Marijuana and the Tax Law:
Issues Faced by Tax Practitioners in Representation of Clients

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Issue

There are open questions about whether a tax practitioner (particularly a CPA or attorney) can assist a marijuana business with tax issues, including tax compliance and planning, given that sale of marijuana is a federal crime. Is there any ethical violation? These businesses need tax (and other accounting and legal assistance), what should CPAs and attorneys know and consider before taking on a client involved in production, sale or use of marijuana? Note that beyond ethical and rules of conduct concerns, tax

practitioners face additional concerns of potentially being viewed as violating other laws, such as money laundering, mail fraud and other federal laws (beyond the scope of this article).

Introduction

In 23 states plus the District of Columbia, businesses may exist under state law that produce and/or sell marijuana. There are strict rules on who may produce or sell and who may buy. The state's statute, regulations and guidelines may be quite complicated and interact with other laws, such as zoning and employment laws. And, despite state laws allowing for the production, sale and use of marijuana, these activities remain a crime under the federal Controlled Substances Act.

Marijuana businesses have tax compliance rules and issues to address as well. Many are likely to seek help from a tax advisor or preparer. If that tax professional is a CPA or attorney, they must be cautious of whether they may assist, and if so, what they can do that will not lead to any violation of their licensing rules or other rules of conduct they may be subject to.

This outline starts with some fact patterns to illustrate the issues advisors may face, some background on the issues, relevant rules of conduct, and what some states have provided to help advisers. Ethical issues surrounding serving clients involving in some aspect of marijuana distribution are significant and in need of better guidance.

Selected Data

- 23 states + DC have laws allowing some types of medical marijuana growing, sale and use.
- 4 states (Colorado, Washington, Oregon and Alaska) have laws allowing some forms of recreational growing, sale and use.
- At 2/5/2014, 71,940 optional Medical Marijuana Identification Cards has been issued in California. [Per the data website of the Medical Marijuana Program of the California Department of Public Health.]
- At 12/31/13, 110,979 patients in Colorado had valid Registry ID cards; 94% of reported conditions was for severe pain. [Colorado Department of Public health and Environment, Medical Marijuana Statistics.]
- As of 3/12/14, there were approximately 480 MED Licensed Medical Marijuana Centers and about 183 MED Licensed Retail Marijuana Stores in Colorado.
- Colorado generated about $8.5 million of sales tax in January 2015, licenses and fees from sales of marijuana. [Colorado Marijuana Tax Data website.]

Sample Fact Patterns

1. Sam, who resides in a state where selling marijuana is legal (such as Washington or Colorado; or a state where medicinal sales are allowed) seeks your help in starting a business to sell marijuana. This will involve assistance with the form of entity, creation of the entity, determining what license(s) may be required, registration fees, local zoning restrictions (if any), potential income tax liability (estimated taxes and filings), state tax registration and compliance (such as for sales and excise taxes), banking, firearms laws, and compliance with all business laws including any special ones for selling marijuana.

    a. State statutes, regulations and guidelines for the production, sale and limited use of marijuana tend to be lengthy, multi-faceted and complex. These rules can intersect with other laws, such as corporate, agriculture, banking, tax, zoning, employment,

advertising, and more. Thus, it is apparent that a person would seek (and need) legal counsel to successfully navigate the maze of laws involved in operating a marijuana supply or sales operation. For example, the law governing sale of marijuana in Washington is 43 pages long.

b. If the marijuana dispensary is not allowed to generate a profit, it likely needs an accountant to help it with pricing and recordkeeping.

c. Special income tax rules apply to any producer or retailer. The federal income tax law includes a provision that denies any deductions or credits for any business that involves controlled substances. Assistance of a tax adviser would likely be needed to distinguish unallowable expenses from allowable cost of sales and to determine if a business with more than sales of marijuana constitutes a single business or multiple businesses.

2. Long-time client operating a convenience store started selling marijuana as permissible under state law, but does not tell you. The marijuana sales are recorded on the books as sales of energy drinks. Both energy drinks and marijuana are subject to sales tax.

3. In preparing federal and state tax returns for a legal dispensary, the return preparer will need to verify application of IRC §280E (explained later). For example, if the business sells items besides marijuana, are the records sufficient to separate cost of sales for the marijuana versus other items? How does IRC §263A (unicap) apply to distinguish period costs from inventory costs? Due to federal banking laws, the business may have everything in cash, and will likely need assistance on how to pay its taxes (income, employment and sales) when it cannot do an electronic funds transfer or payment by check or credit card. Will any of this tax preparation work be viewed as assisting in the client's marijuana sales activity?

    a. What should go into the engagement letter to help the CPA? Should you limit your representation to income taxes even if you know the client is subject to sales and/or excise taxes?

    b. Should the CPA get any representation from the client's attorney that the business operates within state law?

    c. Is there any reason for the CPA to break down on his invoice, the services related to the marijuana business versus other tax matters?

    d. Should you not invite your marijuana dispensary client to the office party? What about to your year-end tax planning seminar you offer to your clients?

    e. Can the CPA offer typical services of helping grow a business and reduce tax liability to the marijuana dispensary client as he offers to all other clients?

    f. What legal concerns does the practitioner have in corresponding with the client and in taking their money (particularly if cash)?

4. Anne, a potential client tells you she has been selling medical marijuana, but did not register to pay sales tax, or she has not been measuring sales tax correctly. This has been going on for the past 5 years. The state has a voluntary disclosure program. For other clients, you'd work with the state tax agency to negotiate a settlement for less than the full amount and a waiver of penalties. Are you prohibited from doing so for Anne?

5. In the course of assisting a medical marijuana dispensary client, the CPA who is preparing the return discovers that sales were made beyond the amount allowed to customers. What should the CPA do?

    a. Should a return preparer be hired by the marijuana business's lawyer rather than directly by the business? (To potentially maximize client's benefit of the attorney-client privilege.)

    b. Issues might also arise in assisting non-marijuana clients. For example, what if the CPA's client is a firearms seller and somehow learns that illegal sales were made (including sales to a user of marijuana[1])?

6. Individual hires attorney to assist with formation of a Section 501(c)(4) entity to promote legalization of marijuana at the federal and state levels.[2]

7. CPA or attorney notes in advertising that they can assist clients with tax matters (or the attorney might advertise that they can assist beyond just tax matters) to marijuana businesses. The CPA or attorney has their services listed for free on the Medical Marijuana Business Daily website.

    a. Is there any concern if the majority of a CPA or attorney's business is from clients with marijuana businesses? (Because the CPA or attorney's profitability is tied to an activity illegal under federal law.)

    b. May a CPA or attorney serve a marijuana business located in another state where the adviser is not licensed?

8. What if a tax return preparer does not ask clients if their medical expense includes purchase of medical marijuana, yet the totals from the client include such purchases and the preparer deducts them on Schedule A?

9. An employee or prospective employee of a CPA or law firm uses marijuana for medical purposes (permissible under state law where the employee lives) or an employee has an ownership interest in a medical marijuana dispensary. Any concern to the firm of hiring this person?

10. Individual hires attorney or CPA to draft a letter to Congress seeking repeal of IRC §280E for marijuana businesses that are allowed to operate under state law.[3] Or client hires attorney to help them get a law passed in his state similar to that of Colorado for recreational purchases of marijuana. Is this permissible work?

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[1] DOJ, Bureau of Alcohol, Tobacco, Firearms and Explosives, "Open letter to all federal firearms licensees," 9/21/11 on not selling arms to users of marijuana.

[2] In GCM 36187 (3/11/75), the IRS ruled that a Section 501(c)(4) entity was permissible where the purpose was to reform provided the entity did not promote the use of marijuana.

[3] For example, H.R. 2240 (113th Congress) would add the text shown here in italics to §280E – "No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted*, unless such trade or business consists of marijuana sales conducted in compliance with State law*."

Federal and State Laws On Regulating Marijuana

- Controlled Substances Act (21 USC 801, et seq).
- The U.S. Drug Enforcement Administration (DEA) classifies marijuana as a Schedule I substance, which it defines as "drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence."
- Department of Justice:
    - General information
    - "Ogden memo" (10/19/09) – "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana" + 10/19/09 DOJ press release
    - "Cole memo" of 6/29/11 = "Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use."
    - "Cole memo" (8/29/13) – "Guidance Regarding Marijuana Enforcement" + 8/29/13 DOJ press release.
        - This memo updates the 2009 and 2011 memos to federal prosecutors on guidance in enforcing the ACA regarding marijuana in light of state law that allows certain marijuana activities.
        - It notes that Congress views marijuana as a "dangerous drug" and "illegal distribution and sale of marijuana is a serious crime."
        - Given limited resources for investigations and prosecution, enforcement priorities focus on:
            - "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."
        - Beyond the above "enforcement priorities," the federal government has generally relied on state and local enforcement of marijuana activity.
        - Additional cautions:

- "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."
- "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."

- Treasury Department Financial Crimes Enforcement Network (FinCEN) – On 2/14/14, FinCEN issued FIN-2014-G001 on guidance under the Bank Secrecy Act for financial institutions considering offering services to marijuana businesses. The guidance provides due diligence considerations in providing services. It also clarifies when suspicious activity reports are warranted. Also see press release of 2/14/14.

  Also see 8/12/14 remarks of FinCEN Director Jennifer Shasky Calvery.

- Senate Committee on the Judiciary – hearing 9/10/13 – Conflicts between State and Federal Marijuana Laws; testimony and webcast available.

- *The DEA Position on Marijuana*, April 2013 (70 pages).

  - "DEA'S POSITION ON MARIJUANA Marijuana is properly categorized under Schedule I of the Controlled Substances Act (CSA), 21 U.S.C. §801, et seq. The clear weight of the currently available evidence supports this classification, including evidence that smoked marijuana has a high potential for abuse, has no accepted medicinal value in treatment in the United States, and evidence that there is a general lack of accepted safety for its use even under medical supervision." [page 1]

  - "*THE FAILURE OF CANNABIS CLUBS/MARIJUANA DISPENSARIES*
    The argument that "caregivers" who participate in legalized marijuana efforts are "compassionate" is contradicted by revelations that all too often cannabis clubs are fronts for drug dealers, not health facilities. Even the author of Proposition 215 believes the program is "a joke. …Rev. Imler's observations that 'it's all about the money' are consistent with the financial realities that have been exposed by criminal investigations of cannabis clubs or dispensaries. Cannabis clubs or dispensaries are generating disproportionately large sums of cash through the sales of marijuana and marijuana tainted products when they should be operating as essentially nonprofit enterprises." [page 13]

- Example of DEA enforcement of CSA for marijuana dispensary – per 1/24/13 DEA press release, "San Diego Man is Sentenced to 100 Months for Running Marijuana Dispensary and Money Laundering." Excerpt:

  ""This case illustrates the kind of criminal activity going on within medical marijuana dispensary operations," said San Diego Drug Enforcement Administration Acting Special Agent in Charge William R. Sherman. "The proprietors of these operations are simply drug dealers who are hiding behind the guise of compassionate care, when in fact their only motivation is making money. We will continue to investigate these criminal enterprises that are not only violating the Federal Controlled Substances Act, but are also involved in a variety of other criminal activities."

> "Joshua Hester is the poster boy for the types of marijuana dispensary operations that the federal government is criminally targeting," said U.S. Attorney Laura Duffy. "He wasn't overseeing a non-profit collective that served sick people. He was a convicted drug trafficker making millions of dollars selling high-quality marijuana to recreational users and exploiting state laws that were meant to help the seriously ill.""

- White House Office of National Drug Control Policy – Marijuana Resource Center: State Laws Related to Marijuana – includes a summary of the state of the law with variances among states and local communities. Also includes a list of the 20 states + DC with medical marijuana laws, and the two states with recreational marijuana laws, with links to the laws and when enacted.

Marijuana Resource Center: State Laws Related to Marijuana

- Marijuana Resource Center
- Marijuana FAQ

Since 1996, 20 states and Washington, DC have passed laws allowing smoked marijuana to be used for a variety of medical conditions. It is important to recognize that these state marijuana laws do not change the fact that using marijuana continues to be an offense under Federal law. Nor do these state laws change the criteria or process for FDA approval of safe and effective medications.

Many of these state medical marijuana laws originated in order to create a legal defense to state criminal possession laws or to remove state criminal penalties for purported medical use of marijuana. Since then, many have evolved into state authorization for state-based production and distribution of marijuana for purported medical purposes. These state laws vary greatly in their criteria and implementation, and many states are experiencing vigorous internal debates about the safety, efficacy, and legality of their marijuana laws. Many local governments are even creating zoning and enforcement ordinances that prevent marijuana dispensaries from operating in their communities.

States with medical marijuana laws often have some form of patient registry, which may provide some protection against state arrest for possession up to a certain amount of marijuana for personal medical use. Medical marijuana growers or dispensaries are authorized in some of these states and may be limited to a certain number of plants or products per medical user. Regulation of marijuana for purported medical use may also exist at the county and city level, in addition to state laws.

There are critical differences in marijuana laws from one state, county, or city to another. For more information, see the chart below, excerpted from information from the National Conference of State Legislatures (NCSL):

- NCSL – chart with details of state medical marijuana laws.
- Congressional Research Service, *State Legalization of Recreational Marijuana: Selected Legal Issues,* 1/13/14.
- Washington State – FAQs + regulations (43 pages long)
- California Health and Safety Code, Sections 11357, et seq, includes the Compassionate Use Act of 1996 ("Prop 215"). This law specifies the types of medical conditions covered, states that patients and their primary caregivers who recommend marijuana for medical purposes are not subject to criminal prosecution or sanction. SB 420 (Chapter 875, 2003) covers issuance of voluntary identification cards and a variety of other changes. California Department of Public Health website on Medical Marijuana Program which was created to allow for State-authorized medical marijuana identification cards (MMIC) with a database for verification of qualified patients and their primary caregivers. The program is voluntary. It should help people verify why they have marijuana if asked by law enforcement officers.

  California Department of Justice, "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use," August 2008. Statutes governing marijuana use are also at Health and Safety Code Sections 11362.7 to 11362.83.

Attorneys - Model Rules of Professional Conduct

- Rule 1.2(d) – "(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.
  - Comment on Model Rule 1.2 – "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." [excerpt]
- Rule 8.4(b) – "It is professional misconduct for a lawyer to: … (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." (excerpt)

Attorneys – Changes to Rule 1.2

At least four states have more authoritative guidance in the form of state supreme court comment and/or amendment to Rule 1.2. In each of these states (Colorado,[4] March 2014; Nevada,[5] May 2014;

[4] Colorado Supreme Court Rule Change 2014(05), Rules of Professional Conduct Rule 1.2; http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2014/2014%2805%29%20redlined.pdf and http://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes/2014.cfm. This action by the court may be the reason for withdrawal of Formal Opinion 125 in October 2014 as the opinion is advisory and the court's comment is authoritative (see text below).

[5] Nevada: Comment adopted 5/7/14 for Rule 1.2 specifically references Nevada Constitution, Article 4, Section 38 on marijuana; http://www.legalethicsforum.com/files/adkt-0495-order-1.pdf.

Connecticut,[6] June 2014; and Washington,[7] November 2014), the change allows lawyers to counsel clients regarding the "validity, scope and meaning" of the state marijuana law. The comments also state that a lawyer "may assist a client in conduct the lawyer reasonably believes is permitted by" that law (Connecticut refers to "conduct expressly permitted by" state law). Other than for Washington, the comment also specifically requires attorneys to also advise on the legal consequences under related laws (such as federal law).

Attorneys – Selected State Ethics Rulings Involving Marijuana Matters

- Arizona – State Bar of Arizona Ethics Opinions 11-01: Scope of Representation (2/11) – representation permissible within specified limits. Excerpt:

  > "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."

- California – In June 2015, the Bar Association of San Francisco issued Ethics Opinion 2015-1 on whether a California attorney can ethically represent a client involved with a medical marijuana enterprise. The opinion includes helpful background on the ethics issue and concludes:

  > "We conclude that a lawyer may ethically represent the client on the facts presented consistent with California Rule of Professional Conduct 3-210, provided that the legal advice and assistance is limited to activities permissible under state law and the lawyer advises the client regarding possible liability under federal law and other potential adverse consequences under state and federal laws."
  >
  > "Nevertheless, because of the risks to both lawyer and client, we recommend that the Bar Association of San Francisco urge the Rules Revision Commission, the Board of Trustees of the

[6] Connecticut: Rule 1.2(d) amended 6/13/14 effective 1/1/15), pages 7 – 8; http://www.jud.ct.gov/publications/PracticeBook/PB.pdf.

[7] Washington: Comment 18 adopted 11/5/14, effective 12/9/14; http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Committee-Professional-Ethics and http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc1.02.

State Bar and the Supreme Court to adopt rules and propose legislation that would protect the lawyer from discipline under these circumstances and propose an amendment to the Evidence Code to preserve the attorney-client privilege under these circumstances."

Query: Why not modify the California Business and Professions Code to specify that it is permissible for an attorney or CPA licensed in California to serve a client involved in state sanctioned marijuana enterprise?

- California – Los Angeles – In August 2015, the LA County Bar Association issued Opinion No. 527, *Legal Advice and Assistance to Clients Who Propose to Engage or Are Engaged in the Cultivation, Distribution or Consumption of Marijuana*. This opinion provides a helpful background to relevant California rules. It concludes that a member does not violate the California rules of conduct in advising a client as to various marijuana operations and consumption as long as the member does not advise the client to violate federal law or help to evade detection.
- Colorado – Formal Opinion 125 – *The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities* (Adopted 10/21/13; addendum dated 10/21/13; withdrawn 5/17/14) – Excerpts:
    - "The Committee concludes that a lawyer does not violate Colo.RPC 1.2(d) by representing a client in proceedings relating to the client's past activities; by advising governmental clients regarding the creation of rules and regulations implementing Amendment 64 and the Medical Marijuana Code; by arguing or lobbying for certain regulations, rules, or standards; or by advising clients regarding the consequences of marijuana use or commerce under Colorado or federal law. The Committee further concludes that, for good or ill, under the plain language of Colo.RPC 1.2(d), it is unethical for a lawyer to counsel a client to engage, or assist a client, in conduct that violates federal law. Between these two points lies a range of conduct in which the application of Colo.RPC 1.2(d) is unclear."
    - There is activity clearly permissible for attorneys to assist clients with and some clearly not permissible. Then there are less clear areas in between.
    - Generally, it is permissible to counsel a client on the consequences of their conduct or to help them advocate for law changes.
    - "A lawyer cannot comply with Colo.RPC 1.2(d) and, for example, draft or negotiate (1) contracts to facilitate the purchase and sale of marijuana or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana, even though such transactions comply with Colorado law, and even though the law or the transaction may be so complex that a lawyer's assistance would be useful, because the lawyer would be assisting the client in conduct that the lawyer knows is criminal under federal law."
    - Tax work: ""[t]here 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." Colo.RPC 1.2(d), cmt. [9]. Under Colo.RPC 1.2(d) as written, a lawyer violates that Rule at the point where tax preparation becomes tax planning, the intent of which is to assist a client in planning the violation of federal law."

        - Query: When does tax planning, such as to minimize the impact of IRC §280E, become a violation of federal law, if ever?

- Connecticut Bar Association – Informal Opinion 2013-02 – Providing Legal Services to Clients Seeking Licenses Under the Connecticut Medical Marijuana Law (1/16/13) – stresses that even if the federal Controlled Substances Act is not enforced, its violation is still a crime. "At a minimum, a lawyer advising a client on Public Act 12-55 must inform the client of the conflict between the state and federal statutes, and that the conflict exists regardless of whether federal authorities in Connecticut are or are not actively enforcing the federal statutes." Notes that some assistance is possible and that lawyers should be careful to "not assist clients in conduct that is in violation of federal criminal law."

- Illinois State Bar Association Conduct Advisory Opinion No. 14-07 (Oct 2014) - "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." The ISBA notes that this helps clients "engage in legally regulated businesses efficiently." But as with other state bar opinions, the ISBA urges lawyers to "tread carefully over the legal terrain."

- Maine - Opinion #199 – Advising clients concerning Maine's Medical Marijuana Act (7/7/10) – notes the risks to a lawyer of counseling or assisting a client selling marijuana because even though permitted under state law, it is still a federal crime (whether or not the federal law is enforced). Notes: "Where the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis. Bar Counsel has asked for a general opinion regarding the kind of analysis which must be undertaken. We cannot determine which specific actions would run afoul of the ethical rules. We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk which needs to be carefully evaluated."

- King County Bar Association issues related to Washington I-502 (October 2013) –
    - Website of ethics issues – includes King County Bar Association Advisory Opinion on I-502 and Rules of Professional Conduct, a resolution presented to the ABA, additional commentary and analysis.
        - The resolution to the ABA House of Delegates recommended that lawyer disciplinary authorities not take action against lawyers for counseling and assisting clients in complying with state and territorial laws that allow for legal possession and use of marijuana.
        - References:
            - Resolution presented to ABA House of Delegates in August 2013 (10A).
            - Per ABA Select Committee Report of 9/19/13, the resolution was withdrawn.
            - Per an article by Thomas Fitzpatrick, "Ethical Considerations in Advising Clients in the Brave New (Post-I-502) World," 10/11/13, page 9, the resolution was withdrawn because it did not get support from the Washington State Bar Association.
            - King County Bar Association recommendation to ABA (May 2013)

- "The KCBA believes that subjecting an attorney to professional misconduct on this basis [assisting a client in complying with I-502] would be wholly inconsistent with the purpose of the rule and the public policy of the state." [KCBA, October 2013)

CPAs – Rules of Conduct

- AICPA Issue Brief (May 2013) – prepared by the AICPA staff along with the Colorado and Washington state CPA societies. Provides an overview to federal and state law on regulating marijuana production, distribution and use. Suggests that CPAs considering serving clients involved with a marijuana-related business review their state licensing rules to see if such service may be "grounds to refuse to grant or renew a license based on the failure to satisfy the good moral character requirement or as grounds for disciplinary action." They should also consider reciprocity issues as well if they provide services outside of their licensing state.

  CPAs who belong to the American Institute of Certified Public Accountants (AICPA) must also consider the AICPA Code of Professional Conduct. A member CPA disciplined by their state licensing board or convicted of a felony must be sanctioned by the AICPA per AICPA Bylaw Section 7.3. "If information or a compliant is received that alerts the Ethics Division that a member provided services to a client whose business violated federal law, such information or compliant may give rise to an ethics investigation and possible sanction pursuant to Rule 501, which prohibits a member from committing an act discreditable to the profession."

  "CPAs considering whether to provide services for medical and/or recreational marijuana businesses need to proceed with caution."

  This issue brief notes that the state laws allowing businesses to sell marijuana and the need these businesses will have for accounting and tax assistance "puts CPAs in a gray legal area." The brief includes seven questions CPAs should ask themselves, along with consulting legal counsel and their State Board of Accountancy.

  The brief also notes that CPA firms should review the impact of state marijuana laws on their drug-free workforce policy.

  Also see AICPA State Regulatory Update, Summer 2013, for an article similar to the issue brief.

  Also see January 2015 update to the memo.

- AICPA Code of Professional Conduct – Section 501, Acts Discreditable – "A member shall not commit an act discreditable to the profession." The interpretations focus mostly on client records, discrimination in employment practices, failure to follow governmental audit standards and failure to file tax returns.

- International Ethics Standards Board for Accountants, Handbook of the Code of Ethics for Professional Accountants, 2013 Edition:

  - 210.2 "Client issues that, if known, could threaten compliance with the fundamental principles include, for example, client involvement in illegal activities (such as money laundering), dishonesty or questionable financial reporting practices."
  - 270.3 "…if the assets were derived from illegal activities, such as money laundering, a threat to compliance with the fundamental principles would be created. In such situations, the professional accountant may consider seeking legal advice."

- California Board of Accountancy Facebook post of January 2013

https://www.facebook.com/CBAnews

- Good moral character and compliance with laws:
  - New York State Society of CPAs – Rule 101 – Integrity – "A member shall maintain integrity by … (b) conducting oneself in the practice of public accountancy by evidencing moral fitness to practice; …"
  - Texas State Board of Public Accountancy – "The *Public Accountancy Act*, promulgated by the Texas Legislature, sets the requirements for the issuance of the certificate of a Certified Public Accountant. The person must: 1. be of good moral character;… This requirement is determined in two primary ways. The applicant responds to a question on the application about any arrests, convictions, probations, or deferred adjudications. The applicant should provide information about each offense. The Board also conducts a moral character background investigation with the Texas Department of Public Safety. If necessary, the applicant may need to meet with Board staff to address his/her moral character before the application is approved."

Tax Rules of Conduct for Attorneys, CPAs and Enrolled Agents – Circular 230

- §10.51(a)(1) – a practitioner may be disciplined if convicted of any federal crime, or any felony under federal or state law if the conduct renders the practitioner unfit to practice before the IRS.
- §10.51(a)(10) – a practitioner may be sanctioned that will affect the ability to practice before the IRS if disbarred or suspended by a state authority.

  Circular 230 (August 2011).
- In IRS Issue Number 2014-22 (12/3/14), the IRS provides an article form BNA Daily Tax Report by Casey Wooten (11/20/14). This article reports that Karen Hawkins, IRS Directof of the Office of Professional Responsibility plans to issue some guidance to practitioners who serve taxpayers in marijuana businesses legitimate under state law. The guidance is expected in early 2015.
- Internal Revenue Service Advisory Council (IRSAC) 2014 Annual Report – Released 11/19/14. Per the IRS, "IRSAC is an advisory group to the entire agency. IRSAC's primary purpose is to provide an organized public forum of relevant tax administration issues for the Commissioner, senior IRS executives and representatives of the public to discuss relevant tax issues." The full report is also available in pdf format. One of the recommendations pertains to practitioners serving marijuana businesses. IRSAC recommends: "Published guidance should promptly clarify that a tax professional will not be considered unethical, will not be targeted for audit, and will not be in violation of Treasury Circular 230 solely for representing or preparing a return for a business that is illegal under federal law but legal at the state level under state law."
- In a speech to the ABA Tax Section on 5/8/15, IRS OPR Director Karen Hawkins said that an Enrolled Agent helping a marijuana client file a return does not raise an issue for OPR. She also observed that the IRS taking cash from such a business because the bank will not take their deposit, is like the IRS helping them launder money. [Hoffman, "ABA Meeting: Agents Working With Pot Growers OK with OPR, Hawkins Says," *Tax Notes*, 2015 TNT 90-17, 5/11/15.] She also noted that CCA 201504011 is too difficult for most marijuana growers and distributors to use. [Davison, "Hazy Marijuana Laws Cause Headaches for IRS, Side Effects for Practitioners," *BNA Daily Tax Report*, 5/14/15]

  Observation: The money laundering comment is interesting and one of concern to anyone providing goods or services to a marijuana business. If they take the client's cash, are they helping them to launder? For the IRS or any state tax agency, what if a business purposefully made a large estimated tax payment knowing it will get a refund? Would that be considered money laundering? (A concern, but beyond the scope of this tax-focused outline; look for other sources and have a client consult an attorney to reduce the risk of violating these laws.)

Malpractice Insurance

- Review terms to see if any problems of having a client in a state-legal marijuana business.
- Risk of non-coverage likely due to criminal activity or other intentional act that is not legal.
- "Denver lawyer loses liability insurance over medical-marijuana clients," by John Ingold, *The Denver Post*, 5/7/12.

Tax Rules and Considerations

- IRC §61, Gross income defined – "gross income means all income from whatever source derived." Thus, it includes income from both legal and illegal sources.
- IRC §1401 and IRC §1402 – illegal income can also be included in "net earnings from self-employment" and thus subject to the 15.3% SE tax rate.
- Calculating income tax liabilities (federal and state) for a person in the business of selling marijuana involves several tax provisions. It also involves interpretation and recordkeeping. For example, special capitalization/expensing, inventory and accounting method rules apply to producers (including growers) and retailers (IRC §263A, IRC §446 and IRC §471). A determination must also be made as to which business expenses relate to sales of marijuana and thus are not deductible in calculating federal (and perhaps also state) taxable income (see IRC §280E, below).
- IRC §280E, Expenditures in connection with the illegal sale of drugs

  Text: No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted. [P.L. 97-248, 9/3/82]

  Senate Report: "Reasons for Change - There is a sharply defined public policy against drug dealing to allow drug dealers the benefit of business expense deductions at the same time that the U.S. and its citizens are losing billions of dollars per year to such persons is not compelled by the fact that such deductions are allowed to other, legal, enterprises. Such deductions must be disallowed on public policy grounds."

  For constitutional reasons, the disallowance does not apply to cost of goods sold (the 16th Amendment applies to gross income which is defined as gross receipts less cost of sales (see Reg. 1.61-3). Per the 1982 Senate Report: "All deductions and credits for amounts paid or incurred in the illegal trafficking in drugs listed in the Controlled Substances Act are disallowed. To preclude possible challenges on constitutional grounds, the adjustment to gross receipts with respect to effective costs of goods sold is not affected by this provision of the bill."

  Section 280E was enacted in reaction to *Edmondson v. Commissioner*, TC Memo 1981-623 (per *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner*, 128 TC 173 (2007)
- Guidance under §280E:
  - There are no regulations.
  - *Californians Helping to Alleviate Medical Problems, Inc. (CHAMP) v. Commissioner*, 128 TC 173 (2007) – §280E only disallows expenses related to marijuana sales, not to other expenses of the taxpayer. "We hold that section 280E does not preclude petitioner from deducting expenses attributable to a trade or business other than that of illegal trafficking in controlled substances simply because petitioner also is involved in the trafficking in a controlled substance." The court found the medical marijuana business to be separate from the taxpayer's caregiving services business.
  - IRS Information Letters (2010) explaining that 280E disallows deductions related to sale of a controlled substance and there is no exception for medical marijuana.
  - CCA 201504011 (1/23/15) – Interaction of inventory rules and §280E. Also see article below.

- Nellen, "Measuring the taxable income of a marijuana business," *AICPA Tax Insider,* 2/12/15.

- *Olive v. Commissioner*, 139 TC No. 2 (2012), aff'd No. 13-70510 (9th Cir., 7/9/15) – this case presents an example of poor recordkeeping and the problems that result. The court estimated that 75.16% was a "reasonable measure of the Vapor Room's COGS for each year at issue." The court did not use that figure against the taxpayer's gross receipts because some inventory had been given to customers for free or was withdrawn for personal use by the owner and staff members.

  Taxpayer deducted expenses related to this business on his return, which the IRS disallowed under 280E. At trial, the taxpayer argued that he really had two businesses, similar to the CHAMP case (see above). However, the court was not persuaded that the taxpayer operated yoga classes and other activities separate from the main business of selling marijuana. All receipts were from the sale of marijuana. Thus, all expenses, other than COS, were disallowed. The court referred to Reg. §1.183-1(d)(1) for the analysis of whether there were separate businesses. There was no mention of §446(d) which specifies that a taxpayer may use different accounting methods for separate trades or businesses.

  On appeal, the 9th Circuit Court held for the IRS as well. In considering the application of §280E, the court found that the taxpayer was a "trade or business" as it was an activity entered into to realize a profit. Also, selling marijuana, it was "trafficking in controlled substances … prohibited by Federal law." The court did not agree with the taxpayer's argument that in enacting §280E in the early 1980s, Congress did not intend for it to apply to marijuana dispensaries currently allowed by law in many states. The court noted that a Congress certainly may intend that a rule apply to "new situations."

  The court also found that the taxpayer's operation was different from that in CHAMP. O did not have separate businesses. Instead, the free offerings to customers was part of the sale of marijuana.

- Paying Taxes in Cash - Relief for Unbanked Marijuana Businesses – The IRS issued interim guidance in Memo SBSE-04-0615-0045 (6/9/15). The IRS will not impose penalty or will abate the 10% penalty for failure to use the Electronic Federal Tax Payment System (EFTPS) because the taxpayer is unable to obtain a bank account. To obtain this relief, the taxpayer must:

  - Have made "reasonable efforts" to open a bank account.
  - Include a signed statement about the attempt to get bank account and support it with relevant documentation, such as a denied application).

  The memo states that this guidance is not applicable to any taxpayer who can get a bank account but chooses not to.

  While the memo does not mention marijuana businesses, this likely is the intended audience as these businesses often cannot obtain a bank account because marijuana activity is still a federal crime even if legal under laws in some states.

  Observation: On 2/14/14, Treasury Department Financial Crimes Enforcement Network (FinCEN) issued FIN-2014-G001 on guidance under the Bank Secrecy Act for financial institutions considering offering services to marijuana businesses. The guidance provides due diligence considerations in providing services. It also clarifies when suspicious activity reports are

warranted. Also see press release of 2/14/14 and 8/12/14 remarks of FinCEN Director Jennifer Shasky Calvery.

- Tax-exempt entity status – In PLR 201224036 (6/15/12), an entity formed to distribute marijuana for medical purposes was denied Section 501(c)(3) status. Per the IRS in this ruling:

  "the distribution of cannabis, is illegal. Federal law does not recognize any health benefits of cannabis and classifies it as a controlled substance. 21 U.S.C. § 812. Federal law prohibits the manufacture, distribution, possession, or dispensing of a controlled substance. 21 U.S.C. § 841(a). Congress has "made a determination that marijuana has no medical benefits worthy of an exception" to the general rule that the manufacture and distribution of cannabis is illegal. *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 493.

  Current federal law prohibits the use of cannabis except in limited circumstances; those limited circumstances do not include the use of cannabis for medicinal purposes. *See Id.* The fact that State legalized distribution of cannabis to a limited extent is not determinative because under federal law, distribution of cannabis is illegal. Because you advocate and engage in activities that contravene federal law, you serve a substantial nonexempt purpose.

  You also operate for private purposes rather than the public interest. An organization that operates primarily for the benefit of its members serves the interests of a select group of individuals rather than the community's or the public's interest. A business or other activity that assists the community incidentally and only provides benefits to a limited number of members of the community more than incidentally is not charitable. See e.g., Rev. Rul. 61-170, *supra*, Rev. Rul. 69-175, *supra*, and Rev. Rul. 73-349, *supra*.

  Your Form 1023 Application and supporting material indicate that you are a cooperative organization and only distribute cannabis to your members. In State, a cooperative must conduct itself primarily for the mutual benefit of its members as patrons of the organization. The organization uses its earnings for the general welfare of its members or it equitably distributes its earnings or services to its members.

  You state that you sell or give cannabis to members based on their financial need. The *Tax Court in Federation Pharmacy Services, Inc. V. Comm'r*, 72 T.C. at 692, stated that selling health items at a discount "is not, of itself, a charitable deed. Many profitmaking organizations sell at a discount. Nor does the fact that [Federation Pharmacy] seeks to sell its drugs at cost alter the result; so does an old-fashioned cooperative, yet it is not entitled to classification as charitable." Id. (citations excluded). As a cooperative, your activities benefit private interests more than incidentally, which precludes exemption under § 501(c)(3). Treas. Reg. §1.501(c)(3)-1(d)(1)(ii).

  To satisfy the organizational test, an organization's Articles of Incorporation must limit its purposes to those listed in § 501(c)(3). Additionally, the Articles must not expressly empower the organization to engage, more than insubstantially, in activities that are not in furtherance of those exempt purposes.

  You do not satisfy the organizational test described in Treas. Reg. §1.501(c)(3)-1(b)(1). Your specific purpose is to dispense medicinal cannabis. Distributing cannabis does not further any exempt purpose. Your Articles of Incorporation therefore do not limit your purposes to one or more exempt purposes under §501(c)(3). Instead, your Articles empower you to engage, other than as an insubstantial part of your activities, in activities not themselves in furtherance of an exempt purpose.

  You also fail the organizational test because your bylaws allow for the issuance of capital stock to shareholders who vote on the members of the board of directors. The bylaws state that

shareholders may be entitled to receive dividend payments. Thus, your bylaws allow your net earnings to inure to the benefit of private shareholders or individuals, contrary to Treas. Reg. §1.501(c)(3)-1(c)(2)."

- IRC §7525, Confidentiality privilege relating to taxpayer communications – provides a limited privilege to clients of CPAs and Enrolled Agents. It does not apply in any criminal tax matter before the IRS or any criminal tax proceeding in federal court by or against the U.S. The §7525 privilege is similar to the standard attorney-client privilege which is limited regarding much tax information where the tax information is intended to be disclosed on a tax return.
- Legislative proposals to change IRC §280E;
    - H.R. 1855 (114th Cong), Small Business Tax Equity Act of 2015 – Modifies §280E to allow deductions for businesses that operate within the bounds of state law. Also see S. 987 (114th Cong).
- State tax issues
    - Does the state conform to IRC 280E?
    - How does sales and other state and local taxes apply?
    - Are there any special tax considerations for the form of entity required (if true) for a marijuana business under state law?
    - State legislative and administrative issues:
        - Should a state allowing any sales of marijuana also change its laws to not conform to IRC Section 280E?
        - How to handle cash payments for taxes as these businesses might not be able to open bank accounts.
        - What new or existing taxes should apply to the growing, distribution and sales of marijuana and what should the new revenue be used for? Can other taxes be reduced?
        - What resources are needed for tax administration and compliance?
- California Board of Equalization (sales tax)
    - General information (sales tax is owed on sales of marijuana)
    - BOE Publication 173, Information on Sales Tax and Registration for Medical Marijuana Sellers (June 2007).
    - 2011 ruling on a medical marijuana dispensary
- Colorado
    - Marijuana Taxes (Sales and Excise) website from the Department of Revenue with links to Q&As, filing instructions, publications, regulations, and enforcement information.
    - Marijuana Taxes – Quick Answers
    - Colorado marijuana tax laws
    - Marijuana Tax Information Help Desk at 303-205-8287.
    - Author's blog post of 1/12/14.

- Institute on Taxation and Economic Policy, *Issues with Taxing Marijuana at the State Level,* 5/6/14.
- *The DEA Position on Marijuana*, April 2013 [excerpt on taxes, page 14]

Cannabis clubs or dispensaries are generating disproportionately large sums of cash through the sales of marijuana and marijuana tainted products when they should be operating as essentially nonprofit enterprises. Most of these profits are going unreported. According to the California Board of Equalization, the state collects anywhere from $58 million to $105 million in taxes from medical marijuana each year from approximately $700 million to $1.3 billion in marijuana sales.[82]

- "There is a clear indication that many dispensaries are intentionally evading their taxes, distributing illegal products and may be laundering illegally acquired money," Jerome E. Horton, California State Board of Equalization Vice Chairperson.[83]

Additionally, the Board of Equalization estimated in 2008 that about 300 dispensaries currently pay taxes, with another 500 evading them[84] (other media outlets have estimated the number of dispensaries to be between 1000-and 1500). If the tax and revenue projections are based on the 300 reporting entities, then, based on California Board of Equalization estimates, total medical marijuana revenues are between $1.87 and $3.47 billion per year.

It is a well proven maxim that the money from illegal drugs is so substantial that it attracts organized criminal groups and makes criminals out of otherwise honest citizens. All of this is proving true with the cannabis clubs.

82 Dinkelspiel, Frances, "Berkeley Cannabis Collectives Slapped With Huge Tax Bills." Berkeleyside. February 3, 2011. Retrieved from http://www.berkeleyside.com/2011/02/03/berkeley-cannabis-collectives-slapped-with-hugetax-bills/

83 Chairman Jerome E. Horton, California State Board of Equalization. (2010, February 3). *Tax Board Vice Chairperson Jerome Horton Proposes Taxing Marijuana Manufacturers* [Press Release]. Retrieved from http://www.boe.ca.gov/news/2010/16-10-H.pdf

84 Dinkelspiel, Frances, "Berkeley Cannabis Collectives Slapped With Huge Tax Bills." Berkeleyside. February 3, 2011. Retrieved from http://www.berkeleyside.com/2011/02/03/berkeley-cannabis-collectives-slapped-with-hugetax-bills/

Taxpayer Rights to Legal and Tax Assistance

- Model Rules of Professional Conduct: Preamble & Scope

"[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. …

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a

member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest."

- State laws allowing for production, distribution and use of marijuana have lengthy statutes and regulations covering many actions, such as registration, who can purchase and how much, licensing, recordkeeping, and more. Most individuals will seek legal help to be sure they are compliance with federal, state and local laws.
- The tax law is complicated and most individuals and businesses need assistance to properly comply with the rules and pay the proper amount of tax.

Cases of Note

- *Gonzales v Raich*, 545 US 1 (2005) – Congress has authority under the commerce clause to prohibit marijuana production and use even if allowed under state law.
- Federal prosecution valid despite state law – two examples of such findings follow:
    - *Sacramento Nonprofit Collective, DBA El Camino Wellness Center v. Holder*, No. 12-15991 (9th Cir., 1/15/14); not for publication. Plaintiffs argued that the federal government violated their 5th and 9th Amendment rights by bringing enforcement of federal law on their marijuana dispensaries operating under California law. The plaintiffs lost. The court observed that they "over-read the statements made in both the Ogden Memorandum and during the course of the prior litigation; at no point did the Government promise not to enforce the CSA."
    - *Montana Caregivers Association, LLC v. U.S.,* No. 12-35110 (9th Cir., 5/15/13; not for publication), aff'g CV 11-74-M-DWM (DC MT, 1/20/12) – plaintiff argued that federal raids on their facilities with marijuana plants and related equipment used to grow and produce marijuana for medical use violated their fights under the 10th, 9th, 5th and 4th Amendments because state law allowed the activity and the US Department of Justice indicated they would not actively prosecute medical marijuana providers. While plaintiff's activities were permissible under Montana law, they were illegal under federal law (Controlled Substances Act, P.L. 91-513 (1970)). The DOJ's "Ogden memo" did not say there would be no prosecution, just that it would be a lower priority for prosecution. This memo was not intended to legalize or authorize marijuana production or consumption and the DOJ is not empowered to do so.

      The plaintiff lost on the 10th Amendment claim because the US Supreme Court and 9th Circuit have found that the Controlled Substances Act if a proper exercise of federal power under the Commerce Clause (*Raich*, see above). There was no 9th Amendment problem because there is no "right to conduct their lives and businesses and the

people's right to obtain and use marijuana for medical reasons." The federal government has the right to enforce the CSA, with no state right to produce and use marijuana.

There was no 4th Amendment problem because the federal government is allowed to search and seize if they allege conduct violated the CSA, even if operating within Montana law. Finally, there was not 5th Amendment problem because "substantive due process does not protect the production and consumption of marijuana for medical purposes."

- Doctors recommending marijuana; aiding and abetting:
  - *Conant, et al (doctors) v. Walters (Director of the White House Office of National Drug Control Policy),* 309 F3d 629, No. 00-17222 (9th Cir. 2002) – affirmed a District Court injunction based on First Amendment rights to prohibit the federal government from revoking a doctor's license or investigating them "where the basis for the government's action is solely the physician's professional "recommendation" of the use of medical marijuana."

    "The plaintiffs themselves interpret the injunction narrowly, stating in their brief before this Court that, "the lower court fashioned an injunction with a clear line between protected medical speech and illegal conduct." They characterize the injunction as protecting "the dispensing of information," not the dispensing of controlled substances, and therefore assert that the injunction does not contravene or undermine federal law."

    The court also noted that for a conviction for "aiding and abetting," the government must prove four things: ""(1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense." *See United States v. Gaskins,* 849 F.2d 454, 459 (9th Cir.1988). The district court also noted that conspiracy requires that a defendant make "an agreement to accomplish an illegal objective and [that he] knows of the illegal objective and intends to help accomplish it." 172 F.R.D. at 700-01 (citing *United States v. Gil,* 58 F.3d 1414, 1423 & n. 5 (9th Cir.1995))." … "Holding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting."

- Responsibility for client's actions? One case that said no is summarized below. But there are many factors to consider.
  - *The People v Lauria*, 251 Cal.App. 2d 471 (1967) – three prostitutes used Lauria's telephone answering service and the government arrested Lauria and the prostitutes and indicted for conspiracy to commit prostitution. Lauria admitted he know some of his customers were prostitutes.

    "we deduce the following rule: the intent of a supplier who knows of the criminal use to which his supplies are put to participate in the criminal activity connected with the use of his supplies may be established by (1) direct evidence that he intends to participate, or (2) through an inference that he intends to participate based on, (a) his special interest in the activity, or (b) the aggravated nature of the crime itself.

    "When we review Lauria's activities in the light of this analysis, we find no proof that Lauria took any direct action to further, encourage, or direct the call-girl activities of his

codefendants and we find an absence of circumstance from which his special interest in their activities could be inferred. Neither excessive charges for standardized services, nor the furnishing of services without a legitimate use, nor an unusual quantity of business with call girls, are present. The offense which he is charged with furthering is a misdemeanor, a category of crime which has never been made a required subject of positive disclosure to public authority. Under these circumstances, although proof of Lauria's knowledge of the criminal activities of his patrons was sufficient to charge him with that fact, there was insufficient evidence that he intended to further their criminal activities, and hence insufficient proof of his participation in a criminal conspiracy with his codefendants to further prostitution.

"In absolving Lauria of complicity in a criminal conspiracy we do not wish to imply that the public authorities are without remedies to combat modern manifestations of the world's oldest profession. Licensing of telephone answering services under the police power, together with the revocation of licenses for the toleration of prostitution, is a possible civil remedy. The furnishing of telephone answering service in aid of prostitution could be made a crime. … Other solutions will doubtless occur to vigilant public authorities if the problem of call-girl activity needs further suppression"

Observations: A CPA or attorney assisting or counseling a person using or distributing marijuana, knows that it is a federal crime, even if allowed under state law. In enacting state marijuana laws, such laws could also include prohibitions against attorneys or CPAs assisting them (it does not appear that any state law prohibits such action).

Law Review and Practitioner Articles

- Sam Kamin and Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?, 91 OR. L. REV. 869 (2013).
- Larry W. Berkowitz, The Ethical Implications of Advising Municipal Officials Regarding Marijuana, 2013 memo.
- Edward J.Roche, Jr., Federal Income Taxation of Medical Marijuana Businesses, 66 TAX LAWYER No. 2 (2013).
- A. Claire Frezza, Counseling Clients on Medical Marijuana: Ethics Caught in Smoke, 25 GEO.J. LEGAL ETHICS 537 (2012).
- Anthony Cooper and Randy Werner, "Practice Considerations Related to Medical Marijuana Clients," New Account, Colorado Society of Certified Public Accountants, March/April 2012, pages 8 – 9.
- Duncan B. Will, "CPA Services for Medical Marijuana Clients," News Account, Colorado Society of Certified Public Accountants, May/June 2010, page 10.
- Stephen Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 YALE LAW JOURNAL 1545 (1995).

Government Reports

- Congressional Research Service (CRS), Marijuana: Medical and Retail – Selected Legal Issues, 4/8/15 – includes summary of banking and taxation rules relevant to cultivation and distribution of marijuana.
- Congressional Research Service (CRS), State Marijuana Legalization Initiatives: Implications for Federal Law Enforcement, 12/4/14.
- Congressional Research Service (CRS), Marijuana: Medical and Retail--Selected Legal Issues, 3/25/14.

- CRS, State Legalization of Recreational Marijuana: Selected Legal Issues, 1/13/14.