Taking the High Road: An Attorney's Professional Responsibilities in the Cannabis Industry

By CINDER ELLA CANCILLA

LIKE THE DAWN OF A NEW ERA IS BOTH LIT AND DARK, the cannabis space in California is both revered and barred. Although endorsed by state law, cannabis remains federally prohibited.[1] With conflicting laws operating within California, an attorney's adherence to professional responsibilities becomes hazy. This Comment provides clarity on how conflicts between state and federal laws significantly affect the duties of an attorney advising a client engaged in commercial cannabis activities (where adherence to those duties is problematic), particularly the associated risks of federal liability.

In 2018, California legalized the medicinal and adult use of cannabis through the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA").[2] MAUCRSA established a comprehensive system to control and regulate the cultivation, distribution, transportation, storage, manufacturing, possession, and sale of both medicinal- and adult-use cannabis.[3] Essentially, any cannabis-related commercial activity conducted in compliance with MAUCRSA and local regulations as well as all contracts and transactions surrounding cannabis are deemed lawful and legally enforceable.[4] Conversely, pursuant to the United States Controlled Substances Act ("CSA") enacted in 1970, knowingly or intentionally committing or conspiring to manufacture, distribute, dispense, or possess cannabis remains federally unlawful.[5] Accordingly, if committed in compliance with MAUCRSA, commercial activity related to the medicinal or adult use of cannabis is legal under California law but necessarily violates federal law under CSA; thus, leaving federal law, CSA, and

1. *See* 21 U.S.C. § 841(a)(1) (2012) (making it illegal to do any of specified acts when controlled substances are involved); *see* 21 U.S.C. § 802(6) (2018) (listing controlled substances as schedule I drugs and including marijuana in that list).

2. *See* CAL. BUS. & PROF. CODE § 26000(b) (West 2017).

3. *See id.*

4. CAL. CIV. CODE § 1550.5(b) (West Supp. 2019).

5. 21 U.S.C. § 841(a)(1); 21 U.S.C. § 802(6).

state law, MAUCRSA, in direct conflict.

Although an attorney does not violate California law by advising a client in commercial cannabis activities, an attorney can violate federal law. Pursuant to the Supremacy Clause of the United States Constitution, where a state and federal law are in conflict, the federal law is supreme.[6] Under federal law, any person who conspires or attempts to commit any offense defined in the United States Codes—the commission of which was the object of the attempt or conspiracy—shall be subject to the same penalties as those prescribed for the offense.[7] If an attorney provides legal services by assisting with business decisions and transactions that facilitate operating a cannabis business, that attorney becomes a participant in the client's operation.[8] This is the issue: An attorney who counsels a cannabis client regarding the client's cannabis business becomes a participant, and once an attorney becomes a participant she is a co-conspirator and is subject to federal penalties.[9]

The risk of federal penalties is exacerbated when an attorney accepts payment of legal fees by funds derived from cannabis businesses.[10] Pursuant to the United States Code, whoever knowingly engages or attempts to engage in a monetary transaction of criminally derived property greater than $10,000 shall be punished by fine or imprisonment.[11] Moreover, a transaction, or attempted transaction, of criminally derived property, real or personal, is subject to forfeiture to the United States.[12] Therefore, if an attorney provides legal services to a client engaged in commercial cannabis activities and knows her legal fees are derived from the client's cannabis operations, that attorney's fees are subject to federal forfeiture,[13] and she will be subject to heightened penalties if the fees are greater than $10,000.[14]

For an attorney practicing in California, it is her duty to support both the United States Constitution and laws and the California constitution and laws.[15] Further, a lawyer in California shall not advise a client in conduct that the lawyer knows violates any law, rule, or ruling of a tribunal.[16] Thus, an attorney advising a client in commercial cannabis activity in compliance with

6. U.S. CONST. art. VI, cl. 2.
7. 21 U.S.C. § 846 (2012).
8. United States v. Gaskins, 849 F.2d 454, 459 (9th Cir. 1988).
9. *See id.*; *see* 21 U.S.C. § 846; *see* 21 U.S.C. § 841(a)(1).
10. 18 U.S.C. § 1957 (2012).
11. 18 U.S.C. § 1957.
12. 18 U.S.C. § 981 (2012).
13. 18 U.S.C. § 981.
14. 18 U.S.C. § 1957.
15. CAL. BUS. & PROF. CODE § 6068(a) (West 2018).
16. CAL. RULES OF PROF'L CONDUCT r. 1.2.1 (2018).

MAUCRSA undoubtedly supports the constitution and laws of California, but not those of the United States. While an attorney's professional responsibilities under California law do not prohibit her from advising a client in commercial activity related to cannabis, they do prohibit her from advising a client to violate federal law or act in a manner that evades detection or prosecution.[17] As a matter of course, an attorney's adherence to California's Business and Professions Code is ill-fated.

When advising a client, the attorney generally provides her opinion on the legal aspects of the client's conduct, including the risks for violating laws and subsequent consequences that may arise from the client's conduct.[18] If the client intends to use the attorney's advice to commit some criminal or fraudulent activity, the attorney may still provide her opinion on the legal aspects of the client's conduct.[19] Providing a legal opinion is critically distinct from recommending the means by which the client may commit some criminal or fraudulent activity with impunity.[20] When an attorney advises a client engaged in commercial cannabis activity, that attorney must provide her opinion on the legal aspects of the client's conduct including the federal prohibition under CSA, the risks of violating CSA, and subsequent consequences. Provided the attorney does not assist a client in evading detection or prosecution under federal law, an attorney who provides the aforementioned information and guidance acts in support of both the United States Constitution and laws and the State of California Constitution and laws.

To conclude, notwithstanding federal liability, an attorney does not violate her duties under California's Rules of Professional Conduct or the State Bar Act when she advises or assists a client in commercial cannabis activity. To mitigate potential federal liability, a California attorney should not counsel a cannabis client regarding the client's cannabis business, which is in direct violation of federal law, and should provide an opinion regarding the legal aspects of a client's proposed action including the risks for violation and subsequent consequences that may arise under both state and federal laws.

17. *See id.*; *see* CAL. CIV. CODE §1550.5(b) (West Supp. 2019).
18. CAL. RULES OF PROF'L CONDUCT r. 1.4 (2018).
19. MODEL CODE OF PROF'L CONDUCT r. 1.2 cmt. 9 (AM. BAR ASS'N 2018).
20. CAL. RULES OF PROF'L CONDUCT r. 1.2.1 cmt. 1 (2018).