

# Legal Representation in the Cannabis and Psilocybin Industries: Ethical Considerations

# Navigating the Intersection of Emerging Markets, Shifting Legality, and Professional Ethics

- The cannabis industry is growing.
  - Combined U.S. medical and recreational cannabis sales could reach \$49.56 billion by 2029.
  - Retail cannabis sales are projected to be upwards of \$53.5 billion by 2027.
- Legal Complexity
  - Businesses and attorneys face mounting challenges due to rapidly evolving regulations.
  - Lawyers advising clients in cannabis-related industries must address significant legal and ethical questions.
- Ethical Challenges from Conflicting Laws
  - Federal-State Conflict: Cannabis remains illegal under federal law, creating complex ethical dilemmas for attorneys.
  - Careful navigation is required to uphold professional standards in this emerging sector.

# The current situation:

- Cannabis Legalization Across the Nation: A Majority of States Onboard
  - A growing trend as the majority of states embrace cannabis through legislative measures.
- Psilocybin on the Horizon: Several States Pioneering New Programs
  - Momentum building as several states explore and initiate psilocybin programs.
- Federal Stance: Severe Prohibition Persists
  - Cannabis and psilocybin face federal prohibition at the most stringent level.
- Federal Authority: Broad Prosecution Powers
  - The federal government possesses the authority to prosecute various stakeholders:
    - Customers, Business Owners, Banks, Lawyers, Investors, Insurers, Landlords.
- Selective Enforcement: Federal Government's Current Approach
  - Despite its authority, the federal government is not currently prosecuting actors in the cannabis/psilocybin industry.

# Cannabis Business Legal Hurdles

- Licensure
- Product Tracking
- Banking
- Insurance: WAC § 314-55-082(1)
- Property

“How did we get here...?”



# Tracing the Historical Regulation and Prohibition of Cannabis and Psilocybin

- States: laws regulating opium in 1800s
- Federal: The Pure Food and Drug Act of 1906
- Patchwork of state laws
- Controlled Substances Act of 1970

# Current Cannabis and Psilocybin Regulation

## Federal

- Drug Abuse Prevention and Control Act, which later became known as the Controlled Substances Act

## State

- Miniature Controlled Substances Acts, or similar provisions in a state's criminal code.

# Federal Controlled Substances Act (CSA)

Passed in 1970

Regulates manufacturing, distributing, or dispensing controlled substances deemed dangerous.

Categorizes controlled substances into five different levels, referred to as "schedules."

Schedule I is the highest rank and contains those substances with the strictest regulations, which the DEA determined have "high potential for abuse" and "no currently accepted medical use in the United States."

- Repealed some extant federal drug laws
- Combined existing federal drug laws and expanded their scope
- Expanded federal law enforcement pertaining to controlled substances
- Gave Attorney General enforcement authority, which delegated its authority to the Drug Enforcement Authority (DEA).



# CSA

## SCHEDULE I

“Marihuana”

Psilocybin

Peyote

## SCHEDULE II

Fentanyl

Methamphetamine

Cocaine

## Two conflicting arguments for the CSA's creation:

- Numerous laws present between 1914 and 1970, consisting of a patchwork of drug regulation. Accordingly, the CSA was an effort to unite and merge “these diverse laws in one piece of legislation.”
- Created and used to destroy political and cultural enemies such as the “New Left.”

## Public Law 91-513

## AN ACT

October 27, 1970  
[H. R. 18583]

To amend the Public Health Service Act and other laws to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse.

Comprehensive  
Drug Abuse Pre-  
vention and Con-  
trol Act of 1970.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Comprehensive Drug Abuse Prevention and Control Act of 1970".*

## TABLE OF CONTENTS

## TITLE I—REHABILITATION PROGRAMS RELATING TO DRUG ABUSE

- Sec. 1. Programs under Community Mental Health Centers Act relating to drug abuse.  
Sec. 2. Broader treatment authority in Public Health Service hospitals for persons with drug abuse and other drug dependence problems.  
Sec. 3. Research under the Public Health Service Act in drug use, abuse, and addiction.  
Sec. 4. Medical treatment of narcotic addiction.

## TITLE II—CONTROL AND ENFORCEMENT

## PART A—SHORT TITLE; FINDINGS AND DECLARATION; DEFINITIONS

- Sec. 100. Short title.  
Sec. 101. Findings and declarations.  
Sec. 102. Definitions.  
Sec. 103. Increased numbers of enforcement personnel.

## PART B—AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

- Sec. 201. Authority and criteria for classification of substances.  
Sec. 202. Schedules of controlled substances.

## PART C—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

- Sec. 301. Rules and regulations.  
Sec. 302. Persons required to register.  
Sec. 303. Registration requirements.  
Sec. 304. Denial, revocation, or suspension of registration.  
Sec. 305. Labeling and packaging requirements.  
Sec. 306. Quotas applicable to certain substances.  
Sec. 307. Records and reports of registrants.  
Sec. 308. Order forms.  
Sec. 309. Prescriptions.

## PART D—OFFENSES AND PENALTIES

- Sec. 401. Prohibited acts A—penalties.  
Sec. 402. Prohibited acts B—penalties.  
Sec. 403. Prohibited acts C—penalties.  
Sec. 404. Penalty for simple possession; conditional discharge and expunging of records for first offense.  
Sec. 405. Distribution to persons under age twenty-one.  
Sec. 406. Attempt and conspiracy.  
Sec. 407. Additional penalties.  
Sec. 408. Continuing criminal enterprise.  
Sec. 409. Dangerous special drug offender sentencing.  
Sec. 410. Information for sentencing.  
Sec. 411. Proceedings to establish previous convictions.

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## SCHEDULE I

### Opiates.

(a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

- (1) Acetylmethadol.
- (2) Allylprodine.
- (3) Alphacetylmethadol.
- (4) Alphameprodine.
- (5) Alphamethadol.
- (6) Benzethidine.
- (7) Betacetylmethadol.
- (8) Betameprodine.
- (9) Betamethadol.
- (10) Betaprodine.
- (11) Clonitazene.
- (12) Dextromoramide.
- (13) Dextrorphan.
- (14) Diampromide.
- (15) Diethylthiambutene.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

Hallucinogenic  
substances.

- (1) 3,4-methylenedioxy amphetamine.
- (2) 5-methoxy-3,4-methylenedioxy amphetamine.
- (3) 3,4,5-trimethoxy amphetamine.
- (4) Bufotenine.
- (5) Diethyltryptamine.
- (6) Dimethyltryptamine.
- (7) 4-methyl-2,5-dimethoxyamphetamine.
- (8) Ibogaine.
- (9) Lysergic acid diethylamide.
- (10) Marihuana.
- (11) Mescaline.
- (12) Peyote.
- (13) N-ethyl-3-piperidyl benzilate.
- (14) N-methyl-3-piperidyl benzilate.
- (15) Psilocybin.
- (16) Psilocyn.
- (17) Tetrahydrocannabinols.

# Cannabis

Original definition:

(15) The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

# Psilocybin

Definition?

Psilocybin.

# Note:

## marihuana

(16) (A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. (B) The term "marihuana" does not include— (i) hemp, as defined in section 1639o of title 7; or (ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

“(1) HEMP.—The term ‘hemp’ means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

# THE GREAT DIVIDE

States began moving away from cannabis prohibition in the 1970s





# Post 1970 Pro-Cannabis Efforts

- Oregon: Decriminalized Cannabis 1973
- Illinois: Cannabis Control Act of 1978 | medical cannabis | never implemented
- Maine: Decriminalized Cannabis 1976
- Minnesota: Decriminalized Cannabis 1976
- Mississippi: Decriminalized Cannabis 1978
- North Carolina: Decriminalized 1977
- Virginia: Legislation allowed doctors to recommend cannabis for Glaucoma and Chemo
- Alaska: legalized recreational in 1975 by *Ravin v. State*, recriminalized in 1990.

# **The Age of Active Medical and Recreational Legalization**

# 1990s

## Medical Cannabis

- Alaska: 1998
- California: 1996
- Maine: 1999
- Oregon: 1998
- Washington: 1998

## Recreational Cannabis

**ZERO**

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# 2000s

## Medical Cannabis

- Colorado 2000
- Hawaii 2000
- Michigan 2008
- Montana 2004
- Nevada 2000
- New Mexico 2007
- Rhode Island 2006
- Vermont 2004
- Washington D.C. 2009

## Recreational Cannabis

**ZERO**

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# THE COLE MEMO (2013)

A document that simultaneously meant everything, and nothing, for the cannabis industry. Its precursor, the Ogden Memo (2009), only pertained to medical cannabis, and gave vague guidance on enforcement prioritization.




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 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.

## Key Paragraph:

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.

# 2010s

## Medical Cannabis

- Arizona 2010
- New Jersey 2010
- Connecticut 2012
- Massachusetts 2012
- Illinois 2013
- New Hampshire 2013
- New York 2014

## Recreational Cannabis

- Colorado 2012
- Washington 2012
- Alaska 2014
- Oregon 2014
- Washington D.C. 2014
- California 2016
- Maine 2016

\*Delaware suspended medical cannabis in 2012 after threat of federal prosecution

# 2010s Continued

## Medical Cannabis

- Minnesota 2014
- Guam 2014
- Maryland 2014
- Louisiana 2015
- Puerto Rico 2015
- North Dakota 2016
- Ohio 2016
- Arkansas 2016
- Delaware\* 2016 expanded

## Recreational Cannabis

- Nevada 2016
- Massachusetts 2016
- Vermont 2018
- Northern Mariana Islands 2018
- Michigan 2018
- Illinois 2019
- Guam 2019



# 2010s Continued Again

## Medical Cannabis

- Florida 2016
- Pennsylvania 2016
- West Virginia 2017
- Oklahoma 2018
- Utah 2018
- Virginia 2018
- Missouri 2018
- U.S. Virgin Islands 2019

## Recreational Cannabis

# 2020s

## Medical Cannabis

- ~Iowa 2020 (4.5 g THC per 90 days)
- Mississippi 2022\* (Overturned by Mississippi Supreme Court)
- South Dakota 2020
- Alabama 2023
- Kentucky 2023

## Recreational Cannabis

- Illinois 2020
- ~Minnesota 2022 (5mg THC per serving)
- Montana 2020
- Vermont 2020
- New Jersey 2020
- South Dakota 2020 (State Circuit Court found Measure Unconstitutional)
- Connecticut 2021
- New Mexico 2021
- New York 2021

# 2020s Continued

## Medical Cannabis

## Recreational Cannabis

- Virginia 2021
- Rhode Island 2022
- Ohio 2023
- Delaware 2023

**PROBLEM**

# Aligning Legal Practice with Ethical Standards: Model Rules of Professional Conduct

American Bar Association: The Model Rules of Professional Conduct

Most states have adopted same or similar rules to govern the practice of law

# 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.

## COMMENTS

- [9] 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.

# Rule 8.4

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;

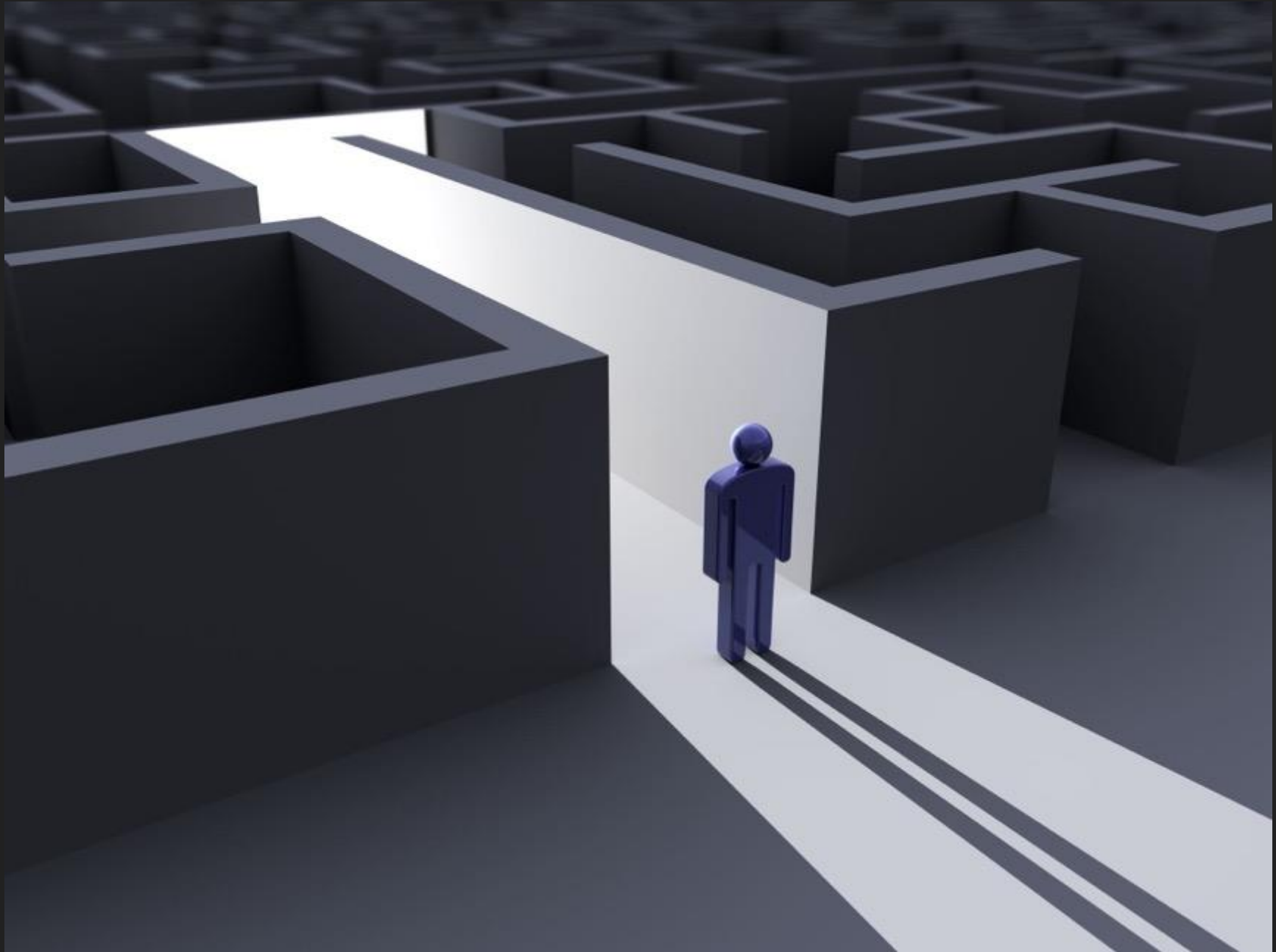
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

## COMMENT

- [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.











# Two Prominent Cases of Legal Backlash

- California attorney Jessica McElfresh:
  - represented cannabis clients for several years - was arrested at gunpoint in San Diego in 2017. The San Diego district attorney charged McElfresh on multiple felony counts, alleging she helped hide evidence of a hash oil manufacturing facility. DA seized her client files and issued a warrant for all of McElfresh's cellphone location data for three years, along with her calendar, address book contacts, and internet searches. Charges eventually dropped.
- *People v. Furtado*, 15PDJ056, 2015 WL 7574128, at \*1 (Colo. O.P.D.J. Nov. 2, 2015)
  - Colorado lawyer who served as general counsel for two medical cannabis dispensaries was publicly censured.
  - The lawyer had established Interest on Lawyers' Trust Accounts accounts at a bank to use for paying taxes and bills for each of the dispensaries. However, the bank did not allow accounts relating to cannabis businesses. Though the lawyer knew of the bank's policy, he did not disclose the purpose of the accounts to the bank.
  - The lawyer was found to have violated Colorado Rule 8.4(c) prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation (comparable to ABA MRPC Rule 8.4(c)).

# State Changes

States began changing rules of professional conduct

# Three categories of rule adjustments

- 1) Strict Prohibition: example- Georgia
- 2) State Non-disciplinary Policy: example- Massachusetts
- 3) Strict Allowance: example- Washington

# Washington 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.

# Washington

## 1.2(d)

- Remember the Cole Memo?
- 2014: added Comment 18 to Rule 1.2:
  - “At least until there is a subsequent change of federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, Ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders and other state and local provisions implementing them.”



# Washington

## 1.2(d)

- 2018:
- Jeff Sessions revokes Cole Memo
- Washington Supreme Court amended Comment 18 of Rule 1.2:
  - “Under paragraph (d), a lawyer may counsel a client regarding Washington's marijuana laws and may assist a client in conduct that the lawyer reasonably believes is permitted by those laws. If Washington law conflicts with federal or tribal law, the lawyer shall also advise the client regarding the related federal or tribal law and policy.”

# Washington

## 1.2(d)

- 2024 amendment to Comment 18 of Rule 1.2:
  - “Under paragraph (d), a lawyer may counsel a client regarding **Washington laws** and may assist a client in conduct that the lawyer reasonably believes is permitted **under those laws (for example and without limitation, Washington laws related to reproductive health care services, gender-affirming care, or cannabis)**. If Washington law conflicts with federal law or the law of another jurisdiction, the lawyer shall also advise the client regarding the **conflicting laws or recommend that the client seek the advice of a lawyer with established competence in the field in question. See Comment 1 to Rule 1.1. If a lawyer counsels or assists a client regarding Washington’s law in these circumstances, that conduct, and the predominant effect of the conduct, shall be deemed to occur in Washington for purpose of these Rules.**”

# Washington Rule 8.4

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;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

## COMMENT

- [8] A lawyer who counsels a client regarding Washington's marijuana laws or assists a client in conduct that the lawyer reasonably believes is permitted by those laws does not thereby violate RPC 8.4. See also RPC 1.2 Washington Comment [18].
- In 2018, the Official Comments to RPC 8.4 were amended by the adoption of Comment [8], reflecting changes in Washington statutes and federal policy regarding marijuana. The amendment was proposed by the Washington State Bar Association and was accompanied by the following drafter's comment: Purpose: Proposed by the Washington State Bar Association Committee on Professional Ethics on an expedited basis, in response to the U.S. Department of Justice's 2018 rescission of its nationwide guidance regarding enforcement of federal law in relation to activity involving marijuana, to clarify that Washington lawyers who counsel or assist clients regarding state marijuana laws are protected by the "safe harbor" provision of Comment 18 to RPC 1.2.

# Washington Rule 8.4

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;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

COMMENT [8] 2024 amendment:

- A lawyer who counsels a client regarding Washington **laws** or assists a client in conduct that the lawyer reasonably believes is permitted by those laws **(for example and without limitation, Washington laws related to reproductive health care services, gender-affirming care, or cannabis)** does not thereby violate RPC 8.4. See also RPC 1.2 Washington Comment

# Navigating the Challenges of Representing Cannabis Businesses

- Know and monitor legal developments.
- Counsel with candor.
- Use precise engagement agreements.
- Review RPC 8.5 (or equivalent) when licensed in multiple states.

# Know the Law: Understanding the Legal Landscape

- Cannabis businesses exist in a legal gray area: legal under state law but illegal under federal law, made possible by an administrative guidance document – the Cole Memo.
- Cannabis remains a Schedule I controlled substance under the Federal CSA, and the DEA can choose to prosecute at any time.
- Stay informed:
  - Review state and federal laws and regulations impacting cannabis businesses.
  - Monitor federal enforcement priorities.

# Know the Law: What to Watch

- Rohrabacher-Farr Amendment
- Rescheduling Cannabis to Schedule III
- New DEA and DOJ leadership

# Know the Law: Rescheduling Cannabis

- Rescheduling Process: Initiation-> Scientific and Medical Review -> Proposed Rulemaking -> Hearings -> Final Rule
- May 21, 2024: DOJ issued a Notice of Proposed Rulemaking in the Federal Register.
- DEA's Eight-Factor Analysis:
  - Factor 1: Cannabis' Actual or Relative Potential for Abuse
  - Factor 2: Scientific Evidence of the Pharmacological Effects and General Pharmacology of Cannabis
  - Factor 3: The State of Current Scientific Knowledge Regarding the Drug or Other Substance
  - Factor 4: Its History and Current Pattern of Abuse
  - Factor 5: The Scope, Duration, and Significance of Abuse
  - Factor 6: What, if any, Risk there is to the Public Health
  - Factor 7: Its Psychic or Physiological Dependence Liability
  - Factor 8: Whether the Substance is an Immediate Precursor of a Substance Already Controlled
- Hearing Scheduled: Dec. 2, 2024, rescheduled to January 21, 2025.
  - Final rule unlikely before mid-2025.
- Effects of Rescheduling:
  - Allows cannabis businesses to benefit from tax deductions (removes Section 280E restrictions).
  - However: the conflicts between state and federal laws will continue to complicate representation of cannabis businesses.



# Counsel with Candor: Clear and Honest Legal Advice

- Provide clients with full transparency about the legal risks of operating a cannabis business:
  - State laws may permit cannabis activity, but federal law prohibits it.
  - Clients must understand federal prohibition and financial restrictions.
- Advise clients against:
  - Transporting cannabis across state lines.
  - Relaxing their tracking and reporting standards.
  - Engaging in activities that could attract federal enforcement.
- Clearly communicate the limitations of legal protections under

# Counsel with Candor: Financial Constraints

## Taxation and Banking Challenges Due to State and Federal Law Conflict:

- Tax Code Issues: IRS Code § 280E
  - Section 280E prohibits cannabis businesses from deducting ordinary and necessary business expenses because cannabis is classified as a Schedule I substance under federal law.
    - Higher Tax Rates: Effective tax rates often exceed 70% without deductions for rent, salaries, and marketing.
    - Cost of Goods Sold is deductible, but deductions are heavily scrutinized by the IRS.
      - Misclassification of expenses can trigger audits and penalties.
- Banking Issues
  - Federal restrictions discourage most banks from servicing cannabis businesses due to

# Washington Financial Institutions with Cannabis-Friendly Policies

- Sound Community Bank
- Timberland Bank
- Twin City Bank
- Numerica Credit Union
- Bee Credit Union
- Salal Credit Union
- Sound Credit Union
- PayQwick
- POSaBIT, Inc.

# Use Precise Engagement Agreements: Your Role and Scope of Representation

- Clarify your role and manage risks
- Explicitly define the scope of representation under state law, consistent with Comment 18 to RPC 1.2(d):
  - Clarify that your representation is limited to the client's conduct that is reasonably believed to be permitted under Washington cannabis laws. Acknowledge that such conduct conflicts with federal law or the laws of other jurisdictions.
- Recommend they seek additional legal advice from competent counsel other jurisdictions with different laws. Address limitations on your ability to advise clients due to federal law.
- Protect yourself from inadvertent ethical violations.

# Ensuring Compliance with RPCs while Licensed in Multiple States: ABA Model Rule 8.5

- Example: Washington vs. Idaho
- Conflicting Rules:
  - Washington allows representation of cannabis businesses.
  - Idaho prohibits cannabis business activities, thus representation violates Idaho RPC 1.2(d).
- Idaho RPC 8.5:
  - Lawyers licensed in Idaho are subject to its rules regardless of where conduct occurs.
  - Choice of Law Analysis (RPC 8.5(b)):
    - Tribunal Matters: Governed by the jurisdiction of the tribunal.
    - Other Conduct:
      - Rules of the jurisdiction where conduct occurred, OR
      - Rules of the jurisdiction where the predominant effect occurs.
      - Safe Harbor: if conduct conforms to rules in jurisdiction where the lawyer reasonably believes the predominant effect will occur.

# States that have adjusted RPCs or Ethics based on cannabis laws

1. Alaska: Amended RPCs.
2. California: Amended RPCs.
3. Colorado: Amended RPCs.
4. Connecticut: Amended RPCs.
5. Illinois: Amended RPCs
6. Maryland: Amended RPCs.
7. Mississippi: Issued Ethics Opinion.
8. Missouri: Issues Ethics Opinion.
9. Nevada: Amended RPCs.
10. New Hampshire: Amended RPCs.
11. New Jersey: Amended RPCs.
12. New Mexico: Amended RPCs.
13. New York: Issued Ethics Opinion.
14. Oregon: Amended RPCs.
15. Rhode Island: Issued Ethics Opinion.
16. Vermont: Amended RPCs.
17. Virginia: Amended RPCs

## Georgia Supreme Court:

2021: Georgia Supreme Court denied the Georgia bar's motion to amend the Georgia Rules of Professional Conduct to permit Georgia lawyers to advise clients involved in cannabis businesses.

*“The Court understands the desire of some Georgia lawyers to assist Georgia’s fledgling cannabis industry. But this Court has long prohibited Georgia lawyers from counseling and assisting clients in the commission of criminal acts. The passage of a Georgia statute purporting to permit and regulate conduct that constitutes federal crimes does not change that long-standing principle. The motion is DENIED.”*

# The Emergence of Psilocybin Legislation and Industry

What do the rules for professional conduct look like in this emerging field?



# Psilocybin Legislative Activity

- 22 state legislatures have introduced bills and ballot initiatives across the U.S.
- Only three show significant development so far:
  - Oregon
  - Colorado
  - Washington
- Legislative Trend:
  - Reflects a broader trend toward a public health approach to drug regulation.
  - Mirrors the evolution seen in cannabis legislation, starting with medical use before potential expansion to adult or recreational use.
- Potential Challenges:
  - Largest roadblock is federal inaction on drug decriminalization.
  - Partisan divide may hinder progress amid the U.S. mental health crisis.

### 1. Arizona

- House Bill 2486 would have appropriated \$30 million for psilocybin research grants and establish an advisory council
- \$5 million appropriated in health care budget for psilocybin studies on PTSD, depression, COVID, and inflammatory disorders
- Died in the process

### 2. California

- Several cities have passed resolutions making personal psilocybin use lowest law enforcement priority
- SB 58 to decriminalize certain natural psychedelics was passed by legislature but vetoed by Governor

### 3. Colorado

- Voters passed Proposition 122 in November 2022 to legalize and regulate psilocybin healing centers
- SB23-290 passed to implement Proposition 122 with penalties, local preemption, and consumer protections
- Psilocybin healing centers set to open in late 2024.

### 4. Connecticut

- 2021 law convened working group to study medical use of psilocybin
- 2023 budget bill earmarked funds for psychedelic-assisted therapy programs with psilocybin

### 5. District of Columbia

- Initiative Measure 81 makes investigation and arrest for personal entheogenic use lowest priority

### 6. Hawaii

- Bills introduced to decriminalize or legalize psilocybin, establish working groups to study therapeutic use

## 7. Illinois

- 2023 HB0001 would establish Psilocybin Advisory Board, psilocybin services, expunge records

## 8. Michigan

- Several cities have passed resolutions making personal psilocybin use lowest law enforcement priority
- Legalization ballot initiative deferred to 2024

## 9. Minnesota

- Bill passed establishing Psychedelic Medicine Task Force to study and advise on legalizing psilocybin

## 10. Missouri

- 2024 SB 768 passed, legalizing psilocybin treatment for veterans over 21.

## 11. Nevada

- Bill passed to establish the Psychedelic Medicines Working Group to study psilocybin therapy

## 12. New Jersey

- 2021 bill reduced penalty for personal psilocybin possession under 1 oz to disorderly person offense
- 2024 "Psilocybin Behavioral Health Access and Services Act" would decriminalize psilocybin, regulate production, and allow home grow option.

### 13. New Mexico

- HB393 would establish Psilocybin Advisory Group to study legal regulated access
- Died in the process

### 14. Oklahoma

- 2023 House Bill passed promoting research into psilocybin therapy for mental health treatment
- No activity since March 2023

### 15. Oregon

- Measure 109 legalized and regulated psilocybin services, passed in November 2020, being implemented.
- The state now has 27 service centers and over 300 licensed facilitators.

### 16. Pennsylvania

- Bills introduced to promote research into therapeutic potential of psilocybin
- Died in process

### 17. Rhode Island

- 2023 bill introduced to legalize psilocybin possession and cultivation for personal use
- Referred to Rhode Island Senate

## 18. Texas

- 2021 bill passed, allowing veterans to participate in clinical trials using psilocybin, MDMA, and ketamine.
- 2021 bill established working group to research therapeutic efficacy of psilocybin

## 19. Utah

- 2022 law established task force to study mental health benefits of psychedelic psychotherapy
- 2023 bill introduced to legalize psilocybin therapy, died in the process.

## 20. Vermont

- Bills introduced to decriminalize entheogenic plants and establish psilocybin therapy working group

## 21. Virginia

- Bills introduced to legalize psilocybin treatment and establish Psilocybin Advisory Board
- Died in process

# 22. Washington

## Washington Psilocybin Services Act (the "Act" — Washington 2nd Sub. Senate Bill 5263, Chapter 364, 2023, Washington Sixty-Eight Legislative)

Washington is the third state exploring therapeutic benefits of psilocybin.

Governor Jay Inslee signed the Act on May 9, 2023.

- Creates a psilocybin task force and a clinical pilot program administered by the University of Washington.
- The Act takes a cautious and measured step to evaluate psilocybin for therapeutic uses.
- Targets Washington residents aged 21 and older, addressing mental health treatment needs.
- Mandates the Psilocybin task (Section 6), effective from May 9, 2023.
- Psilocybin therapy services pilot program outlined in Section 8, effective from July 23, 2023, administered by the University of Washington.
- Cautiously follows Oregon and Colorado but doesn't broadly legalize adult use.
- The Act was watered down by Governor Inslee's modifications.

### Other States

- Oregon regulates manufacture, transportation, delivery, and distribution with a licensing program.
- Colorado allows supervised adult usage and personal use of psilocybin-containing mushrooms.
- Psilocybin laws may be the next wave of drug legislation.
- Potential for greater impact and rapid implementation depending on the outcome of the 2024 elections.
- Similar trajectory to cannabis laws, starting with medical use before potential adult, personal, or recreational use.

Retail sales of magic mushrooms and psychedelics are currently not in the picture.

- Act follows the lead of Oregon and Colorado but doesn't broadly legalize adult use.
- Oregon allows supervised adult use, and Colorado legalizes personal use, including cultivation of psilocybin-containing mushrooms.
- Act takes a measured step, focusing on a psilocybin task force and a therapy services pilot program.
- Addresses therapeutic uses for residents aged 21 and older.

# Institutional Investment Trends: Psychedelics vs. Cannabis

## 1. Businesses launching investment campaigns:

- Compass Pathways Funding, a biotechnology company, raised \$125 million from Healthcare investors like TCGX and Aisling Capital, and other major firms such as Vivo Capital, RA Capital, and Surveyor Capital, with potential for an additional \$160 million.

## 2. Capital Influx in Psychedelics:

- The psychedelics sector witnessed a substantial increase of 116% in capital investment over the past year.
- Totaling \$438 million across 25 companies, second only to the vape sector in total capital invested among tracked sectors.
- Partnership deals for psychedelic drug development surged by an extraordinary 500% in 2023 compared to the same period in 2022.
- Over 60 partnership deals related to psychedelic therapeutics have been announced in 2023 year-to-date.
- Surge in R&D collaborations and licensing deals underlines pharmaceutical confidence in the therapeutic potential and commercial viability.

## 3. DEA Production Quotas:

- DEA significantly increased production quotas for various psychedelic substances used in research.
- Signaling a more favorable regulatory environment for psychedelics.

## 4. FDA Draft Guidance:

- FDA published new draft guidance in June.
- Highlights considerations for researching psychedelics to treat psychiatric and substance use disorders.
- Indicates a positive regulatory tone, contrasting with the unclear situation surrounding CBD and cannabis.

## 5. Institutional Investor Perception:

- Institutional investors show increased comfort investing in psychedelics companies and clinical research.
- Despite the early stage, the perception is that psychedelics offer a clearer regulatory pathway for medical approval compared to cannabis.

# Schedule I under the CSA

Psilocybin or Psilocyn, including “any material, compound, mixture, or preparation, which contains any quantity [those substances], or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation[.]”

Applies if you:

- Possess, manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense.



# Rules of Professional Conduct

- 1.2 (d): A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...
- 8.4 (b): A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects...

# Psilocybin Businesses Need Representation

- Example of complexity:

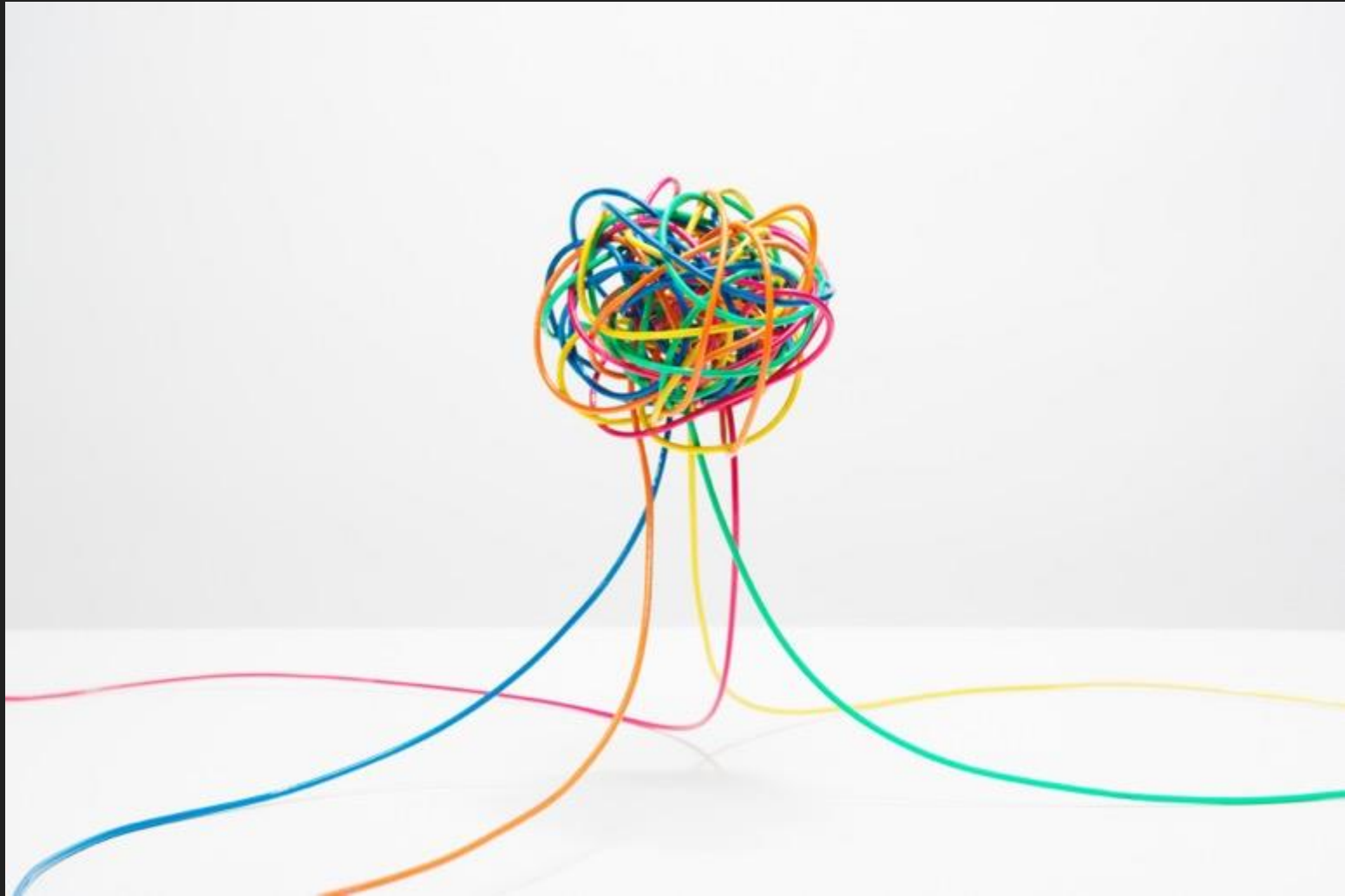
- Oregon

- OHA

- OPAB

- 5 Subcommittees

- Rules for each type of license



# Cannabis as the Trailblazer?

## Similarities

- Schedule I
- Derive directly from nature

## Differences

- No Cole Memo for Psilocybin
- Cannabis in state laws since 1970s
- Cannabis had medical precursors
- Less tax incentive for Psilocybin

# Oregon Psilocybin Attorneys

- 1.2(d): Amended in 2024
- *“Notwithstanding paragraph (c), a lawyer may counsel and assist a client in a proposed course of conduct that the lawyer reasonably believes is permitted under Oregon law. In the event Oregon law conflicts with federal law or the law of another jurisdiction, the lawyer may also advise the client regarding related such conflict and the potential legal consequences.”*

# Washington Psilocybin Attorneys

- Washington Psilocybin Services Act.
  - Representation is likely covered by the 2024 amendment to Comment 18 of RPC 1.2(d): *“a lawyer may counsel a client regarding Washington laws and may assist a client in conduct that the lawyer reasonably believes is permitted under those laws (for example and without limitation, Washington laws related to... cannabis).”*

# Possible Solutions for the Future



# Status Quo: State-By-State

## The Cannabis approach

- Good: Effective; tailored for each state
- Bad: Slow – Requires an amendment every time state endorses a federally controlled substance;
- Varying degrees
  - Inconsistent for lawyers licensed in multiple states
- Most are done under the radar
- Cautionary tale: Georgia



# Federal Rescheduling

- Schedule II: heavily regulated prescription drugs
- Schedule III: Ketamine
- Same problem as Schedule I – if state law does not align with federal regulations, advising clients would technically violate 1.2(d) without an amendment to the RPCs.
  - Example: state recreational cannabis vs. federal requirement for cannabis prescription

# ABA Model Rules Amendment

- Model rule 1.2(d) – to include cannabis and psilocybin
- Good: consistency among states; encourage reluctant states
- Bad: not bonding; would need to be amended every time majority of states endorse a federally controlled substance
  - Too many federally controlled substances to adequately encapsulate all possible endorsements with a single amendment.

Amending Model rule 8.4(b) – not really necessary

# Federal Legalization

- Would solve most, if not all of these issues.
- No indication it will happen

# Until this is resolved...

- Know and monitor legal developments.
- Counsel with candor.
- Use precise engagement agreements.
- Review RPC 8.5 (or equivalent) when licensed in multiple states.
- Stay updated on your local bar rules and advisory opinions.

**Questions?**

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