandatory life• Fine not more than \$8 million if an individual, \$20 million if other than an individual
Marijuana	100 kg to 999 kg mixture; or 100 to 999 plants	<ul style="list-style-type: none">• Not less than 5 years, not more than 40 years• If death or serious injury, not less than 20 years, not more than life• Fine not more than \$2 million if an individual, \$5 million if other than an individual	<ul style="list-style-type: none">• Not less than 10 years, not more than life• If death or serious injury, mandatory life• Fine not more than \$4 million if an individual, \$10 million if other than an individual



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Continuing Criminal Enterprise, 21 USC § 848

Mandatory minimum of 20 years

(c) "CONTINUING CRIMINAL ENTERPRISE" DEFINED For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.



Kraz "Business Man"
Luke Scarmazzo

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Federal Policy

JANUARY 18, 2019 / 2:25 PM / CBS NEWS

U.S. CONGRESSMAN
EARL BLUMENAUER
REPRESENTING THE 3RD DISTRICT OF OREGON

ABOUT CONTACT ISSUES MEDIA C

House Approves Blumenauer Amendment to Protect Cannabis Programs

by NORMA
December 16,

Share

In the FY20 programs fr that had be

Provisions t against the of a rider th

July 30, 2020 | Press Release

As national support for federal marijuana legalization continues to climb, the U.S. House of Representatives today approved important legislation to protect state, territory, and tribal cannabis programs from federal interference.

The amendment, introduced by U.S. Reps. Earl Blumenauer (D-CO), Tom McClintock (R-CA), Eleanor Holmes Norton (D-DC), and Barbara Lee (D-CA), was approved 254-163 and would ensure legal cannabis programs in Oregon and dozens of other states, territories, and tribal lands are protected from Department of Justice intervention.

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How to Advise Clients

- Fee agreements are generally not considered privileged, unless they reveal a confidential communication of legal advice.
 - For example, the identity of the client, the fee agreement, and the fact of retention are ordinarily not privileged because they only involve the incidents of representation. See, *In re Grand Jury Subpoena*, 204 F.3d 516 (4th Cir. 2000) (Retainer agreement which identified attorney's client is not protected by the attorney-client privilege; a client's identity is privileged only if disclosure would in essence reveal a confidential communication.)
- A separate letter, prominently marked **PRIVILEGED & CONFIDENTIAL**, which advises the client with respect to conflicts with federal and/or tribal law would not only constitute a confidential communication, but maximize attorney-client privilege under California law.

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How to Advise Clients

CONFIDENTIAL - APPEARING ON BEHALF OF A CLIENT

with applicable California and local laws on medicinal and adult-use cannabis and hemp. Law Firm is not allowed in any way to enable or aid anyone to commit or plan to commit any violation of the law. As your legal counsel, we are required to draw your attention to the conflict between California law and federal law with respect to cannabis. In brief, while “commercial cannabis

purpose, for very minor, nonmedical cannabis activity, outside current regulations.

Please keep in mind that possessing, using, cultivating, manufacturing, distributing and selling cannabis in any form are all federal crimes punishable by draconian mandatory minimum sentences. For example, the cultivation of one hundred or more cannabis plants (or the distribution

federal conspiracy laws, which punish any agreement to engage in unlawful activity as if the crime

communications related to cannabis remains uncertain under federal law. In a federal asset forfeiture or criminal proceeding, the governing privilege law may be federal and the federal, rather than state, crime-fraud exception to the privilege, may apply. Thus, the attorney-client privilege

Under the “crime-fraud exception” to the attorney-client privilege, if a client becomes involved in

may be unavailable under federal law in a federal proceeding. Consequently, a federal criminal investigation or action, targeting either the lawyer or the client, could give rise to a severe and consequential conflict between the lawyer and the client, because in such matters pressure may be brought against the client and lawyer to testify against each other and the attorney-client privilege may not be available. In view of this remote though potential conflict, we are required to obtain



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How to Advise Clients

rendering those services are confidential communications between client and lawyer, as defined in Section 952, provided the lawyer also advises the client on conflicts with respect to federal law.

Consistent with California Evidence Code section 956, Law Firm strives to maximize lawyer-client confidentiality protections under state law by sending this letter as a separate communication. Please do not share this confidential communication with anyone else.

Please note that the lawyer-client privilege is not absolute, and the scope of privileged communications related to cannabis remains uncertain under federal law. In a federal asset forfeiture or criminal proceeding, the governing privilege law may be federal and the federal, rather than state, crime-fraud exception to the privilege, may apply. Thus, the attorney-client privilege may be unavailable under federal law in a federal proceeding. Consequently, a federal criminal investigation or action, targeting either the lawyer or the client, could give rise to a severe and consequential conflict between the lawyer and the client, because in such matters pressure may be brought against the client and lawyer to testify against each other and the attorney-client privilege may not be available. In view of this remote though potential conflict, we are required to obtain your written consent before proceeding with representation. Please be aware that you have the right to consult independent counsel before signing this consent, and we encourage you to do so.

Client is advised to contact the Law Firm if Client has any questions or concerns regarding the foregoing.

Sincerely,



ACKNOWLEDGEMENT OF POTENTIAL CONFLICTS OF INTEREST AND CONSENT TO REPRESENTATION

Each party understands that there exist potential conflicting interests in the above- described matter, and Law Firm has informed Client of the possible consequences of this conflict and its potential effect on the attorney-client privilege. Client also understands that it has the right to and has been encouraged to consult independent counsel before signing this consent.

The undersigned nevertheless desires representation by Law Firm and, therefore, consents and gives approval to such representation.

On behalf of Client, I understand and acknowledge the foregoing.

Date: _____ Signature: _____

ough potential conflict, we are required to obtain representation. Please be aware that you have the

representation. Please be aware that you have the ing this consent, and we encourage you to do so.

al conflicting interests in the above- described ne possible consequences of this conflict and its Client also understands that it has the right to and

Client also understands that it has the right to and nsel before signing this consent.

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Questions?



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