

**LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 527
August 12, 2015

**LEGAL ADVICE AND ASSISTANCE TO CLIENTS
WHO PROPOSE TO ENGAGE OR ARE ENGAGED IN THE
CULTIVATION, DISTRIBUTION OR CONSUMPTION OF MARIJUANA**

SUMMARY

A member may advise and assist a client regarding compliance with California's marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California's marijuana laws, a member must limit the scope of the member's representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law.

AUTHORITIES CITED

Rules of Professional Conduct:

Calif. Rules of Professional Conduct, Rule 1-100
Calif. Rules of Professional Conduct, Rule 3-210
ABA Model Rule 2.1

Statutes:

Bus. & Prof. C. §§ 6067, 6068(a); 6106
Health & Safety Code § 11362.5
Health & Safety Code § 11362.7 et seq.
18 USC §§ 2,4, 371
21 USC §§ 812, 841(a)(1)), 844(a),
21 USC § 846

Cases:

City and County of San Francisco v. Cobra Solutions (2006) 38 Cal.4th 839
City of Garden Grove v. Superior Court (2007) 157 Cal.App.4th 355, 385
County of San Diego v. San Diego NORML (2008) 165 Cal.App.4th 798
Gonzales v. Raich (2005) 545 U.S. 1
In re Eric J. (1979) 25 Cal.3d 522
In re Lesansky (2001) 25 Cal.4th 11, 14

People v. Jackson (2012) 210 Cal.App.4th 525
People ex rel. City of Dana Point v. Holistic Health (2013) 213 Cal.App.4th 1016
People v. Solis (2013) 217 Cal.App.4th 51
Qualified Patients Assn. et al. v. City of Anaheim (2010) 187 Cal.App.4th 734
Wasatch Property Management v. Degrade (2005) 35 Cal.4th 1111

Ethics Opinions

State Bar Formal Opinion No. 1983-71

Other Authorities

Restatement (Third) of the Law Governing Lawyers, §§ 94 & 94(2)

INTRODUCTION

This opinion addresses whether the State Bar Act and the California Rules of Professional Conduct prohibit a member of the California State Bar from counseling and assisting a client regarding compliance with California law, which creates immunities from California criminal statutes related to the cultivation, distribution and consumption of marijuana in specified circumstances. Specifically, this Opinion considers the following three questions:

1. Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from advising a client on how to individually or collectively cultivate, distribute and consume marijuana in a manner that would not constitute a crime under California law even though such conduct by the client would violate federal law?
2. Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from drafting incorporation documents and incorporating a cooperative which would be engaged in collective cultivation of marijuana in a manner that would not constitute a crime under California law even though such conduct by the client would violate federal law?
3. Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from advising and assisting a client already cultivating and distributing marijuana regarding taking actions that would result in the activity not constituting a crime under California law even though such conduct by the client would violate federal law?

It is the Committee's opinion that the answer to all of these questions is "no," provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California law concerning the cultivation, distribution and consumption of marijuana, a member must limit the scope of the member's representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law.

BACKGROUND

Both federal and California law criminalize the use, possession, cultivation, transportation, and furnishing of marijuana. However, California statutes create certain immunities from criminal prosecution under California law for the cultivation, distribution and consumption of marijuana for medical purposes.

In 1996, California voters passed the Compassionate Use Act of 1996 (“CUA;” Health & Safety Code § 11362.5). This statute provides that state law proscriptions against possession and cultivation of marijuana do not apply to a patient or a patient’s designated caregiver who possesses or cultivates marijuana for the patient’s personal medical purposes upon the written or oral recommendation or approval of a physician. (Health & Safety Code § 11362.5(d).)

In 2004, the California legislature adopted the Medical Marijuana Program Act (“MMPA;” Health & Safety Code §§ 11362.7 *et seq.*). The express intent of the MMPA was to: (1) clarify the scope of the application of the CUA and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers; (2) promote uniform and consistent application of the act among the counties within the state and (3) enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. (*Qualified Patients Assn. et al. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 744.)

The MMPA provides, among other things, that “[q]ualified patients ... and the designated primary caregivers of qualified patients ..., who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, *shall not solely on the basis of that fact be subject to state criminal sanctions*” for possession, cultivation, harvesting, processing, possession for sale, transportation, furnishing or administration, maintaining a place for the sale, use or furnishing, making a place available for the purpose of unlawful manufacture, storage or distribution, or for maintaining a place for the unlawful sale, serving, storage, manufacture or furnishing of marijuana for medical purposes. (Health & Safety Code § 11362.775, emphasis added.) The MMPA also expressly immunizes from state criminal liability, in relation to lawful medical marijuana use, “Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.” (Health & Safety Code § 11362.765 (b)(3).)

The legislature also directed the California Attorney General to “develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the [CUA].” (Health & Safety Code § 11362.81(d).) On August 25, 2008, the California Attorney General issued “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use” (“A.G. Guidelines.”) While the AG Guidelines are not binding on California courts, they are accorded great weight. (*Qualified Patients Assn. et al. v. City of Anaheim, supra*, 187 Cal.App.4th at 748.)

The A.G. Guidelines' stated purpose is to "(1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law." (A.G. Guidelines, p. 1.) Among other things, the AG Guidelines articulate requirements for the lawful operation of nonprofit cooperatives and collectives for the collective cultivation of medical marijuana by qualified patients, including that "[n]o business may call itself a 'cooperative' (or 'co-op') unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code." (A.G. Guidelines, p. 8.)

Thus, the CUA and MMPA, along with the AG Guidelines, specify a narrow set of circumstances under which someone may cultivate, distribute and consume marijuana without committing a crime under California law. Someone who meets the requirements is not committing a California crime in connection with the activities covered by the statutes. At the same time, someone who fails to satisfy the requirements is likely committing a crime under California law and may be prosecuted. (See e.g. *People ex rel. City of Dana Point v. Holistic Health* (2013) 213 Cal.App.4th 1016; *People v. Solis* (2013) 217 Cal.App.4th 51; *People v. Jackson* (2012) 210 Cal.App.4th 525.)

The CUA and the MMPA have no effect on the applicability of the federal Controlled Substances Act ("CSA") in California. Under the CSA it is illegal to manufacture, distribute or dispense a controlled substance, including marijuana (21 USC § 841(a)(1)), or to conspire to do so. (21 USC § 846.) It is also illegal under the CSA to possess marijuana, even for medical uses. (See 21 U.S.C. §§ 812, 844(a); *Gonzales v. Raich* (2005) 545 U.S. 1, 26–29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (*Gonzales*); *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491–495, 121 S.Ct. 1711, 149 L.Ed.2d 722 (*Oakland Cannabis*.) In *Gonzales*, the United States Supreme Court held that intrastate cultivation and use of marijuana under the CUA did not place the defendants in that case beyond the CSA's reach, since Congress's plenary commerce power extends to those activities. (*Gonzales, supra*, 545 U.S. at pp. 17, 26–29, 125 S.Ct. 2195.) In *Oakland Cannabis*, the Court held the CSA did not authorize an implied defense to its penal provisions based on medical necessity, even where a state strictly controlled access to medical marijuana. (*Oakland Cannabis, supra*, 532 U.S. at p. 491, 121 S.Ct. 1711.) To the contrary, the terms of the CSA reflect Congress's conclusion that marijuana serves no medical purpose. (*Id.*)

However, California courts have held that state and local agencies are not preempted by federal law and may carry out state law by allowing medical marijuana dispensaries that qualify for the immunities under state law. (*Qualified Patients Assn. et al. v. City of Anaheim, supra*, at 741–743; *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 385; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 811, 818, 825–828)

At this point in time, the federal CSA and California's CUA and MMPA exist side by side and inherently conflict. The cultivation, distribution and consumption of marijuana in accordance

with California's marijuana laws necessarily violate federal law to the contrary.¹ As a result, someone may cultivate, distribute and consume marijuana in a manner that avoids committing a crime under California law, but the same acts likely constitute a federal crime. Furthermore, a member's representation of a client who is cultivating, distributing or using marijuana in a manner that falls within the California law immunities may nevertheless violate a number of federal statutes, under which a member may also be prosecuted.²

Whether and to what extent a member's representation of a client in connection with legal advice concerning the cultivation, distribution or use of marijuana would be a federal crime is beyond the Committee's purview.³ The Committee notes that in October 2009 the United States Department of Justice ("USDOJ") advised that it does not intend to use federal resources to prosecute under federal law patients and their caregivers who are in "clear and unambiguous compliance" with state medical-marijuana laws, except in cases involving broader issues of federal policy such as unlawful possession or use of a firearm, sales to minors, evidence of money-laundering activity, ties to other criminal enterprises, violence, or amounts of marijuana inconsistent with purported compliance with state or local law.⁴ Furthermore, the Commerce, Justice, Science and Related Agencies Appropriations Act for 2015 prohibits the use of federal funds in 2015 to prevent California, 16 other states and the District of Columbia from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana. (H.Amdt.748 to HR 4660.)

¹ This is unlike more common scenarios where compliance with California laws can be accomplished in a manner that does not violate federal law. For example, a client can legally form a corporation in a wide range of circumstances that would not implicate federal law. However, a client cannot form a corporation for the purpose of taking actions that violate federal law. In such cases, a member's assistance to the client, which would be permissible in other circumstances, may violate the State Bar Act and the Rules of Professional Conduct depending on factors and considerations that are beyond the scope of this opinion.

² For example, a member who assists a client in setting up a marijuana operation in compliance with California law or in assisting a client in maintaining compliance with California's marijuana laws may be engaging in federal criminal conspiracy in violation of 18 USC §371 (which would result in the member's culpability for the wrongdoing of all others within the scope of the entire conspiracy), aiding & abetting the client in violation of 18 USC §2, and misprision of felony in violation of 18 USC § 4 (concerning the knowing concealment of a felony and failure to inform law enforcement).

³ However, the Committee believes that members should assume that cultivation, distribution and consumption of marijuana in a manner that avoids committing a crime under California law is a federal crime until the member determines otherwise.

⁴ Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. [Last accessed 8/13/15].

While members may take some solace from the latest federal appropriations legislation for 2015 and USDOJ's current position regarding prosecution, there is no guarantee that either will continue in the future.⁵ Because federal statutes of limitations may be five to ten years, depending on the violation, if federal authorities were to change their position with respect to enforcement, it is possible that members who assist clients in compliance with California marijuana laws today could be criminally prosecuted in the future.

OVERVIEW OF APPLICABLE CALIFORNIA RULES

This Opinion focuses on whether the California Rules of Professional Conduct and the State Bar Act prohibit a member from advising a client regarding how to engage in the cultivation and distribution of marijuana in a manner that avoids engaging in a crime under California law, even though engaging in those acts violates federal law. It also addresses whether a member violates the California Rules of Professional Conduct and the State Bar Act by assisting a client in carrying out such advice, even though the client would be committing a federal crime.

There are two California provisions that address these questions. First, Rule of Professional Conduct 3-210 states

“A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.”

Second, Business & Professions Code § 6068(a) states that it is an attorney's duty to “support the Constitution and laws of the United States and of this state.”

California does not have a rule of professional conduct that specifically prohibits a lawyer from assisting a client in engaging in an action that the lawyer knows is a crime. Under Business and Professions Code § 6106, “[t]he 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.” But as the California Supreme Court has observed, “discipline may be imposed only for criminal conduct having a logical relationship to an attorney's fitness to practice, and [the] term ‘moral turpitude’ must be defined accordingly.” (*In re Lesansky* (2001) 25 Cal.4th 11, 14.) Providing legal advice regarding compliance with California law in a manner that is consistent with a lawyer's professional responsibility would not reflect negatively on a

⁵ Some ethics opinions in other states have relied on the USDOJ's position in concluding that advice and assistance regarding compliance with state law allowing cultivation, distribution or use of marijuana is permissible under those states' rules of professional conduct. (See State Bar of Arizona Ethics Opinion 11-01; Washington State Bar Association Advisory Opinion 2232.) This Opinion does not rely on the USDOJ's advisory. The Committee does not believe that determining a lawyer's professional responsibility in these circumstances should depend on current prosecutorial or federal appropriation intentions.

lawyer's fitness to practice law, and, therefore, without more, would not constitute moral turpitude.⁶

By contrast, ABA Model Rule 1.2(d) states that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."

While the Model Rule is comparable to Rule 3-210 in prohibiting a lawyer from *advising* a client to violate the law, there is no corresponding prohibition in Rule 3-210, or Section 6068(a), or elsewhere in the State Bar Act or the California Rules of Professional Conduct, on *assisting* a client in conduct that the lawyer knows is criminal. The issues under the applicable California rules are (i) whether advising a client regarding compliance with California law regarding cultivation, distribution and use of marijuana is also advising a client to violate federal law, and (ii) whether advising or assisting a client in complying with California law regarding the cultivation, distribution and use of marijuana, while supportive of California law, is nevertheless a violation of Section 6068(a) because it is not supportive of the laws of the United States.

Neither of these rules is clear on these questions. If Rule 3-210 is read literally, advising a client regarding how to avoid committing a crime under California law is not advising the client to violate federal law. However, the Rule does not directly address whether advice regarding compliance with state law is a violation of the rule if the advice would result in a violation of federal law when carried out by a client.

Ordinarily, under Section 6068(a), when compliance with California law can be accomplished in a manner that does not violate federal law, an attorney is required to advise and assist clients in a manner that supports both bodies of law. However, the inherent conflict between California and federal marijuana laws makes a literal application of Section 6068(a) problematic. An attorney who advises or assists a client to cultivate, distribute and consume marijuana in a manner that would not constitute a crime under California law is supporting state law, but is not supporting the laws of the United States. On the other hand, if an attorney maintains that the laws of the United States prevail over advising and assisting clients regarding compliance with California's marijuana laws, the attorney is supporting the laws of the United States, but is not supporting the laws of this state. A literal reading of the statute does not resolve this dilemma.

The answer to these questions becomes apparent when the Model Rules and the Restatement (Third) of the Law Governing Lawyers are consulted with respect to those aspects of the Model Rules and Restatement that are consistent with the California rules. Both sources recognize that

⁶ A member's oath on admission to practice is also not applicable. The oath is codified in Business and Professions Code section 6067, which provides in relevant part that: "Every person on his admission shall take an oath ***to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability.***" (Emphasis added.) A member breaches the oath by failing to support either the United States or California constitution or by failing to discharge his or her duties as an attorney, which are not described in the oath. In this situation, those duties are stated in Rule 3-210 and Business and Professions Code Section 6068(a).

advice regarding compliance with the law does not violate the rules that prohibit advising violations of law, even if the client intends to use the advice to engage in a criminal act. Furthermore, the principles expressed in the Restatement indicate that a lawyer may assist a client in carrying out advice to avoid committing a crime under California's marijuana laws, even though the client's acts would violate federal criminal laws regarding marijuana.

The ABA Model Rules and the Restatement are not binding in California and have no legal force of their own. (*City and County of San Francisco v. Cobra Solutions* (2006) 38 Cal.4th 839, 852 (“*Cobra Solutions*”).) However, they may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California. (*Cobra Solutions*, supra, 38 Cal.4th at 852; State Bar Formal Opinion No. 1983-71; Cal. Rules of Prof. Cond. Rule 1-100(A).) Because the import of the comparable aspects of the Model Rules and the Restatement (Third) of the Law Governing Lawyers is the same as the applicable California requirements, they inform the Committee's understanding regarding how the California requirements should be applied to answer the questions presented. In addition, the comparable aspects of the Model Rules and Restatement reveal a policy that applies equally to the application of the California requirements to the questions presented.

ANSWER TO QUESTION 1: ADVICE REGARDING COMPLIANCE WITH STATE LAW DOES NOT VIOLATE CALIFORNIA RULES

Comment [9] to Model Rule 1.2 provides guidance as it relates to the limitations on advising a client expressed in California Rule 3-210. The Comment states that the prohibition on counseling and assisting a client to commit a crime “does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct.” The Comment then states:

Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Under the principles in Comment [9], advising a client about how to comply with California law so as not to commit a California crime is not prohibited as long as the lawyer is not also advising the client about how to commit a federal crime with impunity. The first sentence of the Comment allows a lawyer to render that advice even if the client uses the advice to commit a federal crime. The second sentence makes the point that advising a client about the legal aspects of a questionable course of action is not a violation of the rule, while advising a client about how to commit a crime with impunity would be.

The Restatement also provides guidance. Section 94(2) of the Restatement (Third) of the Law Governing Lawyers states that “[f]or purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct...”

The intent element in this Section is an important qualification with respect to what is meant by counseling or assisting a client in conduct the lawyer knows to be criminal. Comment (a) defines these terms as follows:

“Counseling” by a lawyer, within the meaning of the Section, means providing advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client’s action. “Assisting” a client refers to providing, with a similar intent, other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency. (Comment (a), para. 3.)

In the context of advising a client regarding how to avoid committing a California crime, the lawyer’s intent is to facilitate and encourage the client to act in a manner that complies with California law. A lawyer is not advising a client to violate federal law when the lawyer advises the client on how not to violate state law. A lawyer who intends to advise a client for that purpose acts properly under the Restatement.

The fact that the client may use the advice to commit a federal crime does not change the result. In explaining the rationale, the Comment states: “That a client intends to commit a crime or fraud or violate a court order does not by itself preclude a lawyer from providing legal advice to the client concerning that conduct.” (Comment (c), para 4.) The same Comment states that Section 94(2) “prohibits counseling or assisting a client only with the intent to facilitate or encourage the action.”

Neither the Model Rule nor the Restatement directly addresses the scenario presented by the conflict between state and federal marijuana laws. But both recognize that a lawyer may advise a client regarding compliance with a law even if a client uses or intends to use the advice to commit a crime. These principles support the proposition that a lawyer may advise a client who wants to know how to cultivate, distribute and consume marijuana in California in a manner that would not constitute a California crime. That is true even if the client’s use of the advice results in a violation of federal marijuana laws.

While the wording of Rule 3-210 differs from both Model Rule 1.2(d) and Section 94(2) of the Restatement, the import of all of these rules with respect to advising a client is the same. For this reason, the Committee believes that the foregoing principles in the Model Rule and the Restatement apply equally to the application of Rule 3-210.

As a result, it is the Committee’s opinion that a member does not violate Rule 3-210 by advising a client regarding how to cultivate, distribute and consume marijuana in a manner that would not constitute a crime under California law.

ANSWER TO QUESTIONS 2 & 3: ASSISTANCE REGARDING COMPLIANCE WITH CALIFORNIA LAW DOES NOT VIOLATE CALIFORNIA RULES

The next question is whether the State Bar Act and the California Rules of Professional Conduct allow a member to assist a client in implementing advice regarding the cultivation, distribution and consumption of marijuana in a manner that does not constitute a criminal act under

California law, even if the client's conduct under California law would violate federal marijuana laws. Questions 2 and 3 posited in this opinion differ in terms of whether the member is assisting a client who *intends to engage* in such activities or whether a lawyer is assisting a client who *is already engaged* in such activities. However, in the Committee's opinion, the answers to these questions are the same.

In this regard, the Comment to Restatement Section 94 is instructive. In explaining the rationale for the rule, the Comment notes:

Lawyers play an important public role by advising clients about law and the operation of the legal system and providing other assistance to clients. In counseling clients a lawyer may appropriately advise them about the legality of contemplated or past activities... Lawyers are occupationally engaged in advising clients about activities on which law has an often uncertain bearing. ***A lawyer who proceeds reasonably to advise a client with the intent of providing the client with legal advice on how to comply with the law does not act wrongfully, even if the client employs that advice for wrongful purposes or even if a tribunal later determines that the lawyer's advice was incorrect.*** (Emphasis added.)

With respect to assisting a client, the Comment states:

A lawyer's counseling or assisting a client in conduct that does not constitute a crime or fraud or violation of a court order is not subject to professional discipline under Subsection (2), even if the client or lawyer would be subject to other remedies, such as damages in a civil action by an injured third person. For example, it is not a disciplinary violation nor does it create liability to a third person (see § 57, Comment g) to prepare a document for a client that, when executed by the client, breaches contractual obligations of the client. (Emphasis added.)

While the Comment does not specifically address the circumstances involved in this opinion, it does reflect a basic understanding about the role of lawyering, which the Committee believes should inform an understanding of a member's professional responsibility under Section 6068(a). The legal profession exists to connect the public with the law both in terms of advice and in carrying out their affairs in compliance with the law. The legal profession exists as a profession to maintain standards of training, skill, knowledge and experience in order to provide consistency and reliability in the law's application, which benefits the public. Lawyer duties and

professional responsibilities exist in part to protect and promote that function.⁷ The Restatement Comment cited above is directed to the same point.⁸

For this reason, the Committee believes that a member does not violate his or her professional responsibilities under Section 6068(a) in assisting a client to take actions to avoid committing a crime under California’s marijuana laws, despite the fact that the client’s acts would likely violate federal marijuana laws. So long as the member is not assisting a client in evading the prescriptions of federal law, that member is not acting in a manner that constitutes a failure to support federal law in violation of Section 6068(a)

The Committee believes that this approach is consistent with the policy that underlies the applicable California rules. If a lawyer is permitted to *advise* a client on how to act in a manner that would not result in a California crime, the lawyer should be able to *assist* a client in carrying out that advice so the California crime does not occur – and a client should be able to receive such assistance from a lawyer.

An analysis that would conclude that a California client cannot obtain legal advice about how to comply with California law from a lawyer or that a client cannot obtain legal assistance in carrying out that advice disconnects the profession from its function – to assist clients in complying with the law, in this case California law. It would be a strange result indeed, if a client who wants to avoid committing a crime under California law cannot receive assistance from a lawyer.

In reaching this conclusion, the Committee is mindful of the rules of statutory construction that state that a statute or regulation should not be interpreted to produce an absurd or unworkable result. (See e.g. *In re Eric J.* (1979) 25 Cal.3d 522, 537 [“[W]here the language of a statutory

⁷ For example, Preamble [14] to the ABA Model Rules of Professional Conduct states, “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.”

⁸ The same concepts have been applied in ethics opinions in other states concerning marijuana to the same effect. (State Bar of Arizona in Arizona Ethics Opinion 11-01 (February 2011) [“Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy.”]; Illinois State Bar Professional Conduct Advisory Opinion No. 14-07 (October 2014) [“The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses. One of the purposes of legal representation is to enable clients to engage in legally regulated businesses efficiently, and that purpose is advanced by their retention of counsel to handle matters that require legal expertise. A lawyer who concludes that a client’s conduct complies with state law in a manner consistent with the application of federal criminal law may provide ancillary services to assure that the client continues to do so.”]

provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.”]; accord *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122 .) The State Bar Act and the Rules of Professional Conduct are products of state law. The Committee believes they should be reasonably interpreted in a way that provides consistency with the rest of California law of which they are a part.

Voters and the legislature enacted the CUA and the MMPA respectively. The legislature directed the Attorney General to issue guidelines to implement those statutes. There is nothing in the statutes that suggests that either intended that the public should be deprived of the same degree of legal assistance in this one area of state law that is available to the public with respect to every other California statutory enactment.⁹ Nor is there anything in the statutes that suggests that either the voters or the legislature intended that the public would be denied any legal assistance in meeting all of the technical legal requirements that determine whether a marijuana operation is in compliance with California law or committing a crime under California law.

A construction of the State Bar Act or the California Rules of Professional Conduct that would result in either of the foregoing outcomes produces an absurd and unworkable result. Where there is a reasonable interpretation of the State Bar Act and the Rules that would avoid such results, the Committee is obliged to adopt that construction.

The Committee believes that both Rule 3-210 and Section 6068(a) should be applied in a manner that preserves the basic functionality of the legal profession, as just described. For that reason, it is the Committee’s opinion that neither Rule 3-210 nor Section 6068(a) prevents a member from assisting a client in carrying out advice regarding cultivation, distribution and use of marijuana to avoid committing a crime under California law, even if the client would be or is committing a federal crime in undertaking those actions.¹⁰

ADVICE AND ASSISTANCE DIRECTED TO VIOLATING FEDERAL LAW IS NOT PERMITTED

While a member’s professional responsibilities under the Rules of Professional Conduct and the State Bar Act do not prevent a member from advising and assisting a client about cultivating, distributing and consuming marijuana in a manner that does not constitute a crime under California law, they do not allow a member to advise a client to violate federal law or assist a client in violating federal law in a manner that evades detection or prosecution. Such advice and assistance would violate a member’s professional responsibility under both Rule 3-210 and Section 6068(a).

⁹ The fact that the legislature directed the Attorney General to adopt guidelines is an indication of a contrary intent.

¹⁰ While this Opinion does not address whether the same result would obtain under Model Rule 1.2(d), the Committee notes that assistance that is intended to allow a client to act in a manner that does not violate state law may not violate the Model Rule.

In this regard, a member advising a client regarding compliance with California law with respect to cultivation, distribution and consumption of marijuana must limit the scope of the lawyer's representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member is required to advise the client regarding the violation of federal law and the potential penalties associated with the violations of federal law.

CONCLUSION

This opinion is limited to the unique circumstances that currently exist due to the inherent dichotomy between state and federal law with respect to the cultivation, distribution and consumption of marijuana as described in this opinion. The Committee recognizes that lawyers who advise and assist clients with respect to compliance with the CUA, MMPA and Attorney General Guidelines are at risk of federal prosecution. That risk will continue until either the federal government or California changes their marijuana laws in a way that ends the dichotomy.

The Committee believes the State Bar Act and California Rules of Professional Conduct should not compound the risk to the profession. Nor should they be applied in a manner that would preclude access to legal services needed to attain compliance with California's marijuana laws, when there is a reasonable construction of the State Bar Act and the Rules of Professional Conduct that would avoid that result.

For the reasons set forth in this Opinion, the Committee concludes that a member does not violate the California Rules of Professional Conduct or the State Bar Act by (i) advising a client regarding how to cultivate, distribute and consume marijuana in a manner that does not result in a crime under California law and (ii) assisting a client in implementing such advice, provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would evade detection or prosecution or otherwise allow the client to evade detection or prosecution under federal law.¹¹

This opinion is advisory only. The Committee acts on specific questions submitted ex parte or generated by the Committee and its opinion is based on such facts as are set forth in the inquiry.

¹¹ This opinion is limited to the professional responsibility of a member of the California State Bar representing a client in California with respect to the cultivation, distribution and consumption of marijuana in California under California law. The California Rules of Professional Conduct do not authorize a member to perform functions in other states except as otherwise permitted by law. (Cal. Rules of Prof. Cond. 1-100(D).) The laws and applicable professional standards outside of California are different and a member advising and assisting clients located outside of California or with respect to activities that will occur outside of California are subject to the specific requirements of those jurisdictions. (*Id.*)