



NEW YORK  
CITY BAR

**A REPORT ON AMENDING THE NEW YORK RULES OF PROFESSIONAL  
CONDUCT TO PERMIT COUNSELING ON THE USE OF MARIJUANA  
CONSISTENT WITH STATE LAW  
BY THE COMMITTEE ON PROFESSIONAL DISCIPLINE**

**I. EXECUTIVE SUMMARY**

This paper addresses whether the New York Rules of Professional Conduct (the “Rules”) should be amended in light of the conflict between state and federal law concerning the use, possession, and sale of marijuana, to protect attorneys who represent clients in connection with manufacturing, delivering, selling, possessing and using medical marijuana as authorized under New York’s Compassionate Care Act (“CCNY”). As the Rules currently stand, an attorney may be subject to discipline for violating the Rules by representing a client concerning conduct permitted under the CCNY. While the marijuana laws were the impetus for this paper, the proposal made in section IV below would address other circumstances where a conflict may exist between state and federal law.

**II. ISSUE**

Under the CCNY, in certain circumstances, it is permissible for businesses to engage in business transactions with marijuana for medical use. The CCNY was “sponsored by Assembly Health Committee Chair Richard Gottfried and Senator Diane Savino, was approved by the New York Assembly and Senate on June 20, 2014 and was signed by Governor Andrew Cuomo on July 5, 2014.”<sup>1</sup>

Section 3369(1) of the CCNY states that “certified patients, designated caregivers, practitioners, registered organizations and the employees of registered organizations shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use or manufacture of marijuana, or for any other action or conduct in accordance with this title.”<sup>2</sup>

Under the CCNY, patients and/or caregivers are required to register with the state in order to access marijuana for medical use.<sup>3</sup> In addition to patients and caregivers, the law affects

---

<sup>1</sup> *New York’s Compassionate Care Act: An Overview of A.6357-E and S.7923*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/states/new-york/new-yorks-compassionate-care-act-an-overview-of-a-6357-e-and-s-7923/> (All websites referenced in this report were last visited on February 11, 2019.)

<sup>2</sup> N.Y. Pub. Health Law § 3369.

<sup>3</sup> N.Y. Pub. Health Law §§ 3360 – 3369.

(1) any practitioner registered with the Department of Health to issue a certification as determined by the commissioner, (2) any “registered organization, [being] a for-profit business entity or not-for-profit corporation organized for the purpose of acquiring, possessing, manufacturing, selling, delivering, transporting, distributing or dispensing mari[j]uana for certified medical use,”<sup>4</sup> and (3) “any independent laboratory [that] test[s] the medical mari[j]uana produced by the registered organization.”<sup>5</sup> All of these players involved in the medical marijuana business should be entitled to legal counsel. Additionally, there has been discussion of expanding the law to permit recreational use as well.<sup>6</sup> New York is one of the thirty-three states, along with Washington D.C., that have changed its laws to allow the use of medical marijuana.

Federal law, however, makes the same conduct –i.e., the use and sale of medical marijuana –illegal. Under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (“Controlled Substances Act” or “CSA”), the manufacture, importation, possession, use and distribution of marijuana is illegal, and there is no exception for the use or sale of medical marijuana as permitted under the CCNY. Specifically, under 21 U.S.C.A. § 812, marijuana is listed as a Schedule I narcotic, of which the manufacture, possession and distribution is prohibited, and for which there is no approved medical use.<sup>7</sup>

Notably, in January 2018, the current federal administration rescinded prior Justice Department policy that discouraged federal prosecution of marijuana offenses where the drug is legal under state law.<sup>8</sup> This conflict between state and federal law creates a conundrum for attorneys representing clients or attorneys who may wish to represent clients engaged in the practice of selling medical marijuana legally under state law but whose conduct is illegal under

---

<sup>4</sup> N.Y. Pub. Health Law § 3364.

<sup>5</sup> N.Y. Pub. Health Law § 3364.

<sup>6</sup> Vivian Wang, *Cuomo Moves to Legalize Recreational Marijuana in New York Within Months*, N.Y. TIMES, Dec. 17, 2018, <https://www.nytimes.com/2018/12/17/nyregion/marijuana-legalization-cuomo.html>; see also J. David Goodman, *Cuomo Moves Closer to Marijuana Legalization in New York*, N.Y. TIMES, July 13, 2018, <https://www.nytimes.com/2018/07/13/nyregion/marijuana-new-york-cuomo-legalization.html>. The New York City Bar Association supports the Marihuana Regulation and Taxation Act (A.3506-B/S.3040-B), which would create a system for the production, distribution and adult non-medical use of marijuana in New York State. See New York City Bar Association, Committee on Drugs and the Law, Report on Legislation by the Committee on Drugs and the Law: The Marihuana Regulation and Taxation Act (June 2018), <https://s3.amazonaws.com/documents.nycbar.org/files/20072987-MarijuanaRegulationTaxationAct.pdf>.

<sup>7</sup> 21 U.S.C.A. § 812.

<sup>8</sup> Charlie Savage and Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES, Jan. 4, 2018, <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html>; see also Dan MacGuill, *Attorney General Sessions Orders Return to Pre-Obama Marijuana Enforcement*, Jan. 5, 2018, <https://www.snopes.com/news/2018/01/05/jeff-sessions-marijuana/>; see also Charles Fain Lehman, *Justice Department Announces Plans to Enforce Federal Marijuana Laws: Sessions issues new order revoking Obama DOJ's policy*, THE WASHINGTON FREE BEACON, Jan. 4, 2018, <https://freebeacon.com/issues/justice-department-announces-plans-enforce-federal-marijuana-laws/>.

federal law.<sup>9</sup> Essentially, attorneys assisting their clients in lawful business transactions under the CCNY may nonetheless be violating their professional obligations under the Rules because the federal government deems these same transactions to be illegal.

### III. ANALYSIS

Under the Rules as they currently stand, an attorney can violate the Rules by assisting clients in legal transactions under the CCNY because the sale or use of marijuana is illegal under federal law. Rules 1.2(d) and 8.4 are the two Rules at issue. Rule 1.2(d) states:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.”<sup>10</sup>

Rule 8.4 states in part:

“A lawyer or law firm shall not:

(b): engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer.

(d): engage in conduct that is prejudicial to the administration of justice.

(h): engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.”<sup>11</sup>

Medical marijuana is legal in thirty-three states and Washington D.C., and recreational marijuana is legal in ten of those states. Ten out of the thirty-three states and Washington D.C. have amended their ethics rules to protect attorneys advising clients on the legal use of marijuana under state law.<sup>12</sup> These states include Alaska, Connecticut, Hawaii, Illinois, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania and West Virginia. Five states adopted comments to their ethics rules to address attorneys counseling clients in connection with marijuana laws and business laws.<sup>13</sup> Seven states have issued advisory opinions to their ethics laws addressing Rule 1.2 and advising that attorneys will not be prosecuted for assisting clients engaging in conduct

---

<sup>9</sup> The federal Rohrabacher-Blumenauer appropriations bill amendments first passed in 2014 prevent the DOJ from using federal funds to prevent states, including New York, from implementing laws that authorize the use, distribution, possession or cultivation of medical marijuana. *See Consolidated Appropriations Act of 2018*, Pub. L. No. 115-141, Tit. V §538, 132 Stat 348. While the amendment has been renewed with each appropriations bill since then, future renewals are not guaranteed. Most importantly, it does not legalize medical marijuana under federal law.

<sup>10</sup> NY RPC rule 1.2(d).

<sup>11</sup> NY RPC rule 8.4.

<sup>12</sup> *33 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, November 13, 2018, <https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.

<sup>13</sup> These states include California, Colorado, Maryland, Nevada, and Washington.

permitted by state medical marijuana laws as long as the attorney also advises the client on the related federal law and policy.<sup>14</sup>

In 2014, the Committee on Professional Ethics of the New York State Bar Association issued an Ethics Opinion (“Ethics Opinion 1024”) concluding that Rule 1.2(d) “does not forbid lawyers from providing [] necessary advice and assistance” to marijuana business owners.<sup>15</sup> However, that opinion was predicated on the fact that the U.S. Department of Justice had announced and adopted formal guidance restricting the enforcement of federal marijuana prohibition when people and entities were acting in accordance with state laws permitting and regulating medical marijuana. Under these “unusual circumstances,” the State Bar opinion concluded that “[i]n light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.”<sup>16</sup> Ethics Opinion 1024, however, was issued in 2014 during the Obama administration, when the political climate favored the legalization of medical marijuana. As noted above, the federal political climate has since changed and no longer favors the legalization of medical marijuana.<sup>17</sup>

As the Preamble to the Rules states, “[t]he Rules are [] partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term ‘should.’ Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules. The Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”<sup>18</sup> Therefore, we propose an amendment to the Rules as set forth below because mere adoptive comments to the ethics rules and advisory opinions are insufficient to protect attorneys in New York from disciplinary violations.

---

<sup>14</sup> These states, in addition to New York, include Florida, Maine, Massachusetts, Minnesota, New Mexico, and Rhode Island.

<sup>15</sup> New York State Bar Association, Committee on Professional Ethics, Formal Op. 1024 (2014), <http://www.nysba.org/CustomTemplates/Content.aspx?id=52179>.

<sup>16</sup> *Id.*

<sup>17</sup> Savage & Healy, *supra* note 8.

<sup>18</sup> NY RPC Preamble.

#### IV. PROPOSAL

##### 1. **The Rules Should Be Amended to Reflect the Permitted Use and Sale of Medical Marijuana According to the CCNY and Permit the Assistance of Clients Engaging in Those Business Transactions by Attorneys without the Possibility of Disciplinary Proceedings**

New York should follow what ten other states and Washington D.C. have done in regards to this issue, which is to amend its Rules to protect attorneys who are providing legal assistance to clients engaging in the medical marijuana business permitted under the CCNY.<sup>19</sup>

States that have amended their ethics rules have taken two basic approaches. Certain jurisdictions, such as Connecticut, have amended their ethics rules to include a broad exception for attorneys to aid in their clients' business practices that are permitted under state law but may contravene other law, without specific reference to marijuana. For example, the Connecticut Supreme Court amended Connecticut's Rule 1.2(d)(3) to state:

“a lawyer may...counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.”<sup>20</sup>

On the other hand, other jurisdictions, such as New Jersey, have been more specific in their amendments and address marijuana laws directly in their amended rules. New Jersey's Rule 1.2(d) states as follows:

“A lawyer may counsel a client regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.”<sup>21</sup>

We propose that New York adopt general amendments to the Rules—rather than amendments specific to medical marijuana and the CCNY—such as those adopted in Connecticut and other jurisdictions.<sup>22</sup> We propose the general approach for at least two reasons—first, the Rules do not currently make reference to any other specific laws, state or federal, and generally provide broad guidance. Second, the rationale for amending the Rules to permit counseling on a matter legal under state law which may not be legal under federal law

---

<sup>19</sup> This paper is not advocating one way or another as to what laws the legislature should pass concerning marijuana sales and use by the public within the state.

<sup>20</sup> Connecticut RPC rule 1.2(d)(3).

<sup>21</sup> N.J. RPC rule 1.2(d).

<sup>22</sup> Hawaii, Illinois, New Hampshire and Pennsylvania.

applies to situations other than medical marijuana, and there should not be a need to amend the Rules each time such a situation is identified or arises in the future.

We propose the adoption of a new Rule (Rule 8.6) and offer the following sample language:

“Notwithstanding Rule 1.2(d), or any other rule contained in New York’s Rules of Professional Conduct, a lawyer may counsel or assist a client regarding conduct expressly permitted by New York law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”

We propose that the new Rule be a stand-alone rule denominated as Rule 8.6, as part of Section 8: Maintaining the Integrity of the Profession, of the Rules.<sup>23</sup> Additionally, to address the issue of consistency between Rules 1.2(d) and proposed Rule 8.6, we propose amended language for Rule 1.2(d) as follows:

“Subject to Rule 8.6, a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.”

With these amendments to the Rules, attorneys will be able to assist and represent clients in delivering, selling, possessing and using medical marijuana as permitted by state law without uncertainty as to whether or not they are violating the Rules and potentially subjecting themselves to disciplinary proceedings.

**2. The Amendments to the Rules Should Be Endorsed because, as a Policy, Business Clients Engaged in Transactions Permitted under State Law Should Have Access to Legal Representation by a Broad Array of Attorneys Who Are not Unduly Hamstrung by Professional Disciplinary Rules**

Business clients should be legally represented to ensure compliance with business laws. In light of the growing medical marijuana industry, its businesspeople should be afforded the same legal protections, guidance, and advice as that afforded to businesspeople in other industries to ensure legal compliance and to protect clients from potential adverse consequences of their actions. Additionally, a business client needs legal assistance for more than legal compliance issues. The rationale behind this rule change extends the right of business owners and clients in the medical marijuana business to access legal advice for everyday business-operation essentials such as leases, taxes, banking and finances.

Moreover, failure to amend the Rules creates uncertainty for attorneys as to their professional conduct and ultimately disincentivizes them from taking on clients in this industry.

---

<sup>23</sup> NY RPC rule 8.

If attorneys are not willing to assist these clients because the Rules may subject them to disciplinary proceedings, the Rules are preventing an industry legal under New York law from getting the benefit of a broad array of attorneys.

## **V. CONCLUSION**

New York should amend the New York Rules of Professional Conduct to include proposed Rule 8.6 to protect New York legal practitioners from Rule violations as a result of counseling clients concerning activities that are legal under New York law.

Professional Discipline Committee  
Kaylin L. Whittingham, Chair  
[KLW@Whittinghamlaw.com](mailto:KLW@Whittinghamlaw.com)

February 2019