

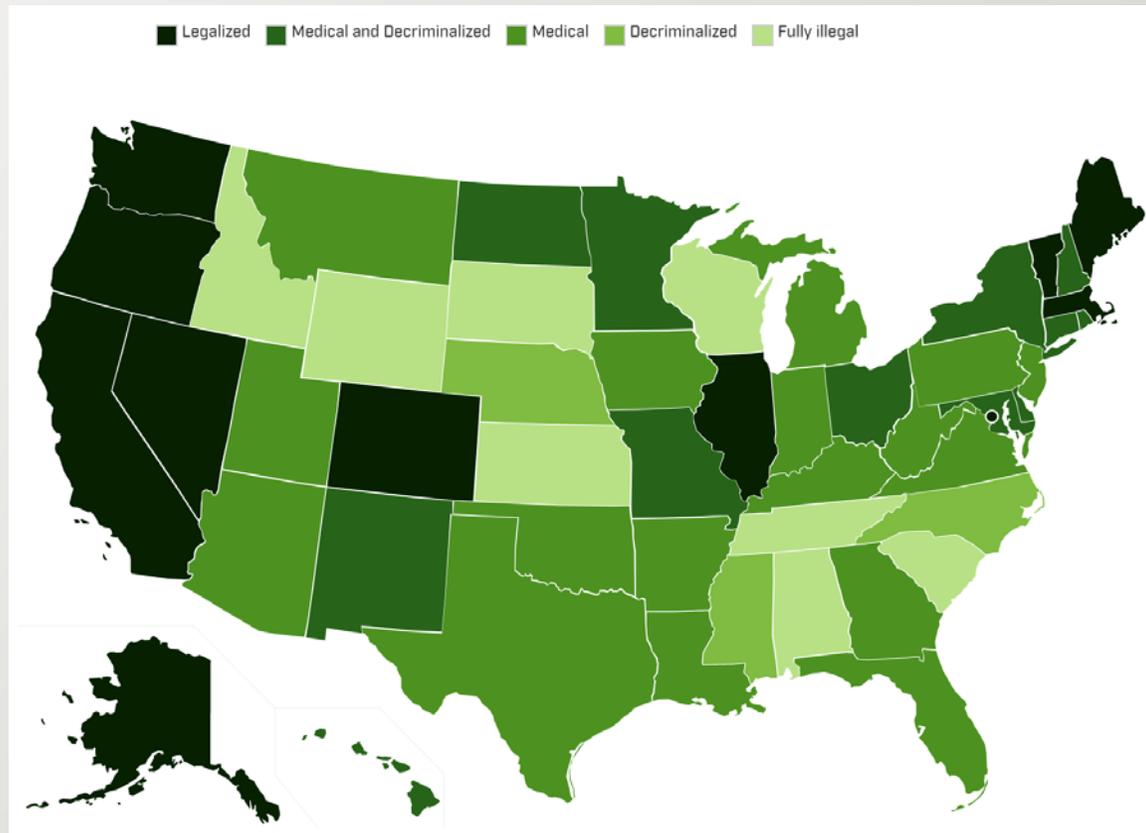
# Ethical Issues Regarding the Representation of Tribes Engaged in Marijuana Activities

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# Federal and State Laws Re: Marijuana

- Federal: Controlled Substances Act
- Varying State Laws



# Controlled Substances Act

- Defines Marijuana as a Schedule I drug
  - Meaning it has a high potential for abuse and no legitimate medical use
- Heavy mandatory minimums
  - Manufacture or Distribution of 1,000 kgs or 1,000 plants
    - Mandatory minimum of 10 years in prison, with no possibility of suspension or parole
    - Fines up to \$50,000,000
  - “Kingpin” Liability
    - Minimum 20 years
    - Applies where someone “obtains substantial income or resources” from the activity, and “occupies a position ... of management.”
- Potential accomplice liability for anyone slightly involved in the process.

# Defenses?

- The fact that it is legal under state law is not a defense to federal criminal liability.
- Enforcement memos
  - In 2013, then-Deputy Attorney General of the United States James Cole issued an enforcement priorities memo in response to Washington and Colorado legalizing marijuana.
    - The memo instructed prosecutors not to prosecute marijuana activities that were legal under a state's robust regulatory system, if one existed.
  - In 2014, Director of the Executive Office for United States Attorneys, Monty Wilkinson, issued a memorandum that expanded the Cole Memorandum to tribes as well as states.
  - Jeff Sessions rescinded both memos (which were not legally binding in the first place)

# State Laws

- Washington – Marijuana is legal to own and use, and can be grown and distributed by licensed entities in accordance with complex regulations.
- Oregon – Similar to Washington.
- Idaho – No marijuana allowed, not even medical marijuana.
- Montana – Medical marijuana allowed under complex regulations, harsh sentences for non-medical marijuana.
- Alaska – Similar to Washington, also allows onsite consumption subject to certain rules.
- Common theme looking at all the state laws is that they are subject to extensive and complicated regulations. Precisely the kind of laws that you might need legal help to navigate.

# State Professional Responsibility Rules

- Two relevant rules:
  - 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, 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.
  - 8.4: It is professional misconduct for a lawyer to [commit crimes].

# State Ethics Opinions

- Washington Advisory Opinion 201501: “In this unprecedented situation, it would be the failure to allow lawyers to advise their clients rather than allowing them to do so, that would undermine the rule of law.”
  - Washington RPC 1.2 Comment 18: “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.”
- Most states that have considered the issue have come out the same way.
- Notable exceptions:
  - North Dakota: Even if you go to a state where it is legal to use medical marijuana, going there and using medical marijuana violates the rules.
  - Pennsylvania: “Once a jurisdiction makes the policy decision to authorize some form of marijuana related activity, those who choose to engage in such activity – and the public at large – would be better served if the legal profession was able to advise clients engaged in such activities without fear of professional discipline. However, the Committees do not agree that the indisputable existence of such a need for legal services can justify ignoring the clear language of a Rule of Professional Conduct.”

# Tribal-State Conflict

- Tribes can choose whether to proceed under state law or not
- At least some tribes, in California and Wisconsin, were raided in 2015 despite the alleged protection of the Wilkinson memo.
- If the issue arose, state bars might be less forgiving of actions that are legal under tribal law but illegal under both state and federal law.