BACK STORY

BY STAN HUNTERTON, ESQ., BAR COUNSEL & PHIL PATTEE, ESQ, ASSISTANT BAR COUNSEL

NEW MARIJUANA LAWS, BUSINESS AND LAWYERS: LET'S BE CAREFUL OUT THERE

When medical marijuana was approved by the Nevada Legislature in 2013, a handful of attorneys were concerned about their involvement in state-authorized businesses that provided a product still illegal under federal law.

Since recreational marijuana arrived on July 1, 2017, customer demand has surpassed nearly all expectations. The stakes for attorneys and their clients are increasing as the weed industry grows rapidly.

Indeed, lawyers not directly associated with the marijuana industry could still find themselves entangled in federal criminal problems, as well as private civil litigation, by representing clients with distant – and probably unforeseen – ties to marijuana growers and distributors.

In 2013, the Nevada Legislature approved the sale of marijuana for medical purposes. Almost immediately, attorneys sought advice on their ethical exposure for, in any way, facilitating that market.

That concern was not limited to lawyers assisting clients set up their businesses or working within the industry itself. Local government attorneys worried that drafting necessary ordinances – such as the distance from a dispensary to a fire hydrant, the number of sprinklers in a grow house, etc. – might run them afoul of the federal government and disciplinary rules, because they could be facilitating illegal acts.

Rule of Professional Conduct 1.2 (Scope of Representation) prohibits an attorney from counseling or assisting a client in conduct which violates the law. The Nevada Supreme Court responded to attorneys' concerns by adding a Comment to RPC 1.2 that permitted an attorney to advise and assist a client if the conduct complies with Nevada law. The comment also stated that the attorney must advise the client regarding related federal law.

Similarly, in February 2017, the Nevada Supreme Court added a comment to RPC 8.4(b) (Misconduct: Committing Criminal Acts) that warned that because use, possession and distribution of marijuana still violates federal law, "attorneys are advised that engaging in such conduct may result in federal prosecution" and trigger disciplinary proceedings.

The Cole Memo

Although marijuana still is listed as a Schedule 1 substance under federal law, the Obama Administration took a somewhat hands-off approach to the growing number of states legalizing it. In an August 2013 memorandum, Deputy Attorney General James Cole sought to strike a compromise between legitimate federal interests and state sovereignty.

Cole's memo provided "guidance" to federal prosecutors and told them to avoid prosecutions of growers, distributors or individuals who comply with state regulations. Instead, federal authorities were directed to concentrate their efforts on specific "enforcement priorities," including sale to minors; prevention of marijuana revenue funding criminal gangs or cartels; interstate smuggling from pot-friendly jurisdictions to other states; keeping marijuana off of federal lands; and "drugged driving."

However, almost immediately after coming to power earlier this year, the Trump Administration showed signs that it might move away from Cole Memo parameters. In February 2017, new Attorney General Jeff Sessions convened a Task Force on Crime Reduction and Public Safety, which some feared might start dismantling the Cole Memo. But the task force concluded with no such recommendation.

Then, in a press conference in November 2017, Sessions hinted that the Justice Department might revisit the Cole Memo soon, and that tougher stances on marijuana might be in the offing. (See Editor's Note, below.)

Unexpected Involvement with Marijuana Litigation

Attorneys who represent and counsel clients with marijuana-based businesses know – or should know – the inherent risk associated with their involvement. Federal law enforcement agents could presumably swoop down to arrest their clients, and lawyers could be captured in the same net. Attorneys with pot-involved clients could end up as parties—not as legal counsel—in civil Racketeer Influenced and Corrupt Organization (RICO) actions, or even actually charged with criminal violations.

Pot farms in other jurisdictions have been sued by neighbors objecting to the smell produced by acres of marijuana plants. Some have complained that nearby marijuana farms lower property values, because violent criminals could be drawn to otherwise quiet neighborhoods adjacent to a very valuable pot crop.

Attorneys can also wind up representing clients who have only tenuous connections to the marijuana industry. A recent high-profile case in Oregon involved more than 20 people and 23 businesses as defendants. One defendant was Bank of America, which merely held the mortgage to the property on which marijuana was growing.

The message here is that attorneys who represent entities that seem to operate only in normal commerce (trucking companies, financial institutions, electric utilities, water providers, etc.) could end up handling litigation for clients who provided even minimal services or products to the marijuana industry. Even government agencies also have been sued.

Earlier this year, the federal Tenth Circuit Court of Appeals in Denver ruled that plaintiffs' complaints regarding possibly decreased property values were enough to reject the defendants' motion to dismiss. The litigation is still pending.

Casinos and Marijuana

In Nevada, state and gaming officials are considering the interaction of casinos and the marijuana industry. Traditionally, casinos and individual licensees could have no involvement with marijuana, because it still violates federal law.

However, the possibility of casinos hosting marijuana conventions is being discussed. But again, the illegality of pot at the federal level still concerns casino operators who worry about liability for themselves and their valuable properties. **NL**

EDITOR'S NOTE: On January 4, 2018, Attorney General Jeff Sessions announced the withdrawal of the Cole Memorandum, which had been issued during the Obama administration and which limited federal prosecution of marijuana cases in states that had legalized its possession and sale. That same week, legal sales of recreatioal marijuana began in California.