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EXPERT ADVICE

Attorneys and Marijuana

Recreational marijuana use may now be legal in California, but it's still a federal crime and, for the state's lawyers, there are serious ethical issues lurking in the legal fog that surrounds this new development.

BY ALLISON W. MEREDITH | DECEMBER 7, 2016

November 8, 2016, was a red-letter day for marijuana advocates. Five states voted on ballot measures to legalize recreational marijuana (Arizona, California, Maine, Massachusetts, and Nevada), and another four states voted on measures to legalize medical marijuana (Arkansas, Florida, Montana, and North Dakota). Eight of the nine measures passed, with only Arizona rejecting legalization. Once these state measures take effect, eight states total will have legalized marijuana for recreational use, with another 21 legalizing marijuana for medical use. Some in the industry believed that the November results would be the tipping point for marijuana legalization on a national scale.

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Before the election, Donald Trump told the Washington Post that he viewed marijuana legalization to be an issue that should be decided state by state. Following the election, Tom Angell, chairman of Marijuana Majority, issued a statement saying, "President-Elect Trump has clearly and repeatedly pledged to respect state marijuana laws, and we fully expect him to follow through on those promises, not only because it is the right thing to do but also because these reforms are broadly supported by a growing majority of voters."

Then President-elect Trump announced his plan to nominate Senator Jeff Sessions as his attorney general. Optimism about the future of legal marijuana became concern: would the man who "joked" that he thought the Ku Klux Klan was "OK until I found out they smoked pot," and who is on record as stating that "good people don't smoke marijuana," continue the Obama administration's policy of leaving state-legalized marijuana users in peace? Or would Senator Sessions use the power of federal law enforcement to arrest and prosecute users and businesses who came out of the shadows to participate in the states' gray-market marijuana economies?

Many articles have already discussed Senator Sessions' hostility toward marijuana usage and the threat he poses to state-legalized usage. This piece assumes that Senator Sessions' appointment is a fait accompli and explores the possible consequences for members of the California State Bar who choose to use marijuana and/or participate in marijuana-related businesses.

"The brave new world of legalized marijuana and a hostile federal Department of Justice defy easy application of precedent."

In other words, will California attorneys face professional consequences for choosing to follow state, rather than federal, marijuana laws?

STATE BAR GUIDANCE? NOT YET.

The short answer is, we don't know. Although medical marijuana has been legal in California for 20 years, the State Bar has provided no published guidance with respect to medical marijuana. The State Bar has also failed to provide guidance regarding whether and how attorneys may participate in the burgeoning recreational marijuana industry. On the other hand, the State Bar's actions over the last 20 years indicate a policy of tacit approval: the State Bar has not sought out or sanctioned attorneys who have assisted in establishing medical marijuana businesses or otherwise participated in the medical marijuana industry.

SAN FRANCISCO APPROACH

Additionally, in 2015, the Bar Association of San Francisco issued an opinion stating that a California attorney may ethically represent a California client in lawfully forming and operating a medical marijuana dispensary and related matters, even though they attorney might aid and abet

federal law violations in doing so. (Bar Assoc. of San Francisco, Ethics Comm. Op. No. 2015-1, June 2015.) The State Bar's silence following this opinion could be construed as a nod of approval.

FEDERAL QUESTIONS LOOM

But attorneys should be careful not to put too much stock in the State Bar's seeming indifference to marijuana activities. The State Bar's benign neglect has coincided with a long period of *federal* indifference to state marijuana activities. If the federal government adopts an anti-marijuana policy that includes charging attorneys who represent marijuana businesses with federal crimes, we can only speculate whether the State Bar will follow course and treat the ensuing felony convictions as crimes of moral turpitude for the purposes of disbarment or suspension. (See Cal. Bus. & Prof. Code, § 6101(a).) And although past sanctions activity might provide some insight into the State Bar's approach going forward, the brave new world of legalized marijuana and a hostile Department of Justice defy easy application of precedent.

USE AND POSSESSION: SAFE HARBOR WITH THE STATE BAR?

There are signs that the State Bar will not come down too harshly—or at all—on attorneys who *use* marijuana. The Review Board of the State Bar has issued no opinions sanctioning an attorney for simple possession of marijuana, for medical or non-medical purposes. Because the State Bar's refusal to impose sanctions for simple marijuana use predates the legalization of marijuana for medical purposes in California, it seems unlikely that the State Bar will change course under a reign of Attorney General Sessions. However, the State Bar should issue guidance on this point to clarify its position.

WHAT ABOUT THE BUSINESS OF MARIJUANA?

California's legalized marijuana scheme contemplates a range of marijuana-related businesses, all to be licensed by the state and handsomely taxed. (See Cal. Bus. & Prof. Code, §§ 26000 *et seq.*; Cal. Rev. & Tax Code, §§ 34010, *et seq*.) Attorneys will be needed to draft licensing applications; incorporate businesses; negotiate and close land deals; advise on labor matters; and all of the other activities normally associated with businesses—except that the end goal of these businesses violates federal law.

An attorney who represents or participates in a marijuana-related business could be charged with felony aiding and abetting the cultivation or sale of marijuana. (18 U.S.C. § 2(a).) Attorneys found guilty of aiding and abetting marijuana cultivation or sale would likely face five- or ten-year mandatory minimum sentences, because penalties for selling and distributing marijuana are based on the number or weight of the marijuana plants, (21 U.S.C. §§ 841(a) & (b)), and business are likely to be moving marijuana in large quantities.

The State Bar has, in the past, found that convictions for cultivation of marijuana, and possession of marijuana with intent to distribute, are crimes of moral turpitude warranting suspension or disbarment. (*Matter of Deierling* 1991 WL 94400 (St. Bar. Rev. Dept.) [cultivation with intent to distribute warrants 30-month suspension]; *In re Possino* 37 Cal.3d 163 (1984) [possession with intent to distribute warrants disbarment].) These opinions do not, however, involve convictions for activities that are legal under state law but illegal under federal law. It is therefore conceivable that, going forward, the State Bar will consider the particular circumstances of attorneys convicted of felony cultivation and possession with intent to distribute, and decline to take disciplinary action against attorneys whose convictions arise out of involvement in marijuana businesses. Then again, it might not. A felony is, by definition, a serious crime. The State Bar should put attorneys on notice whether they will be putting their licenses at risk by representing clients in the marijuana industry.

ATTORNEY DUTIES

The interplay between the Supremacy Clause (U.S. Const., art. VI, cl. 2) and the Tenth Amendment, and whether states can truly "legalize" recreational marijuana use in contradiction of federal law, is beyond the scope of this article. But even if *California* has the power to legalize marijuana under state law, its *attorneys* are duty-bound "[t]o support the Constitution and the laws of the United States and this state." (Cal. Bus. & Prof. Code, § 6068(a).) Because any attorney who represents or participates in a marijuana-related business will per se *not* be upholding the laws of the United States, a case could be made that any such representation or participation is an act of moral turpitude even without a criminal conviction. (See Cal. Bus. & Prof. Code, § 6106.)

Although the State Bar has not, to date, taken action against attorneys on this basis, attorneys who choose to rely on that history of inaction should do so with caution. The State Bar must be proactive in the face of the possible 180-degree shift in federal marijuana policy. Accordingly, the State Bar should issue guidance as soon as possible to clarify for its members whether they are risking their careers (in addition to their freedom) by participating in the marijuana industry.

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