

## KEEP CALM AND FOLLOW STATE LAW: MARIJUANA ATTORNEYS REACT TO SESSIONS MEMO

When Attorney General Jeff Sessions announced on January 4, 2018, that the Justice Department was rescinding previously issued guidance about the enforcement of the nation’s marijuana laws, he made clear that he was parting ways from the previous Administration’s approach to enforcement in states where use of the substance has been legalized.<sup>1</sup> What he did not do was make clear how he wants his Department to handle it now.<sup>2</sup>

The announcement came in the form of a memorandum issued by Sessions to all United States attorneys.<sup>3</sup> In it he stated that the attorneys “should follow the well-established principles that govern all federal prosecutions.”<sup>4</sup> In deciding which cases to prosecute, attorneys are to “weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General.”<sup>5</sup>

In the next paragraph, Sessions rescinded all previous guidance issued by the Justice Department as to federal law enforcement in states that have legalized marijuana.<sup>6</sup> The most well-known such guidance was a memorandum published by Deputy Attorney General James M. Cole, now generally referred to as the Cole Memorandum, that explicitly stated how the Justice Department prioritized different types of marijuana-related crimes.<sup>7</sup>

Sessions has since made informal comments at a law school event indicating that federal prosecutors would continue to focus on drug trafficking and other more significant cases, not minor offenses.<sup>8</sup> But his office has not issued any additional formal guidance since the memorandum on Jan. 4. Many commentators are saying the memo will not only create more confusion for federal prosecutors but also for cannabis attor-

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1. MEMORANDUM FROM JEFFERSON B. SESSIONS, ATTORNEY GENERAL, TO UNITED STATES ATTORNEYS, MARIJUANA ENFORCEMENT (Jan. 4, 2018), *available at* <https://www.justice.gov/opa/press-release/file/1022196/download> [hereinafter MEMORANDUM].

2. See Rachel Estabrook, *Sessions’ Memo Was ‘An Abdication Of Responsibility,’ Former Colorado US Atty. Says*, COLO. PUB. RADIO (Jan. 5, 2018), <https://www.cpr.org/news/story/sessions-marijuana-memo-irresponsible-says-former-us-attorney-for-colorado> (quoting former U.S. Attorney for Colorado John Walsh as saying it was unexpected that Sessions “would simply rescind the prior policy and not replace it with anything else.”).

3. MEMORANDUM, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. See Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 597, 609–10 (2015).

8. Sadie Gurman, *Sessions: US Prosecutors Won’t Take on Small-Time Pot Cases*, THE ASSOCIATED PRESS (Mar. 10, 2018), <https://apnews.com/5b27da207202466f90a08ae87614eaea>.

neys, businesspeople, and consumers.<sup>9</sup> Others think it will have relatively little impact: “The rescinding of the Cole Memo does not indicate any specific changes in enforcement policy, and it remains to be seen whether it will have any significant impact on the Department’s actions,” said a statement from Vicente Sederberg LLC, a marijuana law and policy firm with offices in Denver, Los Angeles, Las Vegas, Washington, D.C., and Boston.<sup>10</sup> “U.S. attorneys had vast prosecutorial discretion before and they will continue to have the same level of discretion.”<sup>11</sup>

With that much discretion left to individual U.S. attorneys, “the certainty depends on what state you’re in,” said Andrew Livingston, director of economics and research at Vicente Sederberg.<sup>12</sup> Many U.S. attorneys have issued public statements since the issuance of the memo, each striking a slightly different tone. Colorado’s interim U.S. Attorney Bob Troyer was one of the first, and he indicated that his office would not yet be making any changes in how it makes decisions.<sup>13</sup>

Here is what other U.S. attorneys in states with legalized recreational marijuana have said:

- Alaska: U.S. Attorney Bryan Schroder said the following in a statement: “The highest priorities of the U.S. Attorney’s Office in Alaska are consistent with those of the Justice Department nationally: combating violent crime, including as it stems from the scourge of drug trafficking. . . . We will continue to focus on cases that meet those priorities.”<sup>14</sup>
- California
  - Northern District: Acting U.S. Attorney Alex G. Tse, who stepped into that role on January 8, 2018, has yet to issue a statement regarding the memo from Sessions.<sup>15</sup>
  - Central District: Interim U.S. Attorney Nicola T. Hanna also just recently entered his position and has similarly not

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9. See Rachel Martin, *Sessions to Reverse Policy that Opened Door for States to Legalize Marijuana*, NAT’L PUB. RADIO (Jan. 4, 2018), <https://www.npr.org/2018/01/04/575635031/sessions-to-reverse-policy-that-opened-door-for-states-to-legalize-marijuana>.

10. Press Release from Brian Vicente, Founding Partner, Vicente Sederberg LLC (Jan. 4, 2018) (on file with author).

11. *Id.*

12. Telephone Interview with Andrew Livingston, Director of Economics and Research, Vicente Sederberg LLC (Feb. 5, 2018).

13. Hart Van Denburg, *Sessions Move on Marijuana Stirs Swift Reaction in Colorado*, COLO. PUB. RADIO (Jan. 4, 2018), <https://www.cpr.org/news/story/sessions-move-on-marijuana-stirs-swift-reaction-in-colorado>.

14. Naomi Klouda, *US Attorney: No Change to Enforcement Priorities After Sessions’ Decision*, ALASKA J. OF COM. (Jan. 4, 2018), <http://www.alaskajournal.com/2018-01-04/us-attorney-no-change-enforcement-priorities-after-sessions-decision>.

15. Eric Sandy, *Differing Views: U.S. Attorneys Address Cole Memo Repeal*, CANNABIS BUS. TIMES (Jan. 12, 2018), <http://www.cannabisbusinesstimes.com/article/attorneys-prosecutors-cole-memo-repeal-marijuana/>.

commented yet.<sup>16</sup> Hanna was one of seventeen interim attorneys named by Sessions on January 3, 2018.<sup>17</sup>

○ Southern District: Interim U.S. Attorney Adam L. Braverman, appointed by Sessions in November, said the following after the memo's issuance: "We will continue to utilize long-established prosecutorial priorities to carry out our mission to combat violent crime, disrupt and dismantle transnational criminal organizations, and stem the rising tide of the drug crisis."<sup>18</sup>

○ Eastern District: U.S. Attorney McGregor "Greg" W. Scott's office issued the following statement after Sessions' memo: "The cultivation, distribution[,] and possession of marijuana has long been and remains a violation of federal law for all purposes. We will evaluate violations of those laws in accordance with our district's federal law enforcement priorities and resources."<sup>19</sup>

- Colorado: In addition to his initial response, Troyer addressed state legislators on January 11, 2018, assuring them that his office would not step up marijuana-related prosecutions at the expense of other matters such as immigration, the opioid crisis and violent crime."<sup>20</sup>
- Maine: U.S. Attorney Halsey B. Frank said on January 9, 2018, that his office will not prioritize the prosecution of individuals for possession and will continue to focus on "the trafficking of opiates, cocaine, crack and similar hard drugs."<sup>21</sup>
- Massachusetts: U.S. Attorney Andrew E. Lelling struck a different tone than some of his peers in other districts when he said he would not "provide assurances that certain categories of participants in the state-level marijuana trade will be immune from federal prosecution."<sup>22</sup>

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16. Ben Adlin, *Here's Where US Attorneys Stand on Cannabis Enforcement*, LEAFLY (Jan. 11, 2018), <https://www.leafly.com/news/politics/heres-where-us-attorneys-stand-on-cannabis-enforcement>.

17. Joel Rubin, *With Trump Slow to Make Selections, Interim U.S. Attorneys Named in L.A. and Elsewhere*, L.A. TIMES (Jan. 3, 2018), <http://www.latimes.com/local/lanow/la-me-us-attorney-20180103-story.html>.

18. Adlin, *supra* note 16.

19. Bruce Kennedy and Alex Pasquariello, *One Month After Sessions Marijuana Memo, Where Do U.S. Attorneys Stand on Legal Weed?*, THE CANNABIST (Feb. 5, 2018), <https://www.thecannabist.co/2018/02/05/sessions-marijuana-cole-memo-us-attorney/97703/>.

20. Alicia Wallace, *Colo. Congressional Members Assured by U.S. Attorney They Shouldn't Expect Marijuana Prosecutions to Rise*, THE CANNABIST (Jan. 12, 2018), <https://www.thecannabist.co/2018/01/12/colorado-marijuana-prosecutions-troyer/96650/>.

21. Adlin, *supra* note 16.

22. *Id.*

- Nevada: Interim U.S. Attorney Dayle Elieson was also nominated to her position on January 3, 2018, and she has yet to comment on the memo.<sup>23</sup>
- New Hampshire: Acting U.S. Attorney John Farley gave the *New Hampshire Union Leader* a neutral response, mimicking the language of the memo from Sessions.<sup>24</sup>
- Oregon: U.S. Attorney Billy J. Williams published a guest opinion in the *Oregonian* declining to issue “blanket proclamations on our marijuana enforcement strategy”<sup>25</sup> but seems to be most concerned about overproduction and blackmarket sales, particularly those crossing state lines, as he held a summit to discuss those issues on February 2, 2018.<sup>26</sup>
- District of Columbia: A statement from U.S. Attorney Jessie K. Liu read as follows: “The U.S. Attorney’s Office for the District of Columbia is committed to reducing violent crime and dismantling criminal gangs and large-scale drug distribution networks that pose a threat to public safety.”<sup>27</sup>
- Washington:
  - Eastern District: “This United States Attorney’s Office will continue to ensure, consistent with the most recent guidance from the Department of Justice, that its enforcement efforts with our federal, state, local, and tribal law enforcement partners focus on those who pose the greatest safety risk to the communities in Eastern Washington, by disrupting criminal organizations, tackling the growing drug crisis, thwarting violent crime, and corralling white-collar fraudsters in this District,” said Interim U.S. Attorney Joseph Harrington on Jan. 5, the day he was appointed to his position.<sup>28</sup>
  - Western District: U.S. Attorney Annette L. Hayes gave a statement immediately after Sessions’ memo was issued, characterizing it as a “reiterat[ion]” of the “principles” that

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23. *Id.*

24. Shawne W. Wickham, ‘Horse Has Left the Barn:’ NH Dispensers React to Justice Dept.’s Switch on Legal Marijuana, N.H. UNION LEADER (Jan. 5, 2018), <http://www.unionleader.com/article/20180104/NEWS06/180109715/>.

25. Adlin, *supra* note 16.

26. Gillian Flaccus, “We’re Going to Do Something About It”: Oregon’s Federal Prosecutor Holds Summit on Black Market Marijuana, THE CANNABIST (Feb. 2, 2018), <https://www.thecannabist.co/2018/02/02/oregon-billy-williams-attorney-marijuana-summit/98128/>.

27. Keith L. Alexander, *Lawyers, Legal Experts Watching How Sessions’s New Marijuana Enforcement Impacts District Residents*, THE WASH. POST (Jan. 4, 2018) [https://www.washingtonpost.com/local/public-safety/lawyers-legal-experts-watching-how-sessions-new-marijuana-enforcement-impacts-district-residents/2018/01/04/af13f7aa-f197-11e7-b3bf-ab90a706e175\\_story.html?utm\\_term=.3c7bcf11bb04](https://www.washingtonpost.com/local/public-safety/lawyers-legal-experts-watching-how-sessions-new-marijuana-enforcement-impacts-district-residents/2018/01/04/af13f7aa-f197-11e7-b3bf-ab90a706e175_story.html?utm_term=.3c7bcf11bb04).

28. Kennedy and Pasquariello, *supra* note 19.

U.S. attorneys rely on and an expression of trust that U.S. attorneys “are in the best position to address public safety in their districts.”<sup>29</sup> She added that her office would continue to “focus on those who pose the greatest safety risk to the people and communities we serve.”<sup>30</sup>

While some of those attorneys gave the impression of intending to be harder on marijuana enforcement than in the past, they may not be successful at it in reality. Public perception of legal marijuana is largely positive in states that have voted for it and attempting to take down the industry may lead to political backlash, said Livingston.<sup>31</sup> And at any rate, as Sam Kamin, the Vicente Sederberg Professor of Law and Policy at the University of Denver’s Sturm College of Law, points out, the U.S. attorneys “know what jurors in these states are like.”<sup>32</sup>

Thus, marijuana entrepreneurs operating in accordance with state law do not appear to be facing an increased likelihood of federal prosecution. And yet, Sessions’ memo has still cast a shadow over the industry. Issued just days after legalization took effect in California, the memo was blamed for the demise of some investment deals there, and banks are thought to be even more hesitant to work with cannabis clients than they were previously.<sup>33</sup>

Kamin says that makes sense, given that other countries such as Canada and Uruguay are adopting nationwide cannabis-friendly policies: “If you have \$3 million to invest in marijuana, would you do it here or would you go somewhere else?” he said.<sup>34</sup>

The issuance of the memo has led to calls for Congress to take action, including from the Colorado statehouse and Senator Cory Gardner.<sup>35</sup>

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29. *Id.*

30. *Id.*

31. Telephone Interview with Andrew Livingston, Director of Economics and Research, Vicente Sederberg LLC (Feb. 5, 2018).

32. Interview with Sam Kamin, Vicente Sederberg Professor of Law and Policy, University of Denver Sturm College of Law (Jan. 25, 2018).

33. Ben Markus, *Investment Is All About Risk And Sessions Has Spooked Colorado’s Pot Biz*, COLO. PUB. RADIO (Jan. 24, 2018), <https://www.cpr.org/news/story/investment-is-all-about-risk-and-sessions-has-spooked-colorado-s-pot-biz>.

34. Interview with Sam Kamin, Vicente Sederberg Professor of Law and Policy, University of Denver Sturm College of Law (Jan. 25, 2018).

35. See Alicia Wallace, *Colorado Congressional Members Developing Plan for Federal Marijuana Protections*, THE CANNABIST (Jan. 5, 2018), <https://www.thecannabist.co/2018/01/05/colorado-marijuana-federal-protections/96130/>; Camila Domonoske, *Colorado Sen. Cory Gardner Continues His Standoff With Jeff Sessions Over Marijuana*, NAT’L PUB. RADIO (Jan. 10, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/10/577103864/colorado-sen-cory-gardner-continues-his-standoff-with-jeff-sessions-over-marijua>.

“This is really an opportunity for Congress to act in accordance with the voting public, and to reform marijuana laws at the federal level,” said Rachel Gillette, a partner at Greenspoon Marder LLP.<sup>36</sup>

While the memo may still make some people feel uncertain about the future, that’s a feeling people in this industry are used to: “If you entered this industry in 2009, ‘10, ‘11, you were dealing with uncertainty,” Kamin said. “The people who have made it are people who can deal with uncertainty.”<sup>37</sup>

In Colorado at least, that worry shouldn’t increase: “The statement that came from [Troyer] was good, and so as long as he stays the U.S. attorney in Colorado, marijuana businesses operating in Colorado, I don’t think, are all that much more worried,” said Livingston.<sup>38</sup>

And the message to clients hasn’t really changed.

“The best advice I can give a client is to remain in strict compliance of state law,” said Gillette.<sup>39</sup>

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36. E-mail from Rachel Gillette, Partner, Greenspoon Marder LLP, to author (Jan. 31, 2018) (on file with author).

37. Interview with Sam Kamin, Vicente Sederberg Professor of Law and Policy, University of Denver Sturm College of Law (Jan. 25, 2018).

38. Telephone Interview with Andrew Livingston, Director of Economics and Research, Vicente Sederberg LLC (Feb. 5, 2018).

39. E-mail from Rachel Gillette, Partner, Greenspoon Marder LLP, to author (Jan. 31, 2018) (on file with author).

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