

August 8, 2016

THE HIGH RISK OF GOING GREEN: THE ETHICAL DILEMMAS ATTORNEYS FACE REPRESENTING THE MARIJUANA INDUSTRY

BY BRANNAH HAMILTON

The marijuana industry is continuously growing in the US, and more than twenty states and the District of Columbia have legalized growing, processing, transporting, selling and/or using marijuana for medical purposes.[i]

(file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn1) Colorado and Washington have gone even further and legalized marijuana for recreational and personal use.[ii]

(file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn2) As the demand continues to grow for legal services associated with the burgeoning marijuana industry, attorneys find themselves facing ethical dilemmas concerning their representation of the industry. The unclear ethics of representing marijuana businesses has become a recurring topic of discussion within the legal realm. A recent June ABA conference panel marked the second time in three years that the topic was covered and included legal ethics and risk management advisers, bar regulators, law firm general counsel, and lawyers who defend malpractice and attorney discipline cases.[iii]

(file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn3)

The ethical dilemmas that attorneys face in representing the industry stem from the model rules, specifically ABA Model Rule of Professional Conduct 1.2.[iv] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn4) Model Rule 1.2 has been adopted in some form in almost every US jurisdiction and dictates that an attorney cannot assist a client with any illegal activity.[v] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn5) Marijuana is still illegal federally, so clients that manufacture and distribute or dispense marijuana are committing a federal crime, which can present problems for lawyers who agree to represent a client in the marijuana industry.[vi]

(file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn6) States including Arizona, Washington, and Colorado have attempted to remedy the ethical dilemma by issuing ethics opinions and addendums to state ethics rules.[vii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn7) In an attempt to address the problem the Arizona, the state bar released an ethics opinion discussing the bounds of ethical legal work.[viii]

(file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn8) Washington added a new rule addendum to the state ethics rules and in Colorado, the State Supreme Court changed the state ethics rules itself to make clear that attorneys could practice in the cannabis field and still uphold their ethical obligations.[ix]

(file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn9)



As more states continue replacing prohibition with taxation and regulation, attorneys will continue to seek guidance from the state bar associations. The response to the Model Rule 1.2 dilemma by those states that have legalized the marijuana industry has been widely varied, so the need for a uniform remedy to the ethical dilemmas still persists. One suggested solution for resolving the inconsistencies between state ethics opinions is to rely on the criminal law distinctions between knowledge and intent, for those attorneys concerned about the possibility of being an accomplice and co-conspirator.[x] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn10) With this criminal law framework and distinction in mind, Model Rule 1.2(d) could be read as consisting of three elements: (1) a client's *criminal* activity, (2) a lawyer's *knowledge* that the activity is criminal, and (3) a lawyer's *intentional* assistance in the prohibited client conduct.[xi] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn11) The marijuana industry is complex and growing.[xii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn12) Without guidance from lawyers, clients would often be left unable to determine the meaning and application of the law.[xiii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn13) Clients would effectively be denied the ability to decide how to conduct themselves in an informed manner under the law.[xiv] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn14) If lawyers face disciplinary charges for "assisting" clients when one merely knows of the clients' criminal conduct, then defense attorneys would be inhibited from representing their clients.[xv] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_edn15)

An example of one of the many problematic scenarios created by the Model Rule 1.2 is the situation where a potential client seeks legal advice from an attorney because he/she would like to apply for a license to own and operate a marijuana dispensary. The application process is complex and detailed. If a lawyer is only allowed to discuss the process and associated risks, but prohibited from assisting clients in filling out an application, the practical reality would deny the client the ability to apply for a license.

As more states continue to legalize marijuana, the need for an approach that allows an attorney to represent clients within the marijuana industry without committing an ethical violation will only increase. Access to an attorney is a crucial element for any industry, especially in instances when the law is in flux, clients need legal assistance more than ever. Wide, sweeping reforms are needed to remedy the dilemmas attorneys face when it comes to representing the industry. Until a change is made at the federal level, attorneys who desire to represent clients within the marijuana industry are working together with the industry and their state bar associations to try and find a solution that allows attorneys to represent clients within the industry and assures that potential clients will have access to effective legal counsel. Model Rule 1.2 should not serve as a barrier to lawyers who desire to represent clients within this growing industry because the inability to represent those in the industry not only inhibits an attorney's ability to represent a burgeoning industry but also prohibits potential clients within the marijuana industry from obtaining effective legal assistance.

[i] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref1) Tom Feher, *Representing clients in the marijuana industry: greener grass?*, The Law for Lawyers Today (July 23, 2014), <http://www.thelawforlawyerstoday.com/2014/07/representing-clients-in-the-marijuana-industry-greener-grass/>.

[ii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref2) *Id.*

[iii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref3) Samson Habte, *On the Murky Ethics of Representing Weed Industry*, Bloomberg BNA (June 6, 2016), http://my.bna.com.ezproxy.law.uky.edu/xpdt/LWLNWB/split_display.adp?fedfid=91995648&cvname=lw1notallissues&wsn=495040000&searchid=27816131&doctypeid=1&type=xpdate4news&mode=doc&split=0&scm=LWLNWB&pg=0.

[iv] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref4) Model Rules of Prof'l Conduct r. 1.2 (Am. Bar Ass'n 1983).

[v] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref5) *Id.*

[vi] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref6) Robert Mcvay, *Representing Cannabis Clients: The Legal Ethics*, Canna Law Group, (April 13, 2015), <http://www.cannalawblog.com/representing-cannabis-clients-the-legal-ethics/>.

[vii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref7) *Id.*

[viii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref8) *Id.*

[ix] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref9) *Id.*

[x] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref10) Jennifer Goldstein, *Weeding out Ethical Issues: The Budding Cannabis Industry and Your License to Practice Law*, Epstein Becker Green (Jan. 21, 2016), 15 <http://www.ebglaw.com/content/uploads/2016/04/WEEDING-OUT-ETHICAL-ISSUES-THE-BUDDING-CANNABIS-INDUSTRY-AND-YOUR-LICENSE-TO-PRACTICE-LAW-Epstein-Becker-Green-Robert-D-Reif-Fellowship.pdf>

[xi] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref11) *Id.*

[xii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref12) Model Rules of Prof'l Conduct r. 1.2(d) (Am. Bar Ass'n 1983).

[xiii] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref13) *Id.* at 16.

[xiv] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref14) *Id.*

[xv] (file:///C:/Users/Evan/Downloads/Hamilton%20blog%20post.docx#_ednref15) *Id.*

1.

♥ 0 Likes < Share

COMMENTS (0)

Newest First [Subscribe via e-mail](#)

[Preview](#) [POST COMMENT...](#)

Newer Post

Table Talk: Commissioner of Agriculture's New Hunger Initiative Transforms the Narrative on Food Insecurity ([/full-blog/fergusonblog2](#))

Older Post

Racing From the Track to the Courtroom: Holy Lute Owner Sues Over Alleged Pre-Entry Mistake ([/full-blog/simmsblog2](#))

631 SOUTH LIMESTONE, LEXINGTON, KY

40508 (859) 257-4747 [BLOG.KJEANRL@GMAIL.COM](mailto:blog.kjeanrl@gmail.com) (MAILTO:[BLOG.KJEANRL@GMAIL.COM](mailto:blog.kjeanrl@gmail.com))