IN THE SUPREME COURT OF NEVADA

In the Matter of an Amendment to Rule of Professional Conduct 1.2 Regarding Medical Marijuana

ADKT NO. 0495

BRIEF SUBMITTED BY THE NEVADA DISPENSARY ASSOCIATION

POINTS AND AUTHORITIES

I. PROCEDURAL BACKGROUND

In 2013, the Nevada Legislature passed Senate Bill 374, which provided a framework for sales of medical marijuana. Prior to that, in 2000, Nevada voters passed a ballot initiative that amended the Nevada Constitution to legalize medical marijuana, but the legislation in 2013 implemented the framework that allowed medical marijuana establishments ("MMEs") to cultivate and sell medical marijuana.

As this Court is aware, the Nevada Supreme Court and the Nevada State Bar Board of Governors ("Board") were quickly faced with whether attorneys could represent medical marijuana interests as medical marijuana remained federally illegal. The Nevada Supreme Court adopted a comment to Rule of Professional Conduct ("RPC") 1.2 that allowed attorneys to represent clients engaging in conduct related to medical marijuana as long as the attorney believed the conduct was legal under state law. That approach was consistent with the approach other states had taken on advising clients regarding medical marijuana issues. For example, the State Bar of Arizona issued an opinion that attorneys could advise clients regarding Arizona's medical marijuana laws without violating ethical rules. (State Bar of Arizona Ethics Opinion attached hereto as Exhibit "1").

The Board filed a supplemental brief on August 29, 2014 addressing whether the Court should provide additional guidance to attorneys personally involved in the medical marijuana industry. (Supplemental Brief filed by State Board of Governors). The Board stated that due to quickly-emerging regulations, the Nevada Supreme Court quickly adopted the comment that a lawyer could assist a client in conduct the attorney believed to be permissible under NRS 453A. (Supplemental Brief filed by State Board of Governors, page 1). The Board also expressed that the Nevada Supreme Court was aware that other consequences may be involved in the changing of one rule (Supplemental Brief filed by State Board of Governors, page 1).

II. FEDERAL AUTHORITY

The comment added to Nevada RPC 1.2 was supported by the August 29, 2013 Memorandum issued by United States Deputy Attorney General James Cole stating that United States district attorneys should allow states to address marijuana activity on their own. (Memorandum from James M. Cole, Deputy Attorney General, for All United States Attorneys, Guidance Regarding Marijuana Enforcement "Cole Memo," August 29, 2013, attached hereto as Exhibit "2.")

The Deputy Attorney General stated that the states should regulate marijuana activities, except the federal government's eight (8) "enforcement priorities" as follows:

1. Preventing the distribution of marijuana to minors;

2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;

3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;

6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

7. Preventing the growing of marijuana on public lands and the attendant public safety

and environmental dangers posed by marijuana production on public lands, and;

8. Preventing marijuana possession or use on federal property.

(Exhibit "2.")

The Federal government is slowly progressing toward easing prohibitions on medical marijuana as demonstrated by the Cole Memo and multiple bills in Congress that would reform medical marijuana laws. (U.S. News On-line Article attached hereto as Exhibit "4."). The disparity between state medical marijuana laws and federal laws appears to be lessening as Congress considers several bills easing the restrictions on marijuana, including an exemption for the cannabidiol ("CBD") portion of the cannabis plant. (U.S. News On-line Article attached hereto as Exhibit "3."). United States Representative Paul Ryan has co-sponsored House Resolution 1635, which would create an exception for CBD, which has already been legalized in the majority of States. (U.S. News On-line Article attached hereto as Exhibit "3.").

The Ninth Circuit recently announced that the federal government cannot pursue a criminal case for violation of federal marijuana laws when a person is in compliance with state medical marijuana laws. *United States v. McIntosh*, No. 15-10117, D. C. No. 3:14-cr-00016-MMC-3 (Ninth Cir. August, 2016). The Ninth Circuit based its decision on a rider to the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), that prohibits the Department of Justice from spending funds to prevent states' implementation of their medical marijuana laws.

III. STATE AUTHORITY

Nevada RPC 8.4(b) describes misconduct as an attorney that "commit[s] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." RPC 8.4(b). The rule does not admonish that an attorney violates ethical rules by being convicted of a crime, but rather by committing a crime that involves dishonesty, untrustworthiness or calls into question the attorney's ability to practice. RCP 8.4(b).

Nevada State law specifically prohibits the Nevada State Bar from disciplining an attorney for participating in Nevada's medical marijuana program under NRS 453A.510. NRS 453A.510 states, "A professional licensing board shall not take any disciplinary action against a person licensed by the board on the basis that: 1. The person engages in or has engaged in the medical use of marijuana in accordance with the provisions of this chapter."

As the Board's supplemental brief discusses, no states have adopted a comment or rule to indicate that ownership in a medical marijuana operation amounts to attorney misconduct. The Washington State Bar Association issued an opinion indicating that the opposite was true. In 2015, the Washington State Bar Association issued Advisory Opinion 201501 stating that an attorney could operate a medical marijuana operation without being in violation of Washington rules of professional conduct. (Washington State Bar Advisory Opinion attached hereto as Exhibit "4").

CONCLUSIONS AND RECOMMENDATIONS

I. THE COURT SHOULD DELAY ACTION

1. The NDA urges the Nevada Supreme Court to delay consideration of additional comments to the Nevada Rules of Professional Conduct related to Nevada's medical marijuana laws.

2. Medical Marijuana was legalized in 2000 and the ability to obtain a State license to operate a medical marijuana establishment was implemented in 2014. The Nevada Supreme Court was prudent in quickly amending rule 1.2 to clarify that attorneys admitted to the Nevada State Bar can represent clients in conduct they believe to be legal under NRS 453A. However any further comments or actions would be premature as Congress is considering several marijuana-relate bills, such as a bill to exempt CBD from the Controlled Substance Act.

3. The Nevada Supreme Court's swift action in addressing whether attorneys could represent clients in conducting activity allowed under NRS 453A was necessary as the medical marijuana industry required guidance on legal compliance. If the Nevada Supreme Court had not quickly weighed in and issued a comment that attorneys could represent clients engaging in conduct permitted under NRS 453A, then attorneys would not have known whether they would be sanctioned by the State Bar for representing medical marijuana clients in the multitude of legal issues that have arisen since 2014.

4. Unlike adoption of the comment to RPC 1.2, there is no urgency in addressing whether an attorney's participation in the medical marijuana program, as permitted under NRS 453A, amounts to any ethical violations. In fact, the opposite is true. The Nevada Supreme Court was prudent in waiting to consider and issue any further comments or guidance regarding attorneys and their conduct permitted under NRS 453A as this issue develops through the United States. The Court should continue to gather information and analyses as to the ethical implications of MME ownership and the Court should request noteworthy ethics professors and ethics to weigh in on the matter before issuing a decision.

5. In addition, the legislation pending in Congress, such as H.R. 1635 will further obfuscate the dichotomy between state and federal laws relating to medical marijuana. If the federal government eases the prohibition on certain types of medical marijuana, such as CBD, as it appears is likely to happen, then will Nevada's RPC be modified to adhere to federal law? Will there be an exemption under RPC 8.4 for possession or cultivation of cannibidol? This and other issues are unclear and will continue to remain unclear while the federal government is in flux as to its position on medical marijuana.

II. ALTERNATIVELY, THE COURT SHOULD FOLLOW WASHINGTON STATE PRECEDENT

6. Alternatively, NDA requests that this Court follow precedent from Washington State in which the State Bar Association affirmatively expressed that an attorney could own and operate a medical marijuana establishment without violating Washington's ethical rules.

7. RPC 8.4(b) is already clear on its face that if an attorney engages in a criminal act that adversely reflects upon the attorney's honesty, trustworthiness, or fitness to practice law, then the attorney has engaged in ethical misconduct. Whether an attorney's conduct involved dishonesty or a lack of fitness to practice must be determined on a case-by-case basis as with any other criminal activity. For example, the RPC does not delineate whether driving under the influence of alcohol or embezzlement are considered misconduct, although the former generally does not trigger discipline while the latter generally does.

8. An attorney does not act unethically when he or she owns an interest in a MME as the conduct is allowed under State law and is tacitly condoned by federal law. Ownership in a MME does not "reflect[] upon the attorney's honesty, trustworthiness, or fitness to practice law."

III. ALTERNATIVELY, THE COURT SHOULD REVISE THE BOARD'S SUGGESTED LANGUAGE

9. The Board's suggested comment is overly broad. For example, the comment states that use of marijuana violates federal law and could trigger discipline proceedings under SCR 111. However, NRS 453A.510 prohibits the State Bar of Nevada from disciplining attorneys for participation in the medical marijuana program and thus the comment would cause further confusion and contradictions in an already unclear landscape of state versus federal marijuana law. If the Court adopts a comment to RPC 8.4(b), then it should clarify that a criminal conviction for a crime that involved conduct outlined in the Cole Memo may trigger disciplinary proceedings.

10. The Court should not find that an attorney participating in Nevada's medical marijuana program does so in violation of the RPC or the oath to support the United States Constitution. The Court should follow the Ninth Circuit's decision in *McIntosh*, which instructs that a person following state medical marijuana law is not subject to federal prosecution. If a Nevada attorney is convicted for violation of the Controlled Substance Act related to marijuana, then the attorney failed to comply with the Nevada's medical marijuana laws and failed to act within the boundaries of the Cole memo. Therefore, the subject attorney committed acts beyond what is allowed by State law and the conduct described in the Cole memo.

11. The RPC does not address every type of conduct or crime, it is not Hammurabi's code, and thus there is no reason to specifically address conduct related to marijuana, which is actually legal under the State's laws. If the RPC does address conduct related to marijuana, then it should specify that it only applies to conduct that goes beyond that allowed under State law and beyond the conduct prescribed by the Cole Memo.

12. If this Court chooses to adopt the State Bar's suggested language, then it should at least limit clarify the language to advise attorneys that if they are receive a federal conviction for marijuana related activity that also violated the State's medical marijuana laws and exceeded the boundaries set forth in the Cole Memo, then they may be subject to disciplinary proceedings.

Respectfully Submitted,

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EXHIBIT "1"

State Bar of Arizona Ethics Opinions

11-01: Scope of Representation 2/2011

A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act ("Act"), despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

NOTE: This opinion is limited to the specific facts discussed herein. Because the opinion is based on the Act as currently in effect, subsequent legislative or court action regarding the Act could affect the conclusions expressed herein.

FACTS

In the 2010 general election, Arizona voters approved Proposition 203, titled "Arizona Medical Marijuana Act" ("Act"), which legalized medical marijuana for use by people with certain "chronic or debilitating" diseases. The proposition amended Title 36 of the Arizona Revised Statutes by adding §§ 36-2801 through -2819 and also amended A.R.S. § 43-1201. Arizona became the 16th jurisdiction (15 states and the District of Columbia) to adopt a medical-marijuana law.

Despite the adoption of Arizona's Act, 21 U.S.C. § 841(a)(1) of the federal Controlled Substances Act ("CSA") continues to make the manufacture, distribution or possession with intent to distribute marijuana illegal.

In an October 19, 2009, memorandum ("DOJ Memorandum"), the U.S. Department of Justice advised that it would be a better use of federal resources to not prosecute under federal law patients and their caregivers who are in "clear

and unambiguous compliance" with state medical-marijuana laws. The DOJ Memorandum indicates that federal prosecutors still will look at cases involving patients and caregivers, however, if they involve factors 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.

Although characterizing patients and their caregivers as low priorities, the DOJ Memorandum does not characterize commercial enterprises the same way. In fact, the DOJ Memorandum says that the "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority" of the DOJ. [1]

The DOJ Memorandum explains that the DOJ's position is based on "resource allocation and federal priorities" and

> does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

QUESTION PRESENTED

May a lawyer ethically advise and assist a client with respect to activities that comply with the Act, including such matters as advising clients about the requirements of the Act, assisting clients in establishing and licensing non-profit business entities that meet the requirements of the Act, and representing clients in proceedings before state agencies regarding licensing and certification issues?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

. . .

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 86-05 (March 1986), 87-05 (February 1987), 00-04 (November 2000)

OPINION

I. Introduction

The Act's passage gives rise to complex issues related to the proper ethical role of lawyers in advising and assisting clients about activities falling within the scope of the Act but which potentially may violate applicable federal law. Novel issues are presented regarding the relationship between Arizona's Act and federal law prohibitions on the manufacture, distribution or possession of marijuana. [2]

In addition to such unresolved legal issues, the DOJ Memorandum leaves unclear the extent to which federal prosecutors will pursue violations of federal law for conduct that complies fully with Arizona's Act and whether Arizona's medical-marijuana law ultimately may be held to be preempted or invalid in whole or in part.

While these issues are being decided by prosecutors and courts, it is important that lawyers have the ability to counsel and assist their clients about activities that are in compliance with the Act — and traditionally at the heart of the lawyer's role — by assisting clients in complying with the Act's requirements through the performance of such legal services as: establishing medical-marijuana dispensaries; obtaining the necessary licensing and registrations; representing clients in proceedings before Arizona agencies responsible for implementing the Act; and representing governmental entities to draft rules and regulations or otherwise counsel the governmental entity with respect to its rights and obligations under and concerning the Act.

II. Ethical Rule (ER) 1.2(d) and Prior Ethics Opinions and Court Decisions

Although Arizona's medical-marijuana law is new, it raises a timeless issue for lawyers: whether the client is seeking the lawyer's help to engage in conduct that the lawyer knows is criminal or fraudulent. As one treatise explains, Model Rule (MR) 1.2(d), which mirrors Arizona's ER 1.2(d), states the dividing line as follows:

> [W]hile a lawyer may discuss, explain, and predict the consequences of proposed conduct that would constitute crime or fraud, a lawyer may not counsel or assist in such conduct. Rule 1.2(d) is thus the close relative – in the disciplinary context – of the criminal law of aiding and abetting, and the civil law of joint tort feasance. As is the case in those other forms of accessorial liability, however, the principle of Rule 1.2(d) is much easier to state than to apply.

Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering* § 5.12 at 5-37, 5-38 (3d ed. 2005).

Comment 10 to ER 1.2 emphasizes that a lawyer is not for hire as an accomplice or enabler of criminal conduct:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. 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.

These principles have been applied in three prior Arizona ethics opinions and in Arizona disciplinary cases, which have addressed the issue of whether the lawyer could affirmatively counsel or recommend conduct by the client that the lawyer knew was criminal or fraudulent.

The first two ethics opinions addressed whether a lawyer may advise a client to refuse to submit to blood, breath or urine tests upon being arrested for driving while intoxicated. Ariz. Ethics Ops. 86-05 (March 1986), 87-05 (February 1987). Opinion 86-05 concluded that, based on the then-state of the law, a lawyer could not advise a client to refuse to submit to a test upon being arrested for DUI, but could discuss the consequences of refusal without actually counseling refusal. When a new appellate opinion on the subject changed the law several months later, the Committee reconsidered Op. 86-05 and issued Op. 87-05, which concluded that a lawyer could ethically advise a client to refuse to undergo blood, breath or urine tests. [3]

In discussing ER 1.2(d) under the then-state of the law, Op. 86-05 concluded:

> It is one thing to tell a client that proposed conduct may violate the antitrust laws, for example. It is quite another to advise the client affirmatively to undertake such conduct. ER 1.2(d), recognizing the distinction, explicitly forbids a lawyer to "counsel a client to engage... in conduct that the lawyer knows is criminal or fraudulent." Neither "criminal" nor "fraudulent" is explicitly defined in either the Rule or the accompanying Comment.

Similarly, the third opinion addressed whether a lawyer may ethically advise a client that the client may record telephone conversations between the client's children and the client's former spouse without the former spouse's knowledge and consent. Ariz. Ethics Op. 00-04 (November 2000). In Op. 00-04, the answer to whether a lawyer could ethically advise a client to record a telephone call hinged on the answer to the basic question of whether the client's proposed conduct would be "illegal under federal or state law." If so, "then the inquiring attorney may not, under ER 1.2(d), advise the client to tape record telephone conversations between the client's children and the client's former spouse."

Arizona lawyer-discipline cases demonstrate that ER 1.2(d) (or its predecessor, DR 7-102(A)(7), which contained generally the same language [4]) has been applied to sanction lawyers who affirmatively counseled their clients to engage in conduct that was knowingly fraudulent or otherwise in violation of state law, but not in a conflict-of-laws circumstance. *E.g., In re Burns*, 139 Ariz. 487, 679 P.2d 510 (1984) (by urging his client to take settlement funds and not pay an Air Force lien for medical services, lawyer "encouraged his client to commit fraud on the United States government"); *In re Nulle*, 127 Ariz. 299, 620 P.2d 214 (1980) (lawyer violated DR 7-102(A)(7) by effectively advising corporate client's president to falsely represent himself as the sole owner on a liquor-license application thus violating state law).

III. Medical Marijuana Laws in Other Jurisdictions

Of the other jurisdictions that have legalized medical marijuana [5], it appears that only Maine has addressed the intersection of state-authorized medical marijuana and legal ethics. [6] In Maine Op. 199 (July 7, 2010), the Professional Ethics Commission of the Maine Bar Board of Overseers also warned lawyers about this issue. Maine's version of ER 1.2(d) is the same as Arizona's, except for one word immaterial to this analysis. [7]

Maine concluded:

> Maine and its sister states may well be in the vanguard regarding the medicinal use and effectiveness of marijuana. However, the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law.

IV. Analysis

As noted above, no prior Arizona ethics opinions or cases have addressed the novel issue presented by the adoption of the Act – whether a lawyer may ethically "counsel" or "assist" a client under the following conditions: (1) the client's conduct complies with a state statute expressly authorizing the conduct at issue; (2) the conduct may nonetheless violate federal law; (3) the federal government has issued a formal "memorandum" that essentially carves out a safe harbor for conduct that is in "clear and unambiguous compliance" with state law, at least so long as other factors are not present (such as unlawful firearm use, or "for profit" commercial sales); and (4) no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds.

In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with

examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.

A state law now expressly permits certain conduct. 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. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

Accordingly, we believe the following is a reasonable construction of ER 1.2(d)'s prohibitions in the unique circumstances presented by Arizona's adoption of the Act:

- If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the Act expressly permits; and
- The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and
- The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then
- The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.

This opinion and its construction of ER 1.2(d) are strictly limited to the unusual circumstances occasioned by the adoption of the Act. Any judicial determination regarding the law, a change in the Act or in the federal government's enforcement policies could affect this conclusion. The Committee cannot render opinions based on pure questions of law or on questions involving solely the lawyer's exercise of judgment or discretion. Committee on the Rules of Professional Conduct Statement of Jurisdiction § 9(a), (c). This opinion does not address whether specific conduct is preempted by federal law; whether the Act is or is not available to the client as a defense for a violation of federal law; or whether the lawyer's assistance to the client may expose the lawyer to criminal prosecution under federal law.

CONCLUSION

Lawyers may ethically advise clients about complying with the Arizona Medical Marijuana Act, including advising them about compliance with Arizona law, assisting them to establish business entities, and formally representing clients before a governmental agency regarding licensing and certification issues, but only in the narrow circumstances set forth in this opinion and only if lawyers strictly adhere to those requirements.

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[1] The DOJ recently further refined this position, in a February 1, 2011, letter regarding the City of Oakland's Medical Cannabis Cultivation Ordinance: "The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the [DOJ]. This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana. Accordingly, while the [DOJ] does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the [DOJ Memorandum], we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law."

[2] For example, the United States Supreme Court has held that the CSA does not establish an implied medical-necessity exception to prohibitions on manufacture and distribution of marijuana. *See United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). California has held that the state's medical-marijuana law is not preempted by the CSA because there is "no positive conflict" in that the state law does not require activities in violation of federal law. In so holding, the California court noted that "governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws." *See Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 759-60, 115 Cal. Rptr. 3d 89, 107-08 (2010), *review denied* Dec. 1, 2010.

[3] The Committee does not express any opinion here as to whether the conclusions reached in Op. 86-05 or Op. 87-05 are still valid in light of *Carrillo v. Houser*, 224 Ariz. 463, 232 P.3d 1245 (2010), which held that the DUI implied-consent statute does not generally authorize law enforcement to administer a test to determine alcohol concentration without a warrant, unless the arrestee expressly agrees to the test.

[4] DR 7-102(A)(7) provided that in representing a client, a lawyer "shall not... [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

[5] Alaska, California, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. *Medical Marijuana, 15 Legal Medical Marijuana States and DC, Laws, Fees, and Possession Limits*, http://medicalmarijuana.procon.org/ (last visited Feb. 15, 2011).

[6] The Oregon Supreme Court dealt with a discipline case involving a lawyer who advised a client about a medical-marijuana dispensary but the opinion does not address whether the lawyer's conduct violated Oregon's version of ER 1.2(d). The opinion also does not disclose whether the Oregon State Bar, in prosecuting the lawyer, raised the issue. In *In re Smith*, 348 Or. 535, 236 P.3d 137 (2010), the Oregon court suspended for 90 days a lawyer for misconduct in representing a former employee of a medical-marijuana clinic who attempted to physically take over the clinic. The court concluded that the lawyer gave the client frivolous advice; lied about having authority for the client's acts from a governmental entity; and engaged in a criminal act by accompanying the client when she attempted to occupy the clinic. The lawyer met the client when he was a patient at the same clinic. Oregon's Rule 1.2(c), Oregon Rules of Professional Conduct, is identical to ER 1.2(d) except that Oregon prohibits a lawyer counseling a client to engage or assist to engage in conduct the lawyer knows is "*illegal* or fraudulent," rather than "*criminal* or fraudulent."

[7] Arizona's rule allows a lawyer to discuss with a client the legal consequences of "*any* proposed course of conduct." Maine's rule allows a lawyer to discuss with a client the legal consequences of "*the* proposed course of conduct."

EXHIBIT "2"

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

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[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
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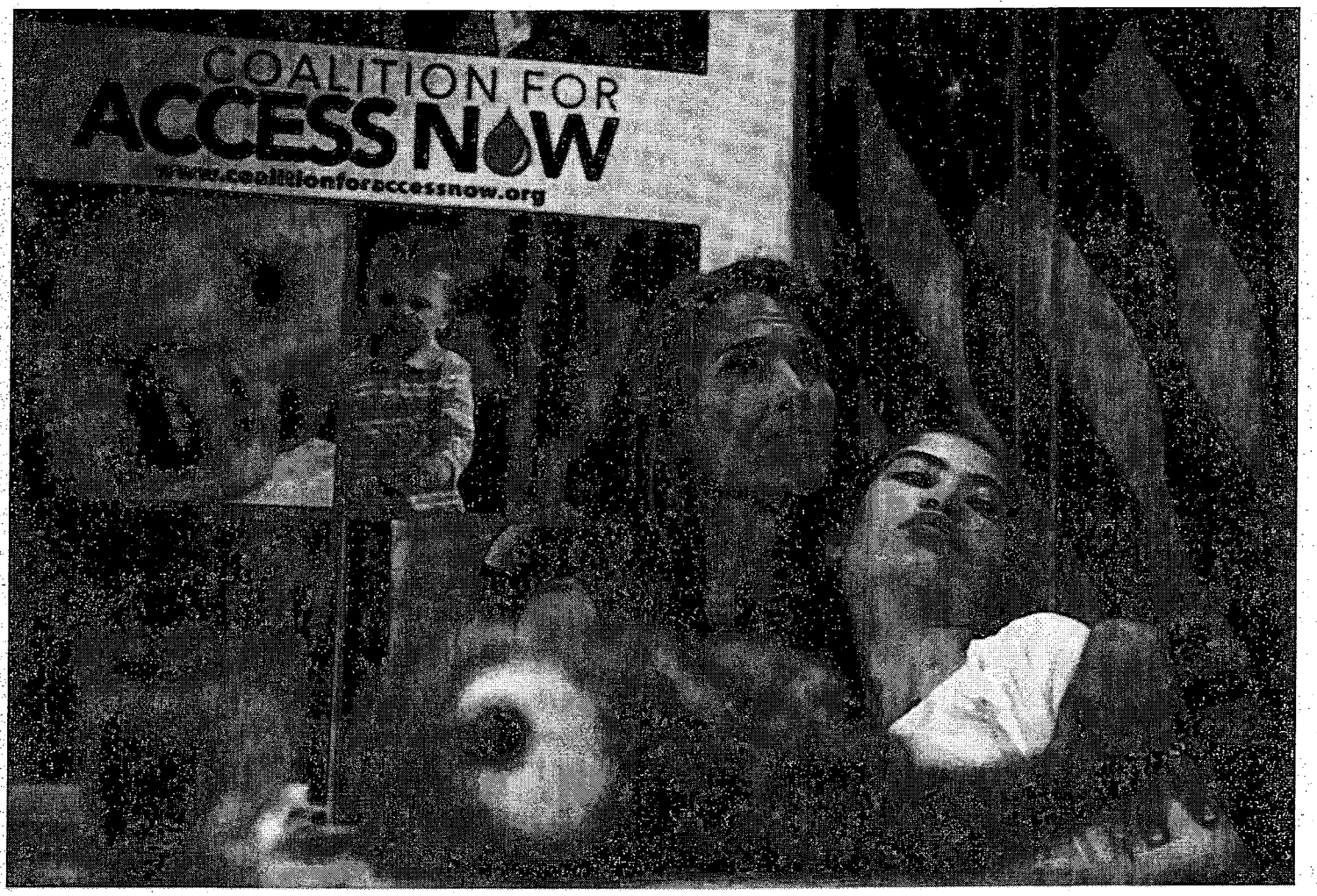
EXHIBIT "3"



Lisa Smith of White Stone, Virginia, comforts her 14-year-old Haley, who suffers from a severe form of epilepsy called Dravet syndrome, during a news conference Wednesday in Washington, D.C. ALEX WONG/GETTY IMAGES

A majority of states now allow residents to use compounds from low-THC cannabis as medicine, but growing the plants remains a federal crime and in some states parents of epileptic children risk losing them by using the non-intoxicating treatment.

Republican members of Congress, inspired by stories from desperate parents who say use of low-THC, high-cannabidiol (CBD) cannabis saved their children, are taking the fight for legalization from statehouses to the U.S. Capitol.

The leaders of the effort, Reps. Scott Perry, R-Pa., and Robert Dold, R-Ill., aren't among the usual suspects for marijuana reform legislation, and they see the bill as something that could be an easy, limited fix that can quickly pass in Congress.

"This is becoming mainstream," Perry said at a Wednesday press conference. "It's not some fringe, crazy idea."

[READ: 'Yippee Ki-yay!' Jubilant Reformers Celebrate DEA Leader's Downfall (//www.usnews.com/news/articles/2015/04/21/yippee-ki-yay-deas-leonhart-prepares-to-resign-reformers-rejoice)]

Medical marijuana is overwhelmingly popular among Americans and is legal under local law in 23 states (http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#Table%202) and the nation's capital to treat certain conditions. Thirteen other states (http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#Table%202) allow cannabidiol from low-THC cannabis for medical treatment.

Federal law makes growing or possessing cannabis for purposes outside limited research illegal, and doctors cannot prescribe it because it's a Schedule I drug under the Controlled Substances Act, meaning it is considered to have no accepted medical value and a high potential for abuse.

In a sign of softening attitudes, the House of Representatives voted 219-189 (http://www.usnews.com/news/articles/2014/05/30/marijuana-wins-us-house-vote-for-first-time) last year to ban federal prosecutors and anti-drug agents from spending funds to undercut state medical marijuana laws – though that ban, incorporated in a spending deal that became law, did not end existing prosecutions, change the underlying law or extend any protection to residents of states without such laws.

prosecution anyone complying with state marijuana laws. Almost simultaneously, however, the GOP-led House appropriations committee rejected an amendment from Rep. Sam Farr, D-Calif., to allow Veterans Health Administration doctors to recommend medical pot.

The low-THC bill from Perry and Dold, the Charlotte's Web Medical Access Act, was introduced last month and would remove (https://www.congress.gov/bill/114th-congress/house-bill/1635/text) cannabidiol and cannabis plants with less than 0.3 percent THC from the federal definition of marijuana, legalizing production of hemp – used for rope, clothing, food and oil – and allowing CBD-loaded "hemp oil" to be legally used throughout the country.

Fourteen Democrats and 13 Republicans have signed onto the bill, which would set a lower THC limit than allowed by most state laws. Rep. Paul Ryan of Wisconsin, the Republican vice presidential candidate in 2012, is among its co-sponsors.

"It's a narrow exception that is worthy of being granted," Ryan told (http://host.madison.com/news/local/health_med_fit/fight-continues-to-bring-seizure-treatment-to-families-even-after/article_01664097-dbef-559b-bfdb-0764bf6bda76.html) the Racine Journal Times.

[**MORE:** FDA Brings Down Hammer on CBD Companies (//www.usnews.com/news/articles/2015/03/11/fda-brings-down-hammer-on-cbd-companies)]

The bill would not legalize all medical marijuana use and would not affect higher-THC marijuana's classification as a Schedule I drug.

Spokesmen for two leading opponents of loosening marijuana laws, Reps. John Fleming, R-La., and Andy Harris, R-Md., did not respond to requests for comment on the bill.