



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1225 (07/08/2021)

Topic: Counseling clients engaged in recreational marijuana business; accepting partial ownership of recreational marijuana business in lieu of fee; personal use of recreational marijuana.

Digest: In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with New York’s Recreational Marijuana Law and its implementing regulations, notwithstanding that federal narcotics law prohibits the activities authorized by that law. A lawyer may also use marijuana for recreational purposes and may, when the law becomes fully effective, cultivate an authorized amount of marijuana plants at home for personal use. Finally, subject to compliance with Rules 1.7 and 1.8(a), an attorney may accept an equity ownership interest in a cannabis business in exchange for legal services.

Rules: 1.1(a); 1.2(d); 1.3; 1.16(b)(2); 1.7; 1.8(a); 8.4(b); 8.4(h).

FACTS

1. New York legalized cannabis products for medical use in July 2014. On March 31, 2021, Governor Andrew M. Cuomo signed into law Chapter 92 of the Laws of 2021, entitled the “Marihuana Regulation and Taxation Act,” creating a regulated recreational cannabis industry in New York (the “Recreational Marijuana Law”). Although marijuana possession and use were legalized for non-medical purposes effective immediately with the adoption of the Recreational Marijuana Law, the authorized commercial sale of cannabis products awaits various administrative rules and regulations and is not anticipated to begin before late 2022.

2. The regulatory framework established by the Recreational Marijuana Law bears many similarities to New York’s regulation of alcohol by the New York State Liquor Authority under the Alcoholic Beverage Control Law. A Cannabis Control Board and the Office of Cannabis Management will control the issuance and revocation of licenses for retail dispensaries and on-site consumption establishments and will administer both the adult-use and medical-use programs, promulgating rules, issuing licenses, and investigating and enforcing violations. The cultivation, processing, distribution, and sale of cannabis products will be tightly controlled and, when the law becomes fully effective, individuals will be permitted to grow a limited number of plants in their homes for personal use.

3. Through local legislation that is subject to permissive referendum, the Recreational Marijuana Law gives cities, villages and towns the authority to “opt out” of allowing retail dispensaries and on-site consumption establishments to operate within their jurisdictions. These localities may also regulate the time, place and manner of the operation of these adult-use facilities, provided the Cannabis Control Board does not determine that such restrictions make such

operations unreasonably impracticable. Cannabis businesses also remain subject to local zoning regulations.

QUESTIONS

4. The inquirer is an attorney who wants to provide legal services to a client engaged in the recreational cannabis business in New York. She poses three separate questions:

- a. May an attorney ethically provide legal services to assist a client to comply with New York's Recreational Marijuana Law?
- b. May an attorney ethically use marijuana recreationally and grow it at home for personal use?
- c. May an attorney accept an equity interest in a client's cannabis business in exchange for providing legal services?

OPINION

Our Prior Opinions Regarding Rule 1.2(d) and New York's Medical Marijuana Law.

5. Rule 1.2(d) of the Rules of the New York Rules of Professional Conduct (the "Rules") provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

6. Notwithstanding Rule 1.2(d), following the enactment of New York's Compassionate Care Act (the "Medical Marijuana Law"), this committee held in N.Y. State 1024 (2014) that an attorney may ethically provide legal services and advice to doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession or use of marijuana for medical purposes to help them act in compliance with state regulation regarding medical marijuana, despite the federal narcotics laws that prohibit the possession, distribution, sale or use of marijuana and which provide no exception for medical uses.

7. We noted that the federal government had publicly announced that it was limiting its enforcement of federal narcotics laws and would not ordinarily prosecute individual actors and institutions who acted consistently with state laws that legalized and extensively regulated medical marijuana. Rather, the federal government said it would pursue enforcement only to further certain federal priorities, such as preventing the flow of revenue from marijuana sales to criminal enterprises and preventing marijuana activity from being used as a cover for trafficking other drugs. We reasoned that lawyers could provide a range of valuable assistance to clients seeking to comply with the Medical Marijuana Law consistent with this federal enforcement policy and, because a strong state regulatory system justified the federal policy of forbearance from the enforcement of federal narcotics laws, federal enforcement policy actually depended on the availability of lawyers to establish and promote compliance with a strong and effective state regulatory system.

8. Without minimizing the core tenet of Rule 1.2(d) or a lawyer’s fundamental duty not to counsel a client to violate the law or to assist a client in so doing, we concluded that “nothing in the history and tradition of the profession, in court opinions, or elsewhere” suggested that Rule 1.2(d) was intended in this “highly unusual if not unique” circumstance to “preclude lawyers from counseling or assisting conduct that is legal under state law” or to provide assistance “that is necessary to implement state law and to effectuate current federal policy” We identified that “highly unusual and unique circumstance” as “where the state executive branch determines to implement the state legislation by authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent implementation of the law.” (N.Y. State 1024 ¶¶ 6 & 23-25; footnote omitted.)

9. We cautioned, however, that “If federal enforcement were to change materially, this Opinion might need to be reconsidered” (N.Y. State 1024 ¶ 25).

10. The federal enforcement policy we described in N.Y. State 1024 had been articulated in a Department of Justice memorandum issued August 29, 2013, known as the “Cole Memo” (named for then Deputy Attorney General James Cole, who was its author). On January 4, 2018, however, then Attorney General Jeff Sessions rescinded the Cole Memo. Accordingly, this committee, in N. Y. State 1177 (2019), reconsidered the conclusion we had reached in N.Y. State 1024.

11. N.Y. State 1177 adhered to the conclusion of N.Y. State 1024. We noted in Opinion 1177 that General Sessions’ successor, William Barr, had testified during his confirmation hearing that he would not target state legal marijuana businesses and would leave it to Congress to act. We further noted that during the interval between our release of N.Y. State 1024 in November 2014, and the rescission of the Cole Memo in January 2018, Congress had in fact acted. Specifically, in December 2014, Congress adopted legislation known as the “Rohrabacher-Blumenauer Amendment” that prohibited the Department of Justice from using any of the funds appropriated by Congress to prevent States from implementing their own State laws that authorized the use, distribution, possession or cultivation of medical marijuana. We reasoned that, in these circumstances, the rescission of the Cole Memo “does not meaningfully change federal law enforcement policy” (N.Y. State 1177 ¶ 9).

12. Accordingly, based on the state of federal law enforcement policy from 2014 through today, and subject to future changes in that policy, we decided in N.Y. State 1024 and affirmed in N.Y. State 1177 that a lawyer may assist a client in conduct designed to comply with the Medical Marijuana Law without violating Rule 1.2(d).

13. We now apply these same principles to answer the inquirer’s three questions.

Assisting a Client to Comply with New York’s Recreational Marijuana Law.

14. The inquirer’s first question is whether an attorney may ethically provide legal services to assist a client to comply with New York’s Recreational Marijuana Law. This question does not require us to analyze any change in federal enforcement policy since we issued N.Y. State 1177 (to our knowledge there have been no changes). Rather, the question is whether New York’s broader legalization of cannabis for recreational use imports into the analysis any additional factors or competing considerations that would alter the conclusion reached by the committee in N.Y.

State 1024 and 1177 regarding medical marijuana. For the reasons that follow, we believe it does not.

15. First, although the Rohrabacher-Blumenauer Amendment is specifically focused on marijuana for medical and not recreational purposes, over the course of three administrations -- Presidents Obama, Trump and Biden -- the Department of Justice has not, to our knowledge, taken any public position on federal enforcement that distinguishes between medical and recreational marijuana laws in the states. Indeed, unlike the Rohrabacher-Blumenauer Amendment, the Cole Memo (now rescinded) was not limited to medical marijuana. Inasmuch as 17 states, plus Washington, D.C., and Guam, have now legalized the recreational use of marijuana in some form, beginning with Colorado in 2012, it seems fair to say that for nearly a decade federal forbearance in the enforcement of federal narcotics laws has been equally applied to state laws legalizing recreational marijuana and to state laws legalizing medical marijuana.

16. Second, the comprehensive licensing and regulatory system that governs recreational use of marijuana in New York is clearly the type of robust and comprehensive state enforcement system that is squarely intended by federal enforcement policy to be an object of federal forbearance.

17. Third, the need for lawyer assistance to clients to assure compliance with state regulatory requirements in the medical marijuana industry, which justifies continued federal forbearance, applies with equal if not more force to recreational marijuana. For example, the licensing process under New York's Recreational Marijuana Law will function more expeditiously and with more consistency if lawyers can assist with preparing and submitting license applications and can counsel the regulators reviewing those applications. More generally, in a complex regulatory system where cultivation, distribution, possession, sale and use of a product are tightly regulated, legal advice and guidance has immense value. Without the aid of lawyers, the recreational marijuana regulatory system would, in our view, likely break down or grind to a halt. The participation of attorneys thus secures the benefits of the Recreational Marijuana Law for the public at large, as well promotes the interests of the private and public sector clients more directly involved in the law's implementation.

18. Fourth, as we observed in N.Y. State 1024, the tension created between federal and state narcotics laws remains a "highly unusual if not unique" situation that was never intended to fall within the blunt prohibition of Rule 1.2(d) against a lawyer counseling a client to engage in, or engaging in, conduct that the lawyer knows is illegal. The federal decision not to enforce narcotics laws against individuals and organizations engaged in conduct authorized by state law renders sui generis our determination of the issues presented by this inquiry, as well as in N.Y. State 1024 and N.Y. State 1177.

Ownership, Home Cultivation, and Personal Use by an Attorney.

19. The inquirer has been offered an equity stake in a client's cannabis business in exchange for legal services. She would also like to use cannabis products recreationally and grow lawful quantities of marijuana at home for personal use. She asks if this would be allowed under the Rules.

20. For many of the same reasons that lead us to conclude that an attorney may provide legal services to a cannabis business, we conclude that such ownership, home cultivation, and personal

use, without more, would not violate Rule 1.2(d). We must, also, however, consider Rule 8.4(b) and (h), which provide:

A lawyer or law firm shall not:

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

21. The first sentence of Comment [2] to Rule 8.4 provides:

Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law.

22. Nothing the inquirer proposes to do involves acts of violence. Moreover, if the inquirer's ownership interest in a cannabis business, her home cultivation of marijuana plants, and her personal recreational use of marijuana comply with the Recreational Marijuana Law, they will fall within the scope of federal forbearance. For that reason, although those activities are technically illegal under federal law, they will not constitute illegal conduct that involves "dishonesty, fraud, breach of trust, or serious interference with the administration of justice." Accordingly, without more, such conduct would not adversely reflect on the inquirer's "honesty, trustworthiness or fitness as a lawyer" within the meaning of Rule 8.4(b).

23. The excessive use of marijuana, however, like excessive consumption of alcohol, may adversely impact a lawyer's ability to competently and diligently represent a client as required by Rules 1.1(a) and 1.3. It could also have more serious consequences and create a physical or mental condition that materially impairs a lawyer's ability to represent a client, requiring mandatory withdrawal from representation (see Rule 1.16(b)(2)). Nothing we say here connotes approval of such excessive use or establishes a protective shield for a lawyer who is facing disciplinary charges, malpractice claims, or other adverse consequences arising out of marijuana use.

24. The second sentence of Comment [2] to Rule 8.4 provides:

A pattern of repeated offenses, even ones of minor significance when considered separately can indicate an indifference to legal obligation.

25. It is true that growing and harvesting marijuana, as well as repeatedly using marijuana, could be said to reflect a "pattern of repeated offenses" of the federal narcotics laws, but we reject the notion that it is a pattern that indicates an "indifference to legal obligation" where, again, the conduct falls squarely within the scope of federal forbearance and New York explicit authorization.

26. Federal forbearance policy is also relevant to Comment [4] to Rule 8.4, which provides in pertinent part:

A lawyer may refuse to comply with an obligation imposed by law if such refusal is based upon a reasonable good-faith belief that no valid obligation exists because, for example, the law is unconstitutional, conflicts with other legal or professional obligations, or is otherwise invalid.

27. In our view, the scope of federal forbearance provides inquirer with a “reasonable good-faith belief that no valid obligation exists” to comply with federal narcotics laws that would otherwise prohibit her ownership of an interest in a cannabis business, her home cultivation of marijuana plants for personal use, and her recreational use of marijuana, where and when such activities are authorized by New York State law.

Additional Rules Relevant to Accepting an Equity Interest in Exchange for Legal Services.

28. Accepting an equity interest in the client’s cannabis business as compensation for providing legal services also requires compliance with Rule 1.8(a) regarding a business transaction with a client. In N.Y. State 913, ¶¶ 6 & 10 (2012), we concluded “that Rule 1.8(a) applies to negotiation of a fee in which a lawyer is to receive an equity interest in a client or the client’s company.” Accordingly, “the terms of the transaction must be fair and reasonable to the client, fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client, with the client being advised of the desirability of seeking independent legal advice and given a reasonable chance to do so, and the client signing a writing that describes the transaction and the lawyer’s role in the deal, including whether the lawyer was acting for the client in the matter.”

29. Further, the inquirer must consider whether acquiring or possessing an equity interest in the client’s cannabis business will give rise to a conflict of interest under Rule 1.7(a)(2). A conflict will arise if there is a significant risk that the lawyer’s advice or other legal assistance to the client will be adversely affected by the lawyer’s financial self-interest. In that event, the lawyer may nevertheless proceed with the representation if (i) the lawyer reasonably believes she can provide competent and diligent representation despite the conflict and (ii) the lawyer obtains the client’s informed consent, confirmed in writing. See Rule 1.7(b); N.Y. State 990 ¶ 26 (2013); N.Y. State 913 ¶¶ 13-14.

30. We caution that were the inquirer to engage in any cannabis related activity that constituted a serious violation of New York State law or of other federal laws, or in activity that would materially implicate federal enforcement priorities not subject to federal forbearance – for example, assisting in the transfer of sales revenues from recreational marijuana sales to criminal enterprises, or using a cannabis business as a cover for trafficking in other narcotics – her conduct would fall outside the safe harbor established by this opinion. In that case, her conduct would constitute violations of Rule 1.2(d) and Rules 8.4(b) and 8.4(h).

31. We further caution that law enforcement authorities may have views of their own on the reach of the criminal statutes they enforce, and whether the conduct we find here to be ethically permissible is within the prohibited scope of those statutes presents questions of law on which this committee does not opine. Our jurisdiction is limited to interpreting the Rules of Professional Conduct.

CONCLUSION

32. In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with New York's Recreational Marijuana Law and its implementing regulations, notwithstanding that federal narcotics law prohibits the activities authorized by that law. A lawyer may also use marijuana for recreational purposes and may, when the law becomes fully effective, cultivate an authorized amount of marijuana plants at home for personal use. Finally, subject to compliance with Rules 1.7 and 1.8(a), an attorney may accept an equity ownership interest in a cannabis business in exchange for legal services.

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