COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

May 3, 2013, 8:45 a.m.
Colorado Supreme Court Conference Room 4244
Ralph Carr Colorado Judicial Center, 4th Floor
2 East 14th Avenue, Denver
Call-in number: 720-625-5050 - Access Code 33432352#

PLEASE NOTE EARLY START TIME AND ALLOW EXTRA TIME TO CLEAR SECURITY, POTENTIALLY AT TWO CHECK-POINTS

1. Approval of minutes – February 1, 2013 meeting [To be distributed separately]

2. Report (brief) from Subcommittee on August 2012 Amendments to ABA Model Rules [Michael Berger]

3. Report from Subcommittee on CRPC 5.5(a)(3), Assisting in the Unauthorized Practice of Law [Tony Van Westrum]

4. Report from Subcommittee on OARC- and COLTAF-proposed amendments to C.R.P.C. 1.15 [Jamie Sudler]

5. Report from Subcommittee on Marijuana [Judge Webb, pages 1-142]

6. New business: Potential amendment to CRPC 1.2(c), concerning unbundled legal services [David Little, pages 45-48 of February 1, 2013 meeting materials]

7. Administrative matters: Select next meeting date

8. Adjournment (before 11:45)

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REPORT OF AMENDMENT 64 SUBCOMMITTEE

The Amendment 64 Subcommittee[1] respectfully submits the following report.

Executive Summary

Possessing, cultivating, and selling marijuana remain illegal under federal law but are, under some circumstances, no longer criminal under state law because of two amendments to the Colorado Constitution. This discrepancy creates uncertainty whether lawyers could face disciplinary action based on either their personal conduct or their advice to clients under these amendments. A majority of the subcommittee[2] recommends that this uncertainty be removed by two changes to the Rules of Professional Conduct:

- A new comment to Rule 8.4 clarifying that a lawyer will not be deemed dishonest, untrustworthy, or unfit as a lawyer solely because the lawyer engages in personal conduct that may

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[1] F. Alvarez, M. Berger, G. Blum, R. Nemirow, A. Rothrock, M. Squarrell, J. Sudler, E. Wald, and J. Webb.

[2] In lieu of a minority report, The Office of Attorney Regulation Counsel (OARC) has chosen to prepare a memorandum opposing both proposed changes. A draft of that memorandum had been circulated before this report was released.

violate federal law, but is permitted under a specific provision of the state constitution.

- A new Rule 8.6 clarifying that notwithstanding any other Rule, a lawyer will not be subject to discipline for engaging in personal conduct, or for advising clients concerning activity, that may violate federal law, but which is permitted under a specific provision of the state constitution.

II. Background

The medical marijuana amendment (Attachment 1) and Amendment 64 (Attachment 2) afford lawyers the opportunity to engage in personal conduct that is permitted under state law. However, because such conduct still violates federal criminal law, lawyers remain vulnerable to discipline under R.P.C. 8.4(b)[3] for such conduct. The background for this anomaly is discussed at length in Colorado Bar Association Ethics Committee Formal Opinion No. 124 -- A Lawyer's Medical Use of Marijuana. (Attachment 3) For the same reason, a lawyer who counsels a client about selling, possessing, or cultivating marijuana, or engaging in

[3] "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."

related activity, such as leasing property to a marijuana dispensary, could be subject to discipline under R.P.C. 1.2(d).[4]

III. The Need for Clarification

Whether the federal government will take action in response to Amendment 64 remains uncertain.[5] Federal law enforcement action could effectively shut down the cultivation and distribution of marijuana contemplated by the amendments, although little such action has been taken concerning medical marijuana. Whether the federal government could use the Supremacy Clause, U.S. Const. art. VI, cl. 2, to invalidate one or both of the amendments to the Colorado Constitution is unclear. Hence, the subcommittee believes that the possibility of federal action does not preclude the need to clarify ethical limitations on lawyers' conduct in this area.

A. Personal Conduct

How many lawyers have been, or without changes to the Rules will be, deterred from engaging in personal conduct permitted by

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[4] "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal . . . ."

[5] Federal criminal law could be amended to exempt from prosecution action that conforms to state law, as Representative DeGette has proposed (Attachment 4).

the amendments is unknowable. As for the potential chilling effect, the Ethics Committee recognized in Formal Opinion No. 124 that it "cannot speak to how the Colorado Supreme Court Office of Attorney Regulation Counsel . . . may regard the lawful use of medicinal marijuana by [lawyers] under either the Colorado Rules or other disciplinary rules." Similarly, whether a hearing board would discipline a lawyer for violating R.P.C. 8.4(b) based on conduct permitted by either of the amendments is indeterminable.

Comment [2] to R.P.C. 8.4(b) explains that while "[m]any kinds of illegal conduct reflect adversely on fitness to practice law . . . some kinds of offenses carry no such implication." This distinction was adopted in Formal Opinion No. 124, which cited *People v. Hook*, 91 P.3d 1070, 1073-74 (Colo. OPDJ 2004) (lawyer's committing the felony of illegal discharge of a firearm does not by itself determine professional discipline that should be imposed). Although the ethics opinion did not cite any authority involving personal use of marijuana by a lawyer in conformity with state law, (nor has the subcommittee found any such authority), it concluded:

> [A] lawyer's medical use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b).1 Rather, to

> violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

OARC's memorandum, discussed further below, views this opinion "as well reasoned and persuasive." However, whether this rationale would have equal force concerning possession or cultivation of marijuana for personal use but without medical need, as now permitted by Amendment 64, could be questioned.

B. The Lawyer as Advisor

The Ethics Committee is considering, but has not yet issued, a formal opinion concerning whether a lawyer who advises clients on activities involving or relating to personal use[6], as well as cultivation and sale of marijuana for profit, would be subject to

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[6] For example, a client could seek advice concerning how the client's prospective use of marijuana would implicate other criminal laws, employment, and parenting time. *See, e.g., Coats v. Dish Network, L.L.C.*, 2013 COA 62 (lawful off-duty conduct statute); *People v. Watkins*, 2012 COA 15 (parole revocation); *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011) (unemployment compensation); *In re Marriage of Parr and Lyman*, 240 P.3d 509 (Colo. App. 2010) (parenting time).

discipline for having given such advice. At its most recent meeting, the Ethics Committee adopted the following resolution:

> The Ethics Committee of the Colorado Bar Association encourages the Supreme Court Standing Committee on the Rules of Professional Conduct to recommend to the Supreme Court the adoption of a rule which provides that an attorney will not be subject to discipline for providing advice to a client regarding conduct which is lawful under Colorado law.

Other indications that this subject is of interest to lawyers include:

- Law review commentary[7]
- Several related programs presented by CLE of Colorado over the last two years
- Two C.A.R. 4.2 petitions requesting the Court of Appeals to take interlocutory review of lower court orders addressing an illegality defense to contracts involving marijuana businesses.[8]

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[7] *See Marijuana Lawyers: Outlaws or Crusaders*, Sam Kamin and Eli Wald (Attachment 5); *Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health?*, A. Rothrock (Attachment 6).

[8] Both petitions were denied in unpublished orders.

- Divergent ethics opinions in other states.[9]

C. Uniformity

Because of the uniquely local nature of the marijuana amendments to our constitution, the majority does not perceive a uniformity concern in conforming the Rules to our constitution.

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[9] The bar association ethics committees of three other states -- Arizona, Connecticut, and Maine -- have addressed the uncertainty surrounding a lawyer's duties when considering the conflicting provisions of federal and state marijuana laws. Arizona's Ethics Committee refused to "apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in 'clear and unambiguous compliance' with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits." State Bar of Arizona Ethics Opinion 11-01 (February 2011). Maine's Professional Ethics Commission opined that so long as both the federal law and the language of the Rule 1.2(d) each remain the same, a lawyer must perform the analysis required by Rule 1.2(d) and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. Maine Opinion 199 (July 7, 2010). In Informal Opinion 2013-02, the Connecticut Bar Association Professional Ethics Committee identified the problem, and, quoting the Maine opinion, noted that "the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not . . ," but left it to individual lawyers to decide for themselves when it was permissible to advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act or whether doing so constitutes assisting clients in conduct that violates federal law.

D. Prosecutorial Discretion

The majority recognizes that the proposals will limit prosecutorial discretion, as noted in OARC's memorandum. However, it disagrees with many of the views expressed in that memorandum, for the following reasons.

First, as discussed in the next two sections of this report, the proposed changes would still permit discipline where a lawyer's personal use of marijuana implicated rules other than Rule 8.4. The same would be true if the lawyer's personal conduct or client advice implicated federal laws beyond those prohibiting the mere possession, sale, or cultivation of marijuana. For example, a lawyer could be subject to discipline for counseling a client on how to circumvent the federal money laundering statute, although the funds in question may have arisen from marijuana-related activity that is lawful under our state constitution.

Second, and with respect for the new (and old) management of the Colorado attorney regulation system, while all prosecutors necessarily have wide discretion in charging, this discretion is not without limits. A prosecutor has no discretion to decide that certain conduct is inimical to society and should be prosecuted, if

the legislature has not seen fit to criminalize the conduct.[10] Here, the voters have spoken by twice amending the Constitution, while recognizing that federal prohibitions would remain.[11] The initiative power under Art. V, section 1 of the Colorado Constitution vests "*legislative* power directly in the people." *Vagneur v. City of Aspen*, 295 P.3d 493, 504 (Colo. 2013) (emphasis in original). Thus, if adopted by the supreme court, in its quasi-legislative, rule-making capacity, the proposed comment and rule change would appropriately subordinate discretion to the will of the people.

Third, the majority believes that OARC misses the mark in stating, "The Attorney Regulation Committee, the Presiding

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[10] *See People v. Gallegos*, 644 P.2d 920, 930 (Colo. 1982) ("If the habitual criminal statute delegated to prosecutors the power to define criminal conduct then it might run afoul of separation of powers limitations . . . . Only the legislature may declare an act to be a crime.").

[11] The Blue Book summary of Amendment 64 includes the following: "Even if Amendment 64 is adopted, the possession, manufacture, and sale of marijuana remain illegal under current federal law, so the adoption of the measure may expose Colorado consumers, businesses, and governments to federal criminal charges and other risks"; "The adoption of Amendment 64 will send a message to the federal government and other states that marijuana should be legal." The summary of the medical marijuana amendment says, "Under federal criminal law, it will continue to be illegal to sell or use marijuana for any purpose."

Disciplinary Judge, Hearing Boards and ultimately the supreme court are checks on OARC's discretion." When disciplinary proceedings are initiated, a lawyer will incur expense and lost time in defending the charge, and may suffer anxiety over the potentially catastrophic outcome. Even if the lawyer is ultimately vindicated, those impacts are not erased. Hence, the specter of disciplinary action will very likely have a chilling effect on lawyers, in both their personal conduct and the representation they accept, unless the proposed comment and rule change remove this cloud. Indeed, the majority believes that this chilling effect would *increase* if lawyers were to read the following sentences in the memorandum:

- "It may be that an attorney decides not to engage in certain conduct based on the fear of being investigated by OARC."
- "[U]ntil Congress changes drug laws, an attorney may still be subject to discipline for violating federal criminal laws and for counseling or assisting a client in doing so."

Fourth, the memorandum takes inconsistent positions by saying, "Personal use of marijuana in Colorado in compliance with state law is not an area of misconduct that OARC considers a violation of Colo. RPC 8.4(b) even if a violation of federal law," but

then also saying, "case-by-case review would include matters involving personal use of marijuana." The memorandum offers no explanation as to why such state-law-compliant conduct would *ever* reflect adversely on a lawyer's honesty, trustworthiness or fitness in other respects to practice law. This inconsistency illustrates the very broad discretion of OARC in determining what conduct to charge based on this undefined standard. Hence, rulemaking is an appropriate restriction on discretion, prior to proceedings before a hearing board.

In sum, the memorandum says that "OARC has already stated that the office will follow the will of the Colorado electorate on this issue." However, the majority submits that the likely chilling effect, without a restriction on OARC's discretion to prosecute in this area, deters lawyers from furthering "the will of the Colorado electorate" by providing citizens with advice on engaging in conduct that is now lawful under our constitution.

IV. Personal Conduct of the Lawyer

A majority of the subcommittee recommends the following new comment to Rule 8.4:

> [2A] Conduct of a lawyer that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. This comment specifically addresses two constitutional amendments: Article XVIII. Miscellaneous, § 14. *Medical use of marijuana for persons suffering from debilitating medical conditions*, and Article XVIII. Miscellaneous, § 16. *Personal use and regulation of marijuana.* The phrase "solely because" clarifies that a lawyer's use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. *See* Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

The majority believes that by endorsing the rationale of Formal Opinion No. 124, in which the OARC memorandum concurs, the comment would lessen the chilling effect on lawyers' personal conduct in this area out of concern over the exercise of prosecutorial discretion based on violation of federal law. However, because the majority recognizes that such conduct, coupled with other activity by the lawyer, could implicate federal law more

broadly, the phrase "standing alone" is intended to limit the safe harbor of this comment. This phrase is explained in a proposed comment to new Rule 8.6, discussed in the next section of this report.

The subcommittee considered the principle that comments should not contradict rules. Here, because engaging in illegal activity does not always adversely reflect on a lawyer's "honesty, trustworthiness, or fitness in other respects," the majority believes that this limitation can be addressed in a comment without contradicting the rule.

As to the phrase "specific provision of the Colorado Constitution," the subcommittee considered, but ultimately rejected, a proposal broadening the scope of the comment, (as well as of proposed Rule 8.6, using similar language), by adding "or other state law." The majority submits that constitutional provisions have more force and greater longevity than legislation. However, the majority also believes that the phrase "(and in implementing legislation or regulations)" is necessary to give full effect to the constitutional provisions.

The majority recognizes some potential redundancy between this comment and proposed Rule 8.6. However, the majority perceives independent justification for the comment because potential discipline would not be imposed solely on the basis of possessing or cultivating marijuana, which would be precluded by the proposed rule. Rather, discipline would be based on the intermediate determination that such conduct "reflect[ed] adversely" on the lawyer.

V. Advice by a Lawyer

A majority of the subcommittee recommends the following new Rule 8.6:

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

The majority believes that this new rule, rather than modifying the language of Rule 1.2(d) or adding a definition of "assisting,"[12] better implements the objective of allowing a lawyer to counsel or assist clients concerning marijuana-related activities that are lawful under state law, but which may violate federal law.

The majority also recommends a comment to the new rule explaining that it derives from the amendments, using the same language as in the proposed comment to Rule 8.4:

> [1] This rule specifically addresses two constitutional amendments: Article XVIII. Miscellaneous, § 14. *Medical use of marijuana for persons suffering from debilitating medical conditions*, and Article XVIII. Miscellaneous, § 16. *Personal use and regulation of marijuana.*

The majority further recommends the following comment:

> [2] The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer's personal conduct, or advice to clients, includes, but is not limited to activity, permitted by the Colorado constitution, and that conduct in total contravenes federal laws

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[12] For example, Rule 1.2(d) could be revised by adding the italicized language, "a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal . . . *with the intent of facilitating or encouraging the conduct.*" RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 94(2) (2000) (emphasis added).

other than those prohibiting possession or cultivation of marijuana.

Finally, because this new rule would limit Rule 1.2(d), the majority proposes adding the following comment to Rule 1.2:

> [14A] Paragraph (d) should be read in conjunction with Rule 8.6.

Respectfully submitted,

John R. Webb

Effective:[See Text Amendments]

West's Colorado Revised Statutes Annotated Currentness
Constitution of the State of Colorado [1876] (Refs & Annos)
Article XVIII. Miscellaneous
→→ § 14. Medical use of marijuana for persons suffering from debilitating medical conditions

(1) As used in this section, these terms are defined as follows:

(a) "Debilitating medical condition" means:

(I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;

(II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or

(III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

(b) "Medical use" means the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians, as provided by this section.

(c) "Parent" means a custodial mother or father of a patient under the age of eighteen years, any person having custody of a patient under the age of eighteen years, or any person serving as a legal guardian for a patient under the age of eighteen years.

(d) "Patient" means a person who has a debilitating medical condition.

(e) "Physician" means a doctor of medicine who maintains, in good standing, a license to practice medicine issued by the state of Colorado.

(f) "Primary care-giver" means a person, other than the patient and the patient's physician, who is eighteen years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition.

(g) "Registry identification card" means that document, issued by the state health agency, which identifies a patient authorized to engage in the medical use of marijuana and such patient's primary care-giver, if any has been designated.

(h) "State health agency" means that public health related entity of state government designated by the governor to establish and maintain a confidential registry of patients authorized to engage in the medical use of marijuana and enact rules to administer this program.

(i) "Usable form of marijuana" means the seeds, leaves, buds, and flowers of the plant (genus) cannabis, and any mixture or preparation thereof, which are appropriate for medical use as provided in this section, but excludes the plant's stalks, stems, and roots.

(j) "Written documentation" means a statement signed by a patient's physician or copies of the patient's pertinent medical records.

(2)(a) Except as otherwise provided in subsections (5), (6), and (8) of this section, a patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation where:

(I) The patient was previously diagnosed by a physician as having a debilitating medical condition;

(II) The patient was advised by his or her physician, in the context of a bona fide physician-patient relationship, that the patient might benefit from the medical use of marijuana in connection with a debilitating medical condition; and

(III) The patient and his or her primary care-giver were collectively in possession of amounts of marijuana only as permitted under this section.

This affirmative defense shall not exclude the assertion of any other defense where a patient or primary care-giver is charged with a violation of state law related to the patient's medical use of marijuana.

(b) Effective June 1, 1999, it shall be an exception from the state's criminal laws for any patient or primary care-giver in lawful possession of a registry identification card to engage or assist in the medical use of marijuana, except as otherwise provided in subsections (5) and (8) of this section.

(c) It shall be an exception from the state's criminal laws for any physician to:

(I) Advise a patient whom the physician has diagnosed as having a debilitating medical condition, about the risks and benefits of medical use of marijuana or that he or she might benefit from the medical use of marijuana, provided that

such advice is based upon the physician's contemporaneous assessment of the patient's medical history and current medical condition and a bona fide physician-patient relationship; or

(II) Provide a patient with written documentation, based upon the physician's contemporaneous assessment of the patient's medical history and current medical condition and a bona fide physician-patient relationship, stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana.

No physician shall be denied any rights or privileges for the acts authorized by this subsection.

(d) Notwithstanding the foregoing provisions, no person, including a patient or primary care-giver, shall be entitled to the protection of this section for his or her acquisition, possession, manufacture, production, use, sale, distribution, dispensing, or transportation of marijuana for any use other than medical use.

(e) Any property interest that is possessed, owned, or used in connection with the medical use of marijuana or acts incidental to such use, shall not be harmed, neglected, injured, or destroyed while in the possession of state or local law enforcement officials where such property has been seized in connection with the claimed medical use of marijuana. Any such property interest shall not be forfeited under any provision of state law providing for the forfeiture of property other than as a sentence imposed after conviction of a criminal offense or entry of a plea of guilty to such offense. Marijuana and paraphernalia seized by state or local law enforcement officials from a patient or primary care-giver in connection with the claimed medical use of marijuana shall be returned immediately upon the determination of the district attorney or his or her designee that the patient or primary care-giver is entitled to the protection contained in this section as may be evidenced, for example, by a decision not to prosecute, the dismissal of charges, or acquittal.

(3) The state health agency shall create and maintain a confidential registry of patients who have applied for and are entitled to receive a registry identification card according to the criteria set forth in this subsection, effective June 1, 1999.

(a) No person shall be permitted to gain access to any information about patients in the state health agency's confidential registry, or any information otherwise maintained by the state health agency about physicians and primary care-givers, except for authorized employees of the state health agency in the course of their official duties and authorized employees of state or local law enforcement agencies which have stopped or arrested a person who claims to be engaged in the medical use of marijuana and in possession of a registry identification card or its functional equivalent, pursuant to paragraph (e) of this subsection (3). Authorized employees of state or local law enforcement agencies shall be granted access to the information contained within the state health agency's confidential registry only for the purpose of verifying that an individual who has presented a registry identification card to a state or local law enforcement official is lawfully in possession of such card.

(b) In order to be placed on the state's confidential registry for the medical use of marijuana, a patient must reside in Colorado and submit the completed application form adopted by the state health agency, including the following information, to the state health agency:

(I) The original or a copy of written documentation stating that the patient has been diagnosed with a debilitating medical condition and the physician's conclusion that the patient might benefit from the medical use of marijuana;

(II) The name, address, date of birth, and social security number of the patient;

(III) The name, address, and telephone number of the patient's physician; and

(IV) The name and address of the patient's primary care-giver, if one is designated at the time of application.

(c) Within thirty days of receiving the information referred to in subparagraphs (3)(b)(I)-(IV), the state health agency shall verify medical information contained in the patient's written documentation. The agency shall notify the applicant that his or her application for a registry identification card has been denied if the agency's review of such documentation discloses that: the information required pursuant to paragraph (3)(b) of this section has not been provided or has been falsified; the documentation fails to state that the patient has a debilitating medical condition specified in this section or by state health agency rule; or the physician does not have a license to practice medicine issued by the state of Colorado. Otherwise, not more than five days after verifying such information, the state health agency shall issue one serially numbered registry identification card to the patient, stating:

(I) The patient's name, address, date of birth, and social security number;

(II) That the patient's name has been certified to the state health agency as a person who has a debilitating medical condition, whereby the patient may address such condition with the medical use of marijuana;

(III) The date of issuance of the registry identification card and the date of expiration of such card, which shall be one year from the date of issuance; and

(IV) The name and address of the patient's primary care-giver, if any is designated at the time of application.

(d) Except for patients applying pursuant to subsection (6) of this section, where the state health agency, within thirty-five days of receipt of an application, fails to issue a registry identification card or fails to issue verbal or written notice of denial of such application, the patient's application for such card will be deemed to have been approved. Receipt shall be deemed to have occurred upon delivery to the state health agency, or deposit in the United States mails. Notwithstanding the foregoing, no application shall be deemed received prior to June 1, 1999. A patient who is questioned by any state or local law enforcement official about his or her medical use of marijuana shall provide a copy of the application submitted to the state health agency, including the written documentation and proof of the date of mailing or other transmission of the written documentation for delivery to the state health agency, which shall be accorded the same legal effect as a registry identification card, until such time as the patient receives notice that the application has been denied.

(e) A patient whose application has been denied by the state health agency may not reapply during the six months following the date of the denial and may not use an application for a registry identification card as provided in para-

graph (3)(d) of this section. The denial of a registry identification card shall be considered a final agency action. Only the patient whose application has been denied shall have standing to contest the agency action.

(f) When there has been a change in the name, address, physician, or primary care-giver of a patient who has qualified for a registry identification card, that patient must notify the state health agency of any such change within ten days. A patient who has not designated a primary care-giver at the time of application to the state health agency may do so in writing at any time during the effective period of the registry identification card, and the primary care-giver may act in this capacity after such designation. To maintain an effective registry identification card, a patient must annually resubmit, at least thirty days prior to the expiration date stated on the registry identification card, updated written documentation to the state health agency, as well as the name and address of the patient's primary care-giver, if any is designated at such time.

(g) Authorized employees of state or local law enforcement agencies shall immediately notify the state health agency when any person in possession of a registry identification card has been determined by a court of law to have willfully violated the provisions of this section or its implementing legislation, or has pled guilty to such offense.

(h) A patient who no longer has a debilitating medical condition shall return his or her registry identification card to the state health agency within twenty-four hours of receiving such diagnosis by his or her physician.

(i) The state health agency may determine and levy reasonable fees to pay for any direct or indirect administrative costs associated with its role in this program.

(4)(a) A patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition. A patient's medical use of marijuana, within the following limits, is lawful:

(I) No more than two ounces of a usable form of marijuana; and

(II) No more than six marijuana plants, with three or fewer being mature, flowering plants that are producing a usable form of marijuana.

(b) For quantities of marijuana in excess of these amounts, a patient or his or her primary care-giver may raise as an affirmative defense to charges of violation of state law that such greater amounts were medically necessary to address the patient's debilitating medical condition.

(5)(a) No patient shall:

(I) Engage in the medical use of marijuana in a way that endangers the health or well-being of any person; or

(II) Engage in the medical use of marijuana in plain view of, or in a place open to, the general public.

(b) In addition to any other penalties provided by law, the state health agency shall revoke for a period of one year the

registry identification card of any patient found to have willfully violated the provisions of this section or the implementing legislation adopted by the general assembly.

(6) Notwithstanding paragraphs (2)(a) and (3)(d) of this section, no patient under eighteen years of age shall engage in the medical use of marijuana unless:

(a) Two physicians have diagnosed the patient as having a debilitating medical condition;

(b) One of the physicians referred to in paragraph (6)(a) has explained the possible risks and benefits of medical use of marijuana to the patient and each of the patient's parents residing in Colorado;

(c) The physicians referred to in paragraph (6)(b) has provided the patient with the written documentation, specified in subparagraph (3)(b)(I);

(d) Each of the patient's parents residing in Colorado consent in writing to the state health agency to permit the patient to engage in the medical use of marijuana;

(e) A parent residing in Colorado consents in writing to serve as a patient's primary care-giver;

(f) A parent serving as a primary care-giver completes and submits an application for a registry identification card as provided in subparagraph (3)(b) of this section and the written consents referred to in paragraph (6)(d) to the state health agency;

(g) The state health agency approves the patient's application and transmits the patient's registry identification card to the parent designated as a primary care-giver;

(h) The patient and primary care-giver collectively possess amounts of marijuana no greater than those specified in subparagraph (4)(a)(I) and (II); and

(i) The primary care-giver controls the acquisition of such marijuana and the dosage and frequency of its use by the patient.

(7) Not later than March 1, 1999, the governor shall designate, by executive order, the state health agency as defined in paragraph (1)(g) of this section.

(8) Not later than April 30, 1999, the General Assembly shall define such terms and enact such legislation as may be necessary for implementation of this section, as well as determine and enact criminal penalties for:

(a) Fraudulent representation of a medical condition by a patient to a physician, state health agency, or state or local law enforcement official for the purpose of falsely obtaining a registry identification card or avoiding arrest and prosecution;

(b) Fraudulent use or theft of any person's registry identification card to acquire, possess, produce, use, sell, distribute, or transport marijuana, including but not limited to cards that are required to be returned where patients are no longer diagnosed as having a debilitating medical condition;

(c) Fraudulent production or counterfeiting of, or tampering with, one or more registry identification cards; or

(d) Breach of confidentiality of information provided to or by the state health agency.

(9) Not later than June 1, 1999, the state health agency shall develop and make available to residents of Colorado an application form for persons seeking to be listed on the confidential registry of patients. By such date, the state health agency shall also enact rules of administration, including but not limited to rules governing the establishment and confidentiality of the registry, the verification of medical information, the issuance and form of registry identification cards, communications with law enforcement officials about registry identification cards that have been suspended where a patient is no longer diagnosed as having a debilitating medical condition, and the manner in which the agency may consider adding debilitating medical conditions to the list provided in this section. Beginning June 1, 1999, the state health agency shall accept physician or patient initiated petitions to add debilitating medical conditions to the list provided in this section and, after such hearing as the state health agency deems appropriate, shall approve or deny such petitions within one hundred eighty days of submission. The decision to approve or deny a petition shall be considered a final agency action.

(10)(a) No governmental, private, or any other health insurance provider shall be required to be liable for any claim for reimbursement for the medical use of marijuana.

(b) Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.

(11) Unless otherwise provided by this section, all provisions of this section shall become effective upon official declaration of the vote hereon by proclamation of the governor, pursuant to article V, section (1)(4), and shall apply to acts or offenses committed on or after that date.

CREDIT(S)

Added by Initiative Nov. 7, 2000, eff. Dec. 28, 2000.

HISTORICAL NOTES

This section, proposed by initiative, was ratified by the electorate at the general election on Nov. 7, 2000, effective upon the proclamation of the governor, Dec. 28, 2000.

Effective: December 10, 2012

West's Colorado Revised Statutes Annotated Currentness
Constitution of the State of Colorado [1876] (Refs & Annos)
Article XVIII. Miscellaneous
§ 16. Personal use and regulation of marijuana

(1) Purpose and findings.

(a) In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.

(b) In the interest of the health and public safety of our citizenry, the people of the state of Colorado further find and declare that marijuana should be regulated in a manner similar to alcohol so that:

(I) Individuals will have to show proof of age before purchasing marijuana;

(II) Selling, distributing, or transferring marijuana to minors and other individuals under the age of twenty-one shall remain illegal;

(III) Driving under the influence of marijuana shall remain illegal;

(IV) Legitimate, taxpaying business people, and not criminal actors, will conduct sales of marijuana; and

(V) Marijuana sold in this state will be labeled and subject to additional regulations to ensure that consumers are informed and protected.

(c) In the interest of enacting rational policies for the treatment of all variations of the cannabis plant, the people of Colorado further find and declare that industrial hemp should be regulated separately from strains of cannabis with higher delta-9 tetrahydrocannabinol (THC) concentrations.

(d) The people of the state of Colorado further find and declare that it is necessary to ensure consistency and fairness in the application of this section throughout the state and that, therefore, the matters addressed by this section are, except as specified herein, matters of statewide concern.

(2) Definitions. As used in this section, unless the context otherwise requires,

(a) "Colorado Medical Marijuana Code" means article 43.3 of title 12, Colorado Revised Statutes.

(b) "Consumer" means a person twenty-one years of age or older who purchases marijuana or marijuana products for personal use by persons twenty-one years of age or older, but not for resale to others.

(c) "Department" means the department of revenue or its successor agency.

(d) "Industrial hemp" means the plant of the genus cannabis and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration that does not exceed three-tenths percent on a dry weight basis.

(e) "Locality" means a county, municipality, or city and county.

(f) "Marijuana" or "marihuana" means all parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marihuana concentrate. "Marijuana" or "marihuana" does not include industrial hemp, nor does it include fiber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other product.

(g) "Marijuana accessories" means any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body.

(h) "Marijuana cultivation facility" means an entity licensed to cultivate, prepare, and package marijuana and sell marijuana to retail marijuana stores, to marijuana product manufacturing facilities, and to other marijuana cultivation facilities, but not to consumers.

(i) "Marijuana establishment" means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store.

(j) "Marijuana product manufacturing facility" means an entity licensed to purchase marijuana; manufacture, prepare, and package marijuana products; and sell marijuana and marijuana products to other marijuana product manufacturing facilities and to retail marijuana stores, but not to consumers.

(k) "Marijuana products" means concentrated marijuana products and marijuana products that are comprised of marijuana and other ingredients and are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.

(l) "Marijuana testing facility" means an entity licensed to analyze and certify the safety and potency of marijuana.

(m) "Medical marijuana center" means an entity licensed by a state agency to sell marijuana and marijuana products pursuant to section 14 of this article and the Colorado Medical Marijuana Code.

(n) "Retail marijuana store" means an entity licensed to purchase marijuana from marijuana cultivation facilities and marijuana and marijuana products from marijuana product manufacturing facilities and to sell marijuana and marijuana products to consumers.

(o) "Unreasonably impracticable" means that the measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.

(3) Personal use of marijuana. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:

(a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.

(b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.

(c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.

(d) Consumption of marijuana, provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.

(e) Assisting another person who is twenty-one years of age or older in any of the acts described in paragraphs (a) through (d) of this subsection.

(4) Lawful operation of marijuana-related facilities. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:

(a) Manufacture, possession, or purchase of marijuana accessories or the sale of marijuana accessories to a person who is twenty-one years of age or older.

(b) Possessing, displaying, or transporting marijuana or marijuana products; purchase of marijuana from a marijuana cultivation facility; purchase of marijuana or marijuana products from a marijuana product manufacturing facility; or sale of marijuana or marijuana products to consumers, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a retail marijuana store or is acting in his or her capacity as an owner, employee or agent of a licensed retail marijuana store.

(c) Cultivating, harvesting, processing, packaging, transporting, displaying, or possessing marijuana; delivery or transfer of marijuana to a marijuana testing facility; selling marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store; or the purchase of marijuana from a marijuana cultivation facility, if the person conducting the activities described in this paragraph has obtained a current, vaild license to operate a marijuana cultivation facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana cultivation facility.

(d) Packaging, processing, transporting, manufacturing, displaying, or possessing marijuana or marijuana products; delivery or transfer of marijuana or marijuana products to a marijuana testing facility; selling marijuana or marijuana products to a retail marijuana store or a marijuana product manufacturing facility; the purchase of marijuana from a marijuana cultivation facility; or the purchase of marijuana or marijuana products from a marijuana product manufacturing facility, if the person conducting the activities described in this paragraph has obtained a current, valid license to operate a marijuana product manufacturing facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana product manufacturing facility.

(e) Possessing, cultivating, processing, repackaging, storing, transporting, displaying, transferring or delivering marijuana or marijuana products if the person has obtained a current, valid license to operate a marijuana testing facility or is acting in his or her capacity as an owner, employee, or agent of a licensed marijuana testing facility.

(f) Leasing or otherwise allowing the use of property owned, occupied or controlled by any person, corporation or other entity for any of the activites conducted lawfully in accordance with paragraphs (a) through (e) of this subsection.

(5) Regulation of marijuana.

(a) Not later than July 1, 2013, the department shall adopt regulations necessary for implementation of this section. Such regulations shall not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable. Such regulations shall include:

(I) Procedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment, with such procedures subject to all requirements of article 4 of title 24 of the colorado Administrative Procedure Act or any successor provision;

(II) A schedule of application, licensing and renewal fees, provided, application fees shall not exceed five thousand dollars, with this upper limit adjusted annually for inflation, unless the department determines a greater fee is necessary to carry out its responsibilities under this section, and provided further, an entity that is licensed under the colorado medical Marijuana Code to cultivate or sell marijuana or to manufacture marijuana products at the time this section takes effect and that chooses to apply for a separate marijuana establishment license shall not be required to pay an application fee greater than five hundred dollars to apply for a license to operate a marijuana establishment in accordance with the provisions of this section;

(III) Qualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment;

(IV) Security requirements for marijuana establishments;

(V) Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under the age of twenty-one;

(VI) Labeling requirements for marijuana and marijuana products sold or distributed by a marijuana establishment;

(VII) Health and safety regulations and standards for the manufacture of marijuana products and the cultivation of marijuana;

(VIII) Restrictions on the advertising and display of marijuana and marijuana products; and

(IX) Civil penalties for the failure to comply with regulations made pursuant to this section.

(b) In order to ensure the most secure, reliable, and accountable system for the production and distribution of marijuana and marijuana products in accordance with this subsection, in any competitive application process the department shall have as a primary consideration whether an applicant:

(I) Has prior experience producing or distributing marijuana or marijuana products pursuant to section 14 of this article and the colorado Medical Marijuana Code in the locality in which the applicant seeks to operate a marijuana establishment; and

(II) Has, during the experience described in subparagraph (I), complied consistantly with section 14 of this article,

the provisions of the colorado Medical Marijuana Code and conforming regulations.

(c) In order to ensure that individual privacy is protected, notwithstanding paragraph (a), the department shall not require a consumer to provide a retail marijuana store with personal information other than government-issued identification to determine the consumer's age, and a retail marijuana store shall not be required to acquire and record personal information about consumers other than information typically acquired in a financial transaction conducted at a retail liquor store.

(d) The general assembly shall enact an excise tax to be levied upon marijuana sold or otherwise transferred by a marijuana cultivation facility to a marijuana product manufacturing facility or to a retail marijuana store at a rate not to exceed fifteen percent prior to January 1, 2017 and at a rate to be determined by the general assembly thereafter, and shall direct the department to establish procedures for the collection of all taxes levied. Provided, the first forty million dollars in revenue raised annually from any such excise tax shall be credited to the public school capital construction Assistance Fund created by article 43.7 of title 22, C.R.S., or any successor fund dedicated to a similar purpose. Provided further, no such excise tax shall be levied upon marijuana intended for sale at medical marijuana centers pursuant to section 14 of this article and the colorado medical marijuana Code.

(e) Not later than October 1, 2013, each locality shall enact an ordinance or regulation specifying the entity within the locality that is responsible for processing applications submitted for a license to operate a marijuana establishment within the boundaries of the locality and for the issuance of such licenses should the issuance by the locality become necessary because of a failure by the department to adopt regulations pursuant to paragraph (a) or because of a failure by the department to process and issue licenses as required by paragraph (g).

(f) A locality may enact ordinances or regulations, not in conflict with this section or with regulations or legislation enacted pursuant to this section, governing the time, place, manner and number of marijuana establishment operations; establishing procedures for the issuance, suspension, and revocation of a license issued by the locality in accordance with paragraph (h) or (i), such procedures to be subject to all requirements of article 4 of title 24 of the Colorado Administrative Procedure Act or any successor provision; establishing a schedule of annual operating, licensing, and application fees for marijuana establishments, provided, the application fee shall only be due if an application is submitted to a locality in accordance with paragraph (i) and a licensing fee shall only be due if a license is issued by a locality in accordance with paragraph (h) or (i); and establishing civil penalties for violation of an ordinance or regulation governing the time, place, and manner of a marijuana establishment that may operate in such locality. A locality may prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through the enactment of an ordinance or through an initiated or referred measure; provided, any initiated or referred measure to prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores must appear on a general election ballot during an even numbered year.

(g) Each application for an annual license to operate a marijuana establishment shall be submitted to the department. The department shall:

(I) Begin accepting and processing applications on October 1, 2013;

(II) Immediately forward a copy of each application and half of the license application fee to the locality in which the applicant desires to operate the marijuana establishment;

(III) Issue an annual license to the applicant between forty-five and ninety days after receipt of an application unless the department finds the applicant is not in compliance with regulations enacted pursuant to paragraph (a) or the department is notified by the relevant locality that the applicant is not in compliance with ordinances and regulations made pursuant to paragraph (f) and in effect at the time of application, provided, where a locality has enacted a nu-

merical limit on the number of marijuana establishments and a greater number of applicants seek licenses, the department shall solicit and consider input from the locality as to the locality's preference or preferences for licensure; and

(IV) Upon denial of an application, notify the applicant in writing of the specific reason for its denial.

(h) If the department does not issue a license to an applicant within ninety days of receipt of the application filed in accordance with paragraph (g) and does not notify the applicant of the specific reason for its denial, in writing and within such time period, or if the department has adopted regulations pursuant to paragraph (a) and has accepted applications pursuant to paragraph (g) but has not issued any licenses by january 1, 2014, the applicant may resubmit its application directly to the locality, pursuant to paragraph (e), and the locality may issue an annual license to the applicant. A locality issuing a license to an applicant shall do so within ninety days of receipt of the resubmitted application unless the locality finds and notifies the applicant that the applicant is not in compliance with ordinances and regulations made pursuant to paragraph (f) in effect at the time the application is resubmitted and the locality shall notify the department if an annual license has been issued to the applicant. If an application is submitted to a locality under this paragraph, the department shall forward to the locality the application fee paid by the applicant to the department upon request by the locality. A license issued by a locality in accordance with this paragraph shall have the same force and effect as a license issued by the department in accordance with paragraph (g) and the holder of such license shall not be subject to regulation or enforcement by the department during the term of that license. A subsequent or renewed license may be issued under this paragraph on an annual basis only upon resubmission to the locality of a new application submitted to the department pursuant to paragraph (g). Nothing in this paragraph shall limit such relief as may be available to an aggrieved party under section 24-4-104, C.R.S., of the colorado administrative Procedure Act or any successor provision.

(i) If the department does not adopt regulations required by paragraph (a), an applicant may submit an application directly to a locality after October 1, 2013 and the locality may issue an annual license to the applicant. A locality issuing a license to an applicant shall do so within ninety days of receipt of the application unless it finds and notifies the applicant that the applicant is not in compliance with ordinances and regulations made pursuant to paragraph (f) in effect at the time of application and shall notify the department if an annual license has been issued to the applicant. A license issued by a locality in accordance with this paragraph shall have the same force and effect as a license issued by the department in accordance with paragraph (g) and the holder of such license shall not be subject to regulation or enforcement by the department during the term of that license. A subsequent or renewed license may be issued under this paragraph on an annual basis if the department has not adopted regulations required by paragraph (a) at least ninety days prior to the date upon which such subsequent or renewed license would be effective or if the department has adopted regulations pursuant to paragraph (a) but has not, at least ninety days after the adoption of such regulations, issued licenses pursuant to paragraph (g).

(j) Not later than July 1, 2014, the General Assembly shall enact legislation governing the cultivation, processing and sale of industrial hemp.

(6) Employers, driving, minors and control of property.

(a) Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.

(b) Nothing in this section is intended to allow driving under the influence of marijuana or driving while impaired by marijuana or to supersede statutory laws related to driving under the influence of marijuana or driving while impaired by marijuana, nor shall this section prevent the state from enacting and imposing penalties for driving under the influence of or while impaired by marijuana.

(c) Nothing in this section is intended to permit the transfer of marijuana, with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.

(d) Nothing in this section shall prohibit a person, employer, school, hospital, detention facility, corporation or any other entity who occupies, owns or controls a property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property.

(7) Medical marijuana provisions unaffected. Nothing in this section shall be construed:

(a) To limit any privileges or rights of a medical marijuana patient, primary caregiver, or licensed entity as provided in section 14 of this article and the Colorado Medical Marijuana Code;

(b) To permit a medical marijuana center to distribute marijuana to a person who is not a medical marijuana patient;

(c) To permit a medical marijuana center to purchase marijuana or marijuana products in a manner or from a source not authorized under the Colorado Medical Marijuana Code;

(d) To permit any medical marijuana center licensed pursuant to section 14 of this article and the Colorado Medical Marijuana Code to operate on the same premises as a retail marijuana store.; or

(e) To discharge the department, the Colorado Board of Health, or the Colorado Department of Public Health and Environment from their statutory and constitutional duties to regulate medical marijuana pursuant to section 14 of this article and the Colorado Medical Marijuana Code.

(8) Self-executing, severability, conflicting provisions. All provisions of this section are self-executing except as specified herein, are severable, and, except where otherwise indicated in the text, shall supersede conflicting state statutory, local charter, ordinance, or resolution, and other state and local provisions.

(9) Effective date. Unless otherwise provided by this section, all provisions of this section shall become effective upon official declaration of the vote hereon by proclamation of the governor, pursuant to section 1(4) of article V.

CREDIT(S)

Added by Initiative Nov. 6, 2012, eff. upon the proclamation of the governor, Dec. 10, 2012.

HISTORICAL AND STATUTORY NOTES

This section, proposed by Initiative, as Amendment 64, was ratified by the electorate at the general election on Nov. 6, 2012, effective upon the proclamation of the vote by the governor, Dec. 10, 2012.

C. R. S. A. Const. Art. 18, § 16, CO CONST Art. 18, § 16

Current with amendments adopted through the Nov. 6, 2012 General Election

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In and Around the Bar
CBA Ethics Committee
Formal Opinion No. 124—A Lawyer's Medical Use of Marijuana, Adopted

Introduction

The CBA Ethics Committee (Committee) has been asked to opine whether a lawyer who, under Colorado law, may cultivate, possess, and use small amounts of marijuana solely to treat a debilitating medical condition may do so without violating the Colorado Rules of Professional Conduct (Colorado Rules, Rule, or Colo. RPC). The Committee first summarizes the relevant federal law criminalizing possession and use of marijuana. Next, the Committee summarizes Colorado law applicable to the medical use of marijuana. The Committee then identifies ethics rules and case law that frame its analysis of when a lawyer's medical use of marijuana may violate the Colorado Rules.

The Committee has tried to analyze the ethics issues without being drawn into the public debate about the value or efficacy of medical marijuana. There are strong opinions for and against the medical use of marijuana. The conflict between federal and state law is just one example.

The Committee recognizes that the public discourse about the use of marijuana, even medical marijuana, frequently considers the

issue of impairment. Use and misuse of marijuana—or, for that matter, any other psychoactive substance, including alcohol, prescription medications, and certain over-the-counter drugs—even when permitted by law, can affect a lawyer's reasoning, judgment, memory, or other aspects of the lawyer's physical or mental abilities. A lawyer's medical use of marijuana, like the use of any other psychoactive substance, raises legitimate concerns about a lawyer's professional competence and ability to comply with obligations imposed by the ethics rules. Consequently, this opinion includes a discussion of the Colorado Rules and relevant ethics opinions addressing lawyer impairment.

Our conclusion is limited to the narrow issue of whether personal use of marijuana by a lawyer/patient violates Colo. RPC 8.4(b). This opinion does not address whether a lawyer violates Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation, possession, or use by third parties of medical marijuana under Colorado law.

Syllabus

Federal law treats the cultivation, possession, and use of marijuana for any purpose, even a medical one, as a crime. Although Colorado law also treats the cultivation, possession, and use of marijuana as a crime, it nevertheless permits individuals to cultivate, possess, and use small amounts of marijuana for the treatment of certain debilitating medical conditions. Cultivation, possession, and use of marijuana solely for medical purposes under Colorado law, however, does not guarantee an individual's protection from prosecution under federal law. Consequently, an individual permitted to use marijuana for medical purposes under Colorado law may be subject to arrest and prosecution for violating federal law.

This opinion concludes that a lawyer's medical use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b).[1] Rather, to violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

A lawyer's use of medical marijuana in compliance with Colorado law may implicate additional Rules, including Colo. RPC 1.1, 1.16(a)(2), and 8.3(a). Colo. RPC 1.1 is violated where a lawyer's use of medical marijuana impairs the lawyer's ability to provide competent representation. If a lawyer's use of medical marijuana materially impairs the lawyer's ability to represent the client, Rule 1.16(a)(2) requires the lawyer to withdraw from the representation. If another lawyer knows that a lawyer's use of medical marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty,

trustworthiness, or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.

Analysis

A. Federal Law

The federal government regulates marijuana possession and use through the Controlled Substances Act, 21 USC § 811 (CSA). The CSA classifies "marihuana" as a Schedule I controlled substance. 21 USC § 812(b). Federal law prohibits physicians from dispensing a Schedule I controlled substance, including marijuana, by prescription. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (no medical necessity exception to CSA prohibition of marijuana). The CSA makes it a crime, among other things, to possess and use marijuana even for medical reasons. Id.; 21 USC §§ 841 to 864. In Gonzales v. Raich, 545 U.S. 1 (2005), the U.S. Supreme Court recognized the authority of the federal government to prohibit marijuana for all purposes, even medical ones, despite valid state laws authorizing the medical use of marijuana.[2]

B. Colorado Law

The Colorado Uniform Controlled Substances Act of 1992 (UCSA) substantially mirrors the federal CSA. See CRS §§ 18-18-101 to -605. Colorado's UCSA, like the federal CSA, treats marijuana as a "controlled substance." See CRS § 18-18-102(5). Like federal law, Colorado law criminalizes the possession and use of marijuana. See CRS § 18-18-406.

Unlike federal law, however, the Colorado Constitution provides that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition." Colo. Const. art. XVIII, § 14(4)(a). An individual must obtain "written documentation" from a physician stating that he or she has been diagnosed with a debilitating medical condition that might benefit from the medical use of marijuana. *Id.* at § 14(3)(b)(I). A "debilitating medical condition" is defined as:

> (I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;
>
> (II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such

condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or

(III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

Id. at § 14(1)(a).

"Medical use" is defined as:

The acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians. . . .

Id. at § 14(1)(b).

The Colorado statutes codify the medical use exemption for marijuana in the Constitution. A Colorado patient is exempted from application of Colorado law criminalizing cultivation, possession, and use of marijuana if the individual can establish that the cultivation, possession, or use was solely for medical purposes as permitted by Colorado law. *See* CRS §12-43.3-102(b).

C. Colo. RPC

Colo. RPC 1.1 requires lawyers to represent their clients using "the legal knowledge, skill, thoroughness and preparation reasonably necessary" for the task.

Colo. RPC 1.16 prohibits a lawyer from representing a client where the lawyer's "physical or mental condition materially impairs the lawyer's ability" to do so.

Colo. RPC 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]" Colo. RPC 8.4(b) sets out a two-part test. First, there must be evidence of a criminal act. Second, the evidence must establish that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

See, e.g., People v. Andersen, 58 P.3d 537, 541 (Colo. OPDJ 2000) (stating in *dictum* that not all convictions of the criminal laws necessarily justify the conclusion that Colo. RPC 8.4(b) has also been violated).

D. Misconduct

All lawyers admitted to practice law in Colorado take an oath that they will support the U.S. and Colorado Constitutions. They also swear to faithfully and diligently adhere to the Colo. RPC at all times. Unfortunately, the Colo. RPC do not provide lawyers with clear guidance on proper ethical conduct when federal and Colorado laws conflict as they do in the unique circumstance regarding an individual's medical use of marijuana.

The Supremacy Clause of the U.S. Constitution unambiguously provides that if there is any conflict between federal and state law, federal law prevails. *Gonzales v. Raich*, 545 U.S. 29. Consequently, even if a lawyer is permitted to cultivate, possess, and use small amounts of marijuana under Colorado law solely for medical use, such medical use may nevertheless constitute a violation of federal criminal law.

The Committee concludes, however, that a Colorado lawyer's violation of federal criminal law prohibiting the cultivation, possession, and use of marijuana where the lawyer's cultivation, possession, or use is for a medical purpose permitted under Colorado law does not necessarily violate Colo. RPC 8.4(b). The Committee reads Colo. RPC 8.4(b) as requiring a nexus between the violation of law and the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See People v. Hook*, 91 P.3d 1070, 1073-74 (Colo. OPDJ 2004) (the fact that a lawyer may have committed the felony of illegal discharge of a firearm does not by itself determine the professional discipline he should receive); *People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (linking a lawyer's discharge of a firearm directly over his wife's head during an argument to a "critical failure of judgment" and "a contempt for the law which was at odds with [his] duty to uphold the law").

Colorado has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. No controlling judicial authority has yet held that Colorado law permitting medical use of marijuana for persons suffering from debilitating conditions is unconstitutional, preempted, void, or otherwise invalid. Consequently, even if a lawyer's cultivation, possession, or use of medical marijuana to treat a properly diagnosed debilitating medical condition under Colorado law may constitute a federal crime, the Committee does not see a nexus between the lawyer's conduct and his or her "honesty" or "trustworthiness," within the

meaning of Colo. RPC 8.4(b), provided that the lawyer complies with the requirements of Colorado law permitting and regulating his or her medical use of marijuana. The Committee also does not see a nexus between the lawyer's conduct and his or her "fitness as a lawyer in other respects," provided that (a) again, the lawyer complies with the requirements of Colorado law permitting his or her medical use of marijuana, and (b) in addition, the lawyer satisfies his or her obligation under Colo. RPC 1.1 to provide competent representation. *E.g., Iowa Sup. Ct. v. Marcucci*, 543 N.W.2d 879, 882 (Iowa 1996) ("The term 'fitness' as used in [Rule 8.4(b)] . . . embraces more than legal competence.").

Although not directly on point, cases addressing parenting time, where medical use of marijuana is an issue, similarly prohibit restrictions on parenting time simply because a parent is permitted to use and uses medical marijuana pursuant to state law. *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo.App. 2010) (before parenting time could be restricted, requiring evidence that use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested a risk of harm).

E. Impairment

Colo. RPC 1.16's prohibition against representing a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" reflects the position that allowing lawyers who do not possess the requisite capacity to make professional judgments and/or follow the standards of ethical conduct harms clients, undermines the integrity of the legal system, and denigrates the legal profession.

Under the Rules, not every debilitating medical condition, treatment regimen, use of medicine, or combination of these factors, will result in mental impairment adversely affecting a lawyer's professional behavior. To violate Rule 1.16, the condition and/or treatment must "materially impair[]" the lawyer's ability to represent a client. *See* Colo. RPC 1.16(a)(2). *See also* American Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 03-429, "Obligations With Respect to Mentally Impaired Lawyer in the Firm" (2003). In that circumstance, a lawyer must not undertake or continue representation of a client.

Every lawyer has a personal responsibility to ensure that the lawyer's physical condition or the substances the lawyer ingests or consumes do not adversely affect the lawyer's ability to follow the ethics rules. Impaired and unimpaired lawyers alike are required, among other things, to act competently. Colo. RPC 1.1. If a lawyer cannot do that because of a substantial impairment, Colo. RPC 1.16(a)(2) requires the lawyer to withdraw from the representation and take "reasonably practical" steps to protect the

client's interests. Colo. RPC 1.6(d). As for the lawyer, there are sources of assistance to help deal with the impairment.[3]

Unfortunately, some lawyers will be unaware of, or will deny, the fact that their ability to represent clients is materially impaired. They may be unwilling or unable to take appropriate action to decline representation or withdraw. *See* ABA Formal Op. 03-429 at 3. When the materially impaired lawyer is unable or unwilling to deal with the consequences of that impairment, the firm's partners and the impaired lawyer's supervisors have obligations under Colo. RPC 5.1(a) and (b) to take reasonable steps to ensure that the impaired lawyer complies with the ethics rules.[4]

If the firm's lawyers believe they have prevented the impaired lawyer from substantially violating any ethical rules while the impaired lawyer was practicing in the firm, the firm's lawyers have no duty to report the lawyer's condition to the authorities. *See* ABA Formal Op. 03-429 at 4-5. However, if the firm's lawyers believe that the impaired lawyer has violated the ethical rules in a way that raises a substantial question about the lawyer's fitness to practice law, they are required to report the lawyer's condition to the appropriate disciplinary authority. *See* ABA Formal Op. 03-429 at 5; Colo. RPC 8.3(a).

Colo. RPC 8.3(a) addresses the more general obligation of any lawyer with knowledge that another lawyer's conduct has violated the ethics rules. The rule requires a lawyer to report another lawyer to "the appropriate professional authority" when the lawyer "knows" that the other lawyer's violation of the ethics rules raises a "substantial question as to that [other] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A lawyer outside the firm who is aware of another lawyer's impairment and who knows that another lawyer has violated the ethical rules in a manner that raises a "substantial question" regarding the lawyer's "honesty, trustworthiness, or fitness as a lawyer" has a duty to report the violation to the appropriate authority. Only those violations that raise a "substantial question" as to the lawyer's ability to represent clients, however, must be reported.

"Substantial" refers to the seriousness of the offense, not to the amount of evidence of which the lawyer is aware. Colo. RPC 8.3, cmt. [3]. An impaired lawyer's failure to refuse or terminate representation of clients ordinarily raises a "substantial question" about the lawyer's fitness as a lawyer. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 03-431 "Lawyer's Duty to Report Another Lawyer Who May Suffer From Disability or Impairment" n.6 (2003).

"Knows" refers to actual knowledge, which may be inferred from circumstances. Colo. RPC 1.0(f). The reporting lawyer may know of the impaired lawyer's misconduct through first-hand observation or through a third party. *See* ABA Formal Op. 03-431

at n.12. The "actual knowledge" standard can be difficult to apply. On one hand, knowledge that a lawyer uses medical marijuana or drinks heavily, for instance, does not necessarily reflect knowledge that the lawyer is impaired in his or her ability to represent clients. *See* ABA Formal Op. 03-431 at 3. On the other hand, behavior such as frequently missing court deadlines, failing to make requisite filings, failing to perform tasks agreed to be performed, or failing to address issues that would be raised by competent counsel may supply the requisite knowledge that another lawyer is impaired. *Id.* at 2. In determining whether a lawyer "knows" of another lawyer's impairment that has caused a violation of the ethics rules, the lawyer with the potential reporting obligation is not expected to be able to identify impairment with the precision of a medical professional. *Id.* at n.10.

Before deciding whether to report the other lawyer to the appropriate disciplinary authority under Colo. RPC 8.3, a lawyer may consider raising the issue with the impaired lawyer or the impaired lawyer's firm, or may consider reporting the affected lawyer's impairment to an approved lawyer's assistance program. If the lawyer speaks with the seemingly impaired lawyer, that lawyer may be able to explain the circumstances giving rise to the other lawyer's conclusion regarding impairment. However, the impaired lawyer's denial or explanation may not remove the need to report if the first lawyer continues to conclude that the other lawyer has violated the Rules in a manner that raises a substantial question regarding the other lawyer's fitness to represent clients. ABA Formal Op. 03-431 at text following n.13.

If, after analysis of the appropriate Colo. RPC, a lawyer feels compelled to report a substantially impaired lawyer to the appropriate disciplinary authority, he or she should consider the ethics issues surrounding client confidentiality. *Id.* at n.16. If information relating to the representation will be disclosed, the reporting lawyer should consider whether there is a need to get the client's permission to disclose this information. *See* Colo. RPC 1.6. *See also* ABA Formal Ops. 03-429 and 03-431.

The Committee cannot speak to how the Colorado Supreme Court Office of Attorney Regulation Counsel or other disciplinary authorities may regard the lawful use of medicinal marijuana by attorneys under either the Colorado Rules or other disciplinary rules. *See* CRCP 251.5(b) (grounds for discipline).

Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.

Notes

1. Under Colo. RPC 8.4(b), it is "professional misconduct" for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

2. As of October 2011, sixteen states and the District of Columbia allowed the use of medical marijuana. "U.S. Attorneys in California Set Crackdown on Marijuana," *New York Times* A-9 (Oct. 8, 2011); "Echoes of Prohibition in Nation's Pot Policies," *The Denver Post* 9-B (Oct. 8, 2011).

3. The Colorado Lawyer Assistance Program (COLAP) provides "[I]mmediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice." CRCP 254(2)(a).

4. Colo. RPC 5.1(a) and (b) describe the obligation of managerial and supervisory attorneys to ensure ethical conduct within the firms they manage and by the lawyers they supervise. Lawyers with managerial authority have an affirmative obligation to make reasonable efforts to establish internal policies and procedures designed to give reasonable assurance that all lawyers in the firm, not just impaired lawyers, fulfill the requirements of the Rules. Supervisory lawyers are obliged to make reasonable efforts to ensure that the conduct of the lawyers they supervise conforms with the Rules.

Back

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(Original Signature of Member)

112TH CONGRESS
2D SESSION

H. R. _____

To amend the Controlled Substances Act to provide that Federal law shall not preempt State law

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IN THE HOUSE OF REPRESENTATIVES

Ms. DEGETTE introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Controlled Substances Act to provide that Federal law shall not preempt State law

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Respect States' and Citizens' Rights Act of 2012".

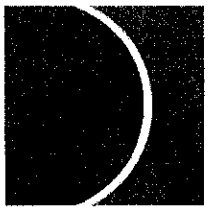
SEC. 2. IN GENERAL.

Section 708 of the Controlled Substances Act (21 U.S.C. 903) is amended—

(1) by striking "No provision" and inserting "(A) IN GENERAL.—Except as provided in subsection (b), no provision"; and

(2) by adding at the end the following:

"(b) SPECIAL RULE REGARDING STATE MARIHUANA LAWS.—In the case of any State law that pertains to marihuana, no provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of State law on the same subject matter, nor shall any provision of this title be construed as preempting any such State law.".



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Marijuana Lawyers: Outlaws or Crusaders?

Sam Kamin & Eli Wald

University of Denver Sturm College of Law

Sam Kamin* and Eli Wald**

Marijuana Lawyers: Outlaws or Crusaders?

I
Introduction

The legal regulation of marijuana is in a state of flux in the United States today. Over the last dozen or so years, eighteen states and the District of Columbia have passed measures permitting the use of marijuana for medical purposes; in the fall of 2012, two states – Colorado and Washington – went a step farther and decriminalized entirely possession of less than an ounce of the drug. At the same time, marijuana remains a Schedule I narcotic, a drug whose manufacture, possession, and distribution remain prohibited by federal law. This Article focuses on the ethical (and sometimes criminal) quandary that the tension between state and federal law in this area creates. As marijuana moves from the shadows to the storefronts in the states, it becomes a business. Businesses have employees, shareholders, and leases. They must comply with state and local zoning ordinances, enter into numerous contracts, and pay their taxes. In many businesses, proprietors turn to lawyers for help with these and other legal issues. Lawyers incorporate businesses, write leases and employment agreements, help navigate the labyrinth of regulatory compliance, and ensure that taxes are being paid promptly and accurately.

This usual relationship is necessarily complicated by the fact that the manufacture and sale of marijuana remains a federal offense punishable by up to twenty-five years in prison.[1] While a state may choose to decriminalize, medicalize, or even legalize marijuana, it does not have the power to undo the federal criminal prohibition of the drug. Even in those states decriminalizing marijuana, every sale of marijuana, every plant that is grown, is a serious violation of federal law. Thus, an attorney engaged by a marijuana practitioner to do the work that lawyers traditionally do for businesses necessarily puts herself at risk. Because all lawyers have an obligation not to knowingly assist criminal conduct,[2] attorneys who take on marijuana clients face the possibility of both significant ethical and criminal consequences for their actions.

In this Article, we discuss the ethical and criminal provisions that impact a lawyer's representation of clients working in the emerging marijuana industry. We show that under a traditional, strict reading of both criminal law and the Model Rules of Professional Conduct, an attorney is prohibited from providing most kinds of legal assistance to a marijuana client. However, such a reading of the rules would have serious negative repercussions in those states that have moved to decriminalize marijuana. Without the participation of attorneys, important state policies will be frustrated; where a state has chosen to regulate marijuana as medicine or to

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[1] See 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1).

[2] See part IV, infra.

tax and regulate it like alcohol, lawyers are a necessary part of the implementation of these policy decisions. Furthermore, depriving marijuana clients access to lawyers undermines the core values of client autonomy and equality under the law.

The ethical and lawful representation of marijuana clients is not without limits, however. Some of these limits are easy to define, while others are far more amorphous. We borrow from the law of accomplice and coconspirator liability to give shape to the line between permitted and forbidden legal help to marijuana clients. So long as lawyers merely know about – but do not form the intent to aid – marijuana clients' violations of federal law, and as long as attorneys provide the same services on similar terms to marijuana clients as they do to other clients, they violate neither their ethical obligations nor the prohibitions of the criminal law.

Using specific examples, we give much-needed guidance to attorneys engaged in this emerging and problematic area of practice. Our proposed reading of Model Rule of Professional Conduct 1.2(d), which prohibits assisting a client in the commission of a crime, establishes that lawyers may generally help marijuana clients address the majority of their legal needs: attorneys may defend marijuana clients charged with violations of the Controlled Substances Act, may serve as lobbyists in challenging federal law, and may advise clients about state and federal marijuana law. Lawyers may also generally help clients with compliance work, such as filing for a license to own and operate a marijuana business; may negotiate leases for commercial real estate space, out of which clients will operate a dispensary; and advise clients about employment matters pertaining to their marijuana businesses. In most instances, such conduct will not violate Rule 1.2(d) at all because lawyers lack the intent necessary for assistance of criminal activity under our proposed interpretation of intent. Even when a lawyer's conduct will arguably violate Rule 1.2(d), we believe that she may assert a moral reason to nonetheless help a marijuana client, as long as she is willing to accept the criminal and disciplinary consequences of her conduct.

II
A History of Marijuana in the United States

A. Federal Law

1. The Birth of Marijuana Prohibition

Even those who continue to believe that marijuana is a pernicious drug[3] must acknowledge that the history of its regulation in the United States is a sorry one. Marijuana in the early twentieth century was negatively associated in the popular consciousness with African-Americans and Mexican-Americans, a fact directly tied to the initial movement to criminalize it.[4]

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[3] While we acknowledge that marijuana may be less dangerous than legal drugs such as alcohol and tobacco, we do not advocate its legalization and none of the arguments in this Article rely on the legalization of marijuana.

[4] See, e.g., Gregg A. Bilz, The Medical Use of Marijuana: The Politics of Medicine, 13 Ham. J. Pub. L. & Pol. 117 (1992) ("The fact that marijuana use was first widely associated with minority groups and the jazz subculture directly influenced the government's approach to the perceived problem. Mexicans, Asians, and African Americans were generally of lower socioeconomic standing, and were prejudicially perceived as criminal and violent. Marijuana was thus portrayed as fostering aggression, and the fear was that the 'killer weed' would 'infect' American youth, provoking them to crime and violence.") (citations omitted).

In large part because of these negative associations, Congress passed the Marijuana Tax Act in 1937, removing the drug from the list of approved pharmaceutical substances.[5]

Two generations later, President Nixon pushed Congress to "get tough" on drugs, following what many saw as the self-indulgent excesses of the 1960s.[6] Congress responded by passing the Controlled Substances Act (CSA), the prevailing regulatory regime to this day. Under the CSA, marijuana is classified – along with heroin, LSD, MDMA, and other dangerous substances – as a Schedule I narcotic.[7] All Schedule I narcotics are deemed by the Drug Enforcement Agency (DEA) to have no approved medical use and a high potential for abuse.[8] Although several seemingly more dangerous substances are listed as less serious Schedule II drugs,[9] the federal government has repeatedly refused to move marijuana from the list of most regulated drugs or to otherwise ameliorate the severity of federal marijuana laws.[10]

2. DEA Regulation

Although there is a great deal of debate regarding the appropriateness of the categorization of marijuana as a Schedule I narcotic, the power of the DEA to so categorize it and to enforce this categorization through civil and criminal sanctions is not in question. In Gonzales v. Raich[11] the United States Supreme Court rejected a Commerce Clause challenge to the power of Congress to regulate the intrastate cultivation and consumption of marijuana. Because even intrastate marijuana production affects the interstate market for marijuana, the

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[5] See, e.g., Michael Vitiello, Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy, 31 U. MICH. J. L. REF. 707, 749 n. 244 (1998) ("prohibition has more to do with politics and racism than with [marijuana's] diminished pharmacological importance."). See also note 21, infra (noting the continuing racially disparate impact of marijuana prohibition in the United States).

[6] Brooke Mascagni, The Politics of Exclusion in California's Marijuana Reform Movement, 15 U. D.C. L. Rev. 33 (2011) ("The U.S. federal government began regulating marijuana in 1937, and in 1971, President Richard Nixon escalated federal prosecution of marijuana with the declaration of the War on Drugs."); Michael Berkey, Mary Jane's New Dance: The Medical Marijuana Legal Tango, 9 Cardozo Pub. L. Pol. & Eth. J. 417, 426 (2011) ("When President Nixon took office in 1969, he saw this prevalent marijuana use by the nation's youth as causing a moral decay in American society.").

[7] 21 U.S.C. § 812.

[8] See, 21 USC § 811, et. seq.

[9] Among the drugs in Schedule II are: opium, PCP, cocaine, and amphetamines. Other serious drugs are subject to the less restrictive regulation of Schedule III: ketamine, anabolic steroids, and barbiturates.

[10] In response to recent raids by agents of the DEA on medical marijuana providers in California, funding bills have been introduced in Congress that would forbid the use of federal funds to prosecute those complying with state medical marijuana provisions; these bills have consistently been defeated. A typical provision stated, "[n]one of the funds made available in this Act to the Department of Justice may be used [in certain states] to prevent such States from implementing their own State laws that authorize the use, distribution, possession or cultivation of medical marijuana." See "Amendment Offered by Mr. Hinchey," Congressional Record, daily edition, vol. 153 (July 2007), p. H8484 ("the Hinchey-Rohrabacher Amendment").

[11] 545 U.S. 1 (2005).

Court held, it was properly the subject of Congressional regulation under the Interstate Commerce Clause.[12]

The continued categorization of marijuana as a Schedule I narcotic has two primary effects. First, the manufacture and distribution of a Schedule I narcotic are expressly prohibited by law and are the targets of significant criminal and civil penalties. The punishment for violation of the CSA's criminal provisions varies with the amount of drug involved but can be quite serious for large amounts – possession of 100 or more marijuana plants, for example, is punishable by up to forty years in a federal prison.[13] The CSA also has extensive civil provisions, allowing for the forfeiture of property shown to have been used in the distribution and manufacture of a prohibited substance.[14] Furthermore, as discussed more fully below, the CSA and its forerunners have been influential on the passage of state laws prohibiting marijuana. In addition to the blanket federal prohibition of marijuana, the legislatures of every state have made the drug's manufacture and sale a criminal offense as well.[15]

As a result of this web of state and federal laws, an enormous number of people have been and continue to be arrested and incarcerated for marijuana crimes in the United States. One study calculated the number of marijuana prisoners nationwide at nearly 45,000 and the annual costs of their incarceration at more than $1 billion.[16] In 2010 more than forty-five percent of those arrested for drug possession in the United States were arrested for marijuana, with the vast majority of these arrests occurring at the state and local level.[17]

The second major consequence of marijuana's categorization as a Schedule I narcotic is the inability of DEA-certified physicians to prescribe the drug to patients. Because the very definition of a Schedule I drug is one with neither an approved medical use nor a safe dosage, such drugs can never be prescribed by any doctor licensed by the DEA. While state MMJ laws generally require a physician's approval to obtain the drug, the laws generally frame that approval in terms of a doctor's recommendation rather than a prescription.[18]

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[12] Id. at 17. The Court distinguished its decisions in Lopez v. United States, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000) – invalidating under the Commerce Clause the Gun-Free School Zones Act and the Violence Against Women Act of 1990, respectively – by analogizing to its long-standing decision in Wickard v. Filburn, 317 U.S. 111 (1942) that wheat grown on Filburn's property for his own consumption was a proper subject of federal regulation under the Commerce Clause.

[13] 21 U.S.C. § 841.

[14] 21 U.S.C. § 881.

[15] Even in Colorado and Washington production and sale outside of the regulated recreational marijuana industries will remain criminal

[16] "Pot Prisoners Cost Americans $1 Billion per Year" at http://www.alternet.org/rights/47815/ (last visited August 10, 2012). See also Drug Use and Dependence, State and Federal Prisoners, 2004 at http://bjs.ojp.usdoj.gov/-index.cfm?ty=pbdetail&iid=778 (last visited August 10, 2012)..

[17] See http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested (last visited August 10, 2012).

[18] The term "recommendation" is carefully chosen; while Congress and the DEA may, through regulation, determine what drugs may and may not be prescribed by licensed physicians, its power to limit what is discussed between doctors and patients is limited by the First Amendment. In Conant v. Walters, the Ninth Circuit Court of Appeals held that a doctor could not, consistent with the First Amendment, be prohibited from recommending marijuana to her patients if she

B. State Regulation

In part because of concerns about the efficacy and fairness of federal marijuana laws, the past several years have seen significant pressure to change marijuana's continued categorization as an illicit substance.[19] Many critics of the federal prohibition believe that marijuana is a relatively benign substance, one that is far less harmful than alcohol and tobacco, both of which are legal, regulated, and taxed.[20] Others have praised it as a powerful medicine, effective at treating pain, nausea, and other ailments.[21] Still others see the underground marijuana trade as a potential source of state revenue. Arguing that taxing and regulating marijuana combined with an end to the arrest and prosecution of nonviolent marijuana offenders would result in a large net gain to state and federal coffers, a number of advocates have seen marijuana as a rare fiscal opportunity in troubled economic times.[22] Finally, the racial disparity in the enforcement of marijuana laws has become difficult for many to ignore.[23]

Although this growing resistance to marijuana prohibition has met a dead end at the federal level, the situation in the states has proven far more fluid. Within the last twenty years, a number of states have begun to decriminalize the drug, making possession of a small amount of marijuana a relatively minor offense under state law.[24] In addition, many municipalities have told

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believed it was appropriate for their treatment. 309 F.3d 629 (9th Cir. 2002). The court relied in part on Supreme Court decisions dealing with the right of publicly funded doctors to discuss abortion with their clients despite a federal ban on the public funding of abortion.

[19] See, e.g., Americans for Safe Access v. DEA, 11-1265 (D.C. Cir. 2012) (lawsuit by advocacy group challenging the DEA's refusal to reclassify marijuana).

[20] See, e.g., NORML, About Marijuana, at norml.org/index.cfm?Group_ID-=7305 (last visited August 10, 2012) ("Marijuana is far less dangerous than alcohol or tobacco. Around 50,000 people die each year from alcohol poisoning. Similarly more than 400,000 deaths each year are attributed to tobacco smoking. By comparison, marijuana is nontoxic and cannot cause death by overdose.").

[21] See, e.g., Drug Policy Alliance, Medical Marijuana, at www.drugpolicy.org/-marijuana/medical/ ("Numerous published studies suggest that marijuana has medical value in treating patients with serious illnesses such as AIDS, glaucoma, cancer, multiple sclerosis, epilepsy, and chronic pain. In 1999, the Institute of Medicine, in the most comprehensive study of medical marijuana's efficacy to date, concluded, 'Nausea, appetite loss, pain and anxiety . . . all can be mitigated by marijuana.'").

[22] See, e.g., Jeffrey A. Miron and Katherine Waldock, The Budgetary Impact of Ending Drug Prohibition, available at http://www.cato.org/publications/white-paper/budgetary-impact-ending-drug-prohibition (finding that ending the marijuana prohibition would result in more than $8 billion in additional revenue for the federal government annually.).

[23] SEE, E.G., LEGALIZING MARIJUANA IS CIVIL RIGHTS ISSUE, CALIFORNIA NAACP SAYS, HTTP://ARTICLES.CNN.COM/2010-07-07/POLITICS/NAACP.MARIJUANA.SUPPORT_1_INTERNATIONAL-FAITH-BASED-COALITION-BISHOP-RON-ALLEN-MARIJUANA-LAWS?_S=PM:POLITICS (last visited August 10, 2012).

[24] See States that Have Decriminalized,at http://norml.org/index.cfm?Group_ID=6331 (last visited August 10, 2012) (listing states).

their law enforcement units to treat the possession of marijuana as their lowest priority.[25] But the biggest change in marijuana policy at the state level has been the move to legalize the drug either for medical or recreational purposes. The move to decriminalize the medical use of marijuana at the state level has proven very effective: eighteen states and the District of Columbia have legalized marijuana for medicinal purposes, making the drug available to those with a doctor's recommendation.[26]

But provision for medical marijuana ("MMJ") use is inherently something of a middle ground. It does not do away with the prohibition entirely but merely provides an affirmative defense to authorized users charged with violating the state's criminal law. Furthermore, in a number of states, there has been criticism that MMJ provisions are nothing more than a wink and a nod at full legalization.[27] Easy access to medical recommendations,[28] "medical" marijuana dispensaries with names like Dr. Reefer and Rocky Mountain High,[29] and aggressive advertising and marketing campaigns by MMJ dispensaries, have led in some places to a backlash against the MMJ industry.[30] While this criticism led to retrenchment in some states, in others it has led

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[25] Feature: Lowest Law Enforcement Priority: Marijuana Initiatives Face the Voters in Five Cities, at http://stopthedrugwar.org/chronicle/2006/oct/26/feature_lowest_law_enforcement_p (last visited August 10, 2012).

[26] Alaska Stat. § 17.37.010 et seq.; Cal. Health & Saf. Code § 11362 et. seq.; Colo. Const. art. 18, sec. 14; Haw. Rev. Stat. § 329-121 et seq.; Me. Rev. Stat. Ann. tit. 22, § 2383-B(5); Mich. Comp. Laws § 333.26421 et seq.; Mont. Code Ann. §§ 50-46-101 et seq., 50-46-201 et seq.; Nev. Rev. Stat. § 453A.010 et seq.; N.J.S.A. § 24:6I-1; N.M. Stat. Ann. § 26-2B-1 et seq.; Or. Rev. Stat. § 475.300 et seq.; R.I. Gen. Laws § 21-28.6-1 et seq.; Vt. Stat. Ann. tit. 18, § 4472 et seq.; Wash. Rev. Code § 69.51A.005 et seq.

[27] Medical Marijuana: A Sad Joke, BUCK SAYS (Apr. 21 2010), http://www.bucksays.com/medical-marijuana-a-sad-joke/; Sherry Hewins, Medical Marijuana, Legitimate Treatment or Excuse to Get High?, HUB PAGES (Sept. 7, 2012), http://sherryhewins.hubpages.com/hub/Medical-Marijuana-Legitimate-Treatment-or-Excuse-to-Get-High; Laura Cosgrove, Medical Marijuana Cards Easy To Get, Some Say; Police Focus On Regulating Dispensaries, *Not Doctors*, MERCURY NEWS (Oct. 4, 2011), http://www.mercurynews.com/mosaic/ci_18375000.

[28] If physicians were a bit more scrupulous about their diagnosis and recommendation of MMJ, lawyers could perhaps rest a little easier that they were, for the most part, helping clients engage in genuine medical usage of marijuana. Indeed, state statutes often treat the need for a doctor's recommendation or approval of the consumption of MMJ as an important check on the use of marijuana within the statutory scheme . *See*, Jay M. Zitter, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R. 6TH 353, §§ 2, 13-17 (2009).

[29] Heath Urie, 'Dr. Reefer' Seeks Patient Support Ahead of Federal Sentencing, DAILY CAMERA (May 2, 2011), http://www.dailycamera.com/boulder-county-news/ci_17977095; William Breathes, Medical Marijuana Dispensary Review: Rocky Mountain High – Cherry Creek, DENVER WESTWORD BLOGS (Feb. 3, 2011), http://blogs.westword.com/latestword/2011/02/medical_marijuana_dispensary_review_rocky_mountain_high_cheer_creek.php.

[30] Kristen Wyatt, Medical Pot Ads Bring Denver Backlash, PORTLAND PRESS HERALD (Aug. 14, 2012), http://www.pressherald.com/news/nationworld/Medical-marijuana-ads-under-attack-in-

to calls to end the medical "charade" and simply permit marijuana to be sold to any adult regardless of whether they have received a doctor's recommendation or not.[31]

The final move from MMJ to full legalization proved a difficult one, however. Until 2012, no state had yet taken the additional step of removing its own prohibition and sale of the drug for recreational purposes.[32] One important reason for this reticence was the significant federal opposition to such a move. In 2010 when California considered Proposition 19, which would have legalized possession and manufacture of relatively large amounts of marijuana, Attorney General Eric Holder made clear that the federal government would look with extreme disapproval on any such move.[33] The measure was polling strongly throughout the state headed into the final weeks before the election when Holder expressed the federal government's staunch opposition to the initiative; Proposition 19 lost by seven percentage points.

The 2012 election proved a turning point, however. With President Obama running for reelection, his administration was less free to flex federal muscle against marijuana decriminalization. Legalization initiatives were put forward in three states – Oregon, Washington, and Colorado – and passed in two of those states. These two initiatives were similar in form; both immediately repealed the state-level laws criminalizing possession of up to an ounce of marijuana and gave the state legislatures a year to come up with a regulatory regime for the licensing and taxing of retail marijuana stores. Both states are presently moving ahead with these plans while keeping an uneasy eye on the federal government's response.[34]

The next section examines the interplay between state and federal marijuana laws, considering the impact of legal change at the state level in light of the fact that marijuana remains a Schedule I controlled substance at the federal level.

C. Uneasy Federalism – The Impact of State Marijuana Laws

Although Congress clearly has the power both to regulate marijuana and to preempt any and all state regulation of that substance,[35] it has so far chosen not to do so. The CSA explicitly

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Denver-.html; Next Target of Federal Pot Backlash in California: Marijuana Ads, MEDICAL MARIJUANA BUSINESS DAILY (Oct. 12, 2011), http://mmjbusinessdaily.com/2011/10/12/next-phase-of-federal-pot-backlash-in-california-target-marijuana-ads/.

[31] See, e.g., http://www.nytimes.com/2012/10/08/us/california-fight-to-ensure-marijuana-goes-only-to-sick.html?ref=us ("Vague state laws governing medical marijuana have allowed recreational users of the drug to take advantage of the dispensaries, say supporters of the Los Angeles ban and the federal crackdown. Here on the boardwalk of Venice Beach, pitchmen dressed all in marijuana green approach passers-by with offers of a $35, 10-minute evaluation for a medical marijuana recommendation for everything from cancer to appetite loss."); http://blogs.westword-.com/latestword/2012/01/medical_marijuana_norml_controversy_colorado.php (reporting that the president of NORML referred to medical marijuana as a "farce.").

[32] Many in the marijuana law reform movement dislike the term "recreational use" and prefer the phrase "adult use."

[33] See, e.g., "Holder vows fight over prop. 19", Los Angeles Times, October 16, 2010 (available at: http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016).

[34] In the interest of full disclosure we note that Professor Kamin sits on Colorado's marijuana regulation task force. See, XXX.

[35] Robert A Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime, 62 VAND. L. REV. 1421, 1445-46 (2009) ("It is hornbook law

disclaims an intent to preempt the field of regulation.[36] However, even if the federal government were to seek to preempt state marijuana laws, its power to do so is inherently limited. For example, Congress cannot force the states to enact legislation consistent with the CSA nor to repeal laws that are inconsistent with it.[37] Furthermore, it cannot enlist unwilling state or local officials in the enforcement of federal laws.[38]

This is not to say, of course, that no consequences flow from the federal government's continued prohibition of conduct that more than a third of the states have endorsed. Obviously, the most serious of these consequences is the ever-present threat of federal prosecution. Although there have been only a handful of federal prosecutions of those acting in conformance with state law, recent actions by United States Attorneys' Offices throughout the country indicate that the risk to MMJ practitioners remains nonnegligible.[39] These enforcement actions demonstrate the difficulty of trying to determine exactly how the CSA will be enforced against the marijuana industry going forward.

This is particularly true when trying to determine the views of the current administration in Washington. Marijuana activists and others seized on President Obama's pro-marijuana sound bites (emboldened, no doubt by images on the web purporting to show President Obama smoking a joint during his youth)[40] as a harbinger of a potential change in policy with regard to federal enforcement of marijuana laws.[41] These supporters found further encouragement in

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that Congress may preempt any state law that obstructs, contradicts, impedes, or conflicts with federal law. Indeed, it is commonly assumed that when Congress possesses the constitutional authority to regulate an activity, it may preempt any state law governing that same activity. Given that there are so few limits on Congress's substantive powers, there would seemingly be no limit to its preemption power either.").

[36] See 21 U.S.C. Sec. 903 ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.")

[37] See, e.g., Printz v. United States, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs").

[38] New York v. United States, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

[39] See, U.S. Attorneys in California Set Crackdown on Marijuana, New York Times, October 7, 2011 (http://www.nytimes.com/2011/10/08/us/california-to-crack-down-on-medical-marijuana.html?); U.S. Attorney says crackdown on medical marijuana operations will continue, Billings Gazette, April 22, 2012) (http://billingsgazette.com/news/state-and-regional/montana/u-s-attorney-says-crackdown-on-medical-marijuana-operations-will/article_29c8a2d3-7fb1-55fe-970c-ed59ff33641d.html)

[40] A web search for the image in the fall of 2012 revealed that it had appeared on more than 250 different websites.

[41] Scott Morgan, Will Obama End the Medical Marijuana Raids?, STOPTHEDRUGWAR.ORG (Nov. 6, 2008), http://stopthedrugwar.org/speakeasy/2008/nov/06/will_obama_end_medical_marijuana.

statements Attorney General Eric Holder made early in 2009 announcing a shift in the enforcement of federal marijuana law. Holder was quoted as saying that the administration would only be going after those who masquerade as medical dispensaries and "use medical marijuana laws as a shield."[42]

In October of 2009 Holder's Justice Department issued a much-publicized memorandum instructing the United States Attorneys throughout the country on the enforcement of marijuana laws.[43] The memo, written by Deputy Attorney General David Ogden, states that its goal is to provide "uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities."[44] This memo was seized upon by many pro-marijuana advocates as an opportunity. In states that had adopted MMJ provisions, the memo was seen as a green light to the open sale of marijuana. For example, in states such as Colorado and California, 2009 saw an explosion in the number of storefront marijuana dispensaries openly doing business in a product prohibited under federal law.[45]

A close reading of the Ogden memo shows that this interpretation was either careless or delusional on the part of those who rushed into the marijuana business in 2009. Although it was read by many as a pledge not to enforce federal marijuana laws in those states that have adopted MMJ laws, the Ogden memo in fact comes closer to doing the opposite: "[t]he prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives."[46] The memo also makes clear that commercial enterprises dealing marijuana remain a priority for federal enforcement, even if they are in compliance with state requirements regarding MMJ. In fact, the memo goes on to state explicitly that compliance with state law is a relevant factor, but in no way determines the scope of the federal government's jurisdiction.[47]

That the Ogden memo was being misinterpreted – willfully or otherwise, and despite its relatively clear warnings about the continued viability of the CSA – did not escape the notice of the Department of Justice. In the summer of 2010 – eight months after the issuance of the Ogden

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[42] David Jonston and Neil A. Lewis, Obama Administration to Stop Raids on Medical Marijuana Dispensers, NY Times, March 18, 2009.

[43] Available at http://blogs.usdoj.gov/blog/archives/192

[44] Id.

[45] In California, Marijuana Dispensaries Outnumber Starbucks, NPR (Oct. 15, 2009), http://www.herbalhealthsystems.com/news/colorado%e2%80%99s-marijuana-dispensary-boom-now-undergoing-regulation-leads-to-explosion-of-patients-seeking-licenses/ ("there are more medical marijuana dispensaries than Starbucks); W. Zachary Malinowski, Colorado's Marijuana Dispensary Boom, Now Undergoing Regulation, Leads top Explosion of Patients Seeking Licenses, HERBAL HEALTH SYSTEMS, http://www.herbalhealthsystems.com/news/colorado%e2%80%99s-marijuana-dispensary-boom-now-undergoing-regulation-leads-to-explosion-of-patients-seeking-licenses/ (last visited Oct. 2, 2012) (after the 2009 memo from the Obama administration, the number of patients seeking medical marijuana cards shot up to over 1,000 per week).

[46] Id.

[47] Memorandum from Deputy Attorney General David W. Ogden to the United States Attorneys (Oct. 19, 2009) http://blogs.justice.gov/main/archives/192, ¶ 6.

memo – a second memo, written by Deputy Attorney General James Cole, was released by the Justice Department on essentially the same topic. That memo states that while the Justice Department's policy has not changed, facts on the ground certainly have:

> The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of the millions of dollars based on the plant cultivation of tens of thousands of cannabis plants.[48]

The Cole memo[49] was thus an acknowledgement that the Ogden memo had inadvertently led to an increase in marijuana cultivation and sale in those states that permitted MMJ to be used and sold. What is more, the Cole memo went on to make clear just how serious a misreading this was of federal policy.

> The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with the resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil enforcement of federal law with respect to such conduct, including enforcement of the CSA.[50]

Events of the next several months made clear that this was more than mere rhetoric. In the fall of 2011, California's four United States Attorneys announced that a federal grand jury had returned indictments against several marijuana cooperative owners throughout the state, charging them with violations of the CSA.[51] In addition, the United States Attorneys sent cease and desist letters to both dispensary owners and their landlords, giving them forty-five days to move their operations or else face arrest.[52] In addition to the clear threat of criminal prosecution, this action made clear that the threat of civil enforcement – explicit in the Cole memo – was not an empty one. For a federal government with limited enforcement resources, the specter of civil

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[48] Memorandum from Deputy Attorney General James Cole to the United States Attorneys (June 29, 2011) http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf, ¶ 4.

[49] Id.

[50] Id. at ¶ 5.

[51] See, e.g., Feds Warn, Indict California Medical Marijuana Dispensary Operators, KABC-TV L.A., Oct. 7, 2011, http://abclocal.go.com/kabc/story?section=news/state&id=8383655 describing recent federal law enforcement actions against California marijuana dispensaries).

[52] Id.

forfeiture is an incredibly powerful tool.[53] Similar crackdowns have since taken place in Washington State, Colorado, and Montana.[54]

Just as the Justice Department's enforcement of the CSA has not been limited to the enforcement of criminal provisions, the federal government's response to MMJ has not been limited to the Department of Justice. The Internal Revenue Service invoked a Reagan-era provision in support of the principle that those in the business of dispensing MMJ may not deduct their business expenses as other businesses do.[55] Using this provision, the IRS has sought to collect back taxes from those it believes wrongfully claimed deductions in violation of this policy.[56] This provision could decimate the industry; few businesses can afford to pay income tax on their gross receipts.[57] When this is combined with the increasing unwillingness of banks and credit card companies to do business with the industry, it is becoming harder and harder for marijuana businesses to continue to do business at all.

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[53] Id.

[54] Medical Marijuana: Federal Crackdown, Similar To That In California, Begins In Colorado, HUFFINGTON POST (Jan. 12, 2012), http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal_n_1202725.html; Jamie Kelly, Former Grizzly pleads not guilty to federal drug charges, MISSOULIAN (Jan. 19, 2012), http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4.

[55] Letter from Andrew J. Keyso, Deputy Assoc. Chief Counsel, IRS, to Congressman Barney Frank et al., U.S. House of Reps. (Dec. 10, 2010available at http://ww.irs.gov/pub/irs-wd/11-0005.pdf ("Section 280E of the Code disallows deductions incurred in the trade or business of trafficking in controlled substances that federal law or the law of any state in which the taxpayer conducts the business prohibits.").

[56] Al Olson, IRS Ruling Strikes Fear in Medical Marijuana Industry, MSN.COM, Oct. 5, 2011, http://bottomline.msnbc.msn.com/_news/2011/10/04/8153459-irs-ruling-strikes-fear-in-medical-marijuana-industry (quoting a target of IRS enforcement as saying: "I see only two outcomes here: Either this IRS assessment has to change or we go out of business. There really isn't a middle ground for us.").

[57] In addition, the Bureau of Alcohol, Tobacco, and Firearms sent a letter in September 2011 to all licensed firearms dealers, instructing them that all licensed marijuana patients were prohibited under federal law from obtaining firearms. Open Letter from Arthur Herbert, Ass't Dir., Enforcement Programs & Servs., ATF, to All Federal Firearms Licensees (Sep. 21, 2011), available at http://www.nssf.org/share/PDF/ATFOpenLetter092111.pdf ("[A]ny person who uses or is addicted to marijuana, regardless of whether his or her state has passed legislation authorizing marijuana use for medical purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition."). The ban has been criticized by at least one State Attorney General, see Matt Volz, Montana Objects to Gun Ban for Medical Pot Users, ASSOCIATED PRESS, Oct. 3, 2011 (on file with the McGeorge Law Review), available at http://www.chron.com/news/article/Montana-objects-to-gun-ban-for-medical-pot-users-2200714.php and has been challenged in federal court by a Nevada woman who was denied a handgun she sought for self-protection because the seller was aware that she was an MMJ patient. Steve Green, Nevada Woman Fighting Federal Ban on Medical Pot Users Owning Firearms, VEGAS INC, Oct. 18, 2011, http://www.vegasinc.com/news/2011/oct/18/nevada-woman/).

These recent actions make clear that even if the federal government does not prosecute everyone actively violating the Controlled Substances Act – and realistically, it cannot achieve anything like full enforcement – other modes of enforcement besides criminal prohibitions still have teeth. Many benefits in American life carry with them a promise not to violate any criminal prohibitions, and these benefits may thus be forfeited by those violating the CSA even if they are complying with state marijuana laws. For example, residents of public housing pledge not to violate criminal laws while living in the unit, probationers and parolees agree that they will not use any controlled substances during their release, and leases often condition continued occupancy on the lessee's agreement not to use the premises for criminal purposes.[58] In a world where marijuana is permitted under state law but prohibited under federal law, the legal consequences of marijuana use will be very difficult for everyone to ascertain.

. Furthermore, as Colorado and Washington begin making plans for a regulated recreational marijuana industry, the complications and risks will only multiply. The recreational marijuana industry promises to be many times larger than the existing MMJ industry. For example, while just over 100,000 people currently hold medical marijuana cards in Colorado,[59] the adult population in the state is over 3.5 million.[60] If this difference in size is any indication, state decriminalization can be expected to lead to a growth in the industry of at least an order of magnitude. This potentially explosive growth in the marijuana business will create large opportunities for investors but also an exponential increase in the number of people affected by the current web of overlapping and contradictory state and federal regulation.

III
Representation of Marijuana Clients: Criminal Concerns

The increased willingness of the federal government to prosecute those involved in the MMJ industry in the states reminds us that there are significant criminal risks faced by those who sell marijuana, whether in the MMJ context or the emerging recreational market. Furthermore, it is important to understand that the risks are borne not just by those participating in the industry directly – those who do business with the marijuana industry are also at risk. The criminal law punishes not just those who actively commit crimes but also those who aid and abet or conspire with those who commit crimes. In particular, the CSA explicitly provides for the punishment of accomplices and coconspirators.[61] As we shall see, these doctrines have significant implications for persons – landlords, wholesale suppliers, employees, and particularly lawyers – who do

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[58] See 42 U.S.C. § 1437d (H)(7)(l)(6) (stating that any drug-related criminal activity by a public housing tenant, on or off such premises, shall be cause for termination of tenancy); See also Sample Parole Agreement for the State of Nevada, http://www.parole.nv.gov/sites/parole/files/pdf/pubmeet/Institutional_Parole_Agreement_draft.PDF.

[59] See Colorado Department of Public Health and Environment, Medical Marijuana Registry Program Update at http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044.

[60] See, U.S.Census, 2010 at http://factfinder2.census.gov/faces/tableservices-/jsf/pages/productview.xhtml?src=bkmk

[61] See, e.g., 18 U.S.C. § 2(a). Recall that the Cole Memo explicitly notes that "those who knowingly facilitate such activities [cultivating, selling, or distributing marijuana], are in violation of the Controlled Substance Act." Supra note 45.

business with those running marijuana businesses. As marijuana – both medical and recreational – becomes a bigger industry, more and more people will find themselves facing the question of where the line between permissible and impermissible conduct lies.

A. Accomplice Liability

Throughout the English-speaking world, the criminal law punishes not merely those who commit crimes themselves, but also those who intentionally assist or facilitate their commission. While the common law had a profusion of terms for those who aid in the commission of an offense – aiders and abettors, accomplices before the fact, accessories after the fact, et cetera – with varying degrees of culpability, the modern law of accomplice liability is generally much more streamlined.[62] Today, one is generally liable for a crime if one commits it oneself (the principal) or if one aids another to commit it (the accomplice). While this much is now relatively clear, there remains much debate regarding what mental state a purported accomplice must have in order to be liable for the principal's conduct.[63] This discussion often boils down to whether one who intentionally engages in conduct that in fact furthers the crime is liable as an accomplice if she is merely indifferent as to whether the crime is committed.[64]

Following the lead of the Model Penal Code (MPC),[65] most states today require that an accomplice not merely aid the principal to commit the offense, but that he have an actual intent to aid the commission of that offense.[66] That is, it is generally insufficient to show merely that

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[62] See, e.g., Baruch Weiss, What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law, 70 FORDHAM L. REV. 1341, 1355-56 (2002)("[I]it was Congress's intent to eliminate the archaic, common-law distinctions between the aider and abettor and the principal, to eliminate the need to determine whether the defendant under consideration had acted as a principal or an aider and abettor, and in general, to make it easier to convict the aider and abettor.")

[63] See, e.g., Robert Weisberg, Reappraising Complicity, 4 BUFF. CRIM. L. REV. 232, 236 (2000-20001) ("For decades, the American courts and legislatures have debated whether knowledge or 'true purpose' should be the required mens rea for accomplice liability.")

[64] See, e.g., People v. Lauria, 69 Cal.Rptr. 628, 635 (1967) (holding that even though Lauria intended to and did provide his answering service to a criminal enterprise, there was no evidence that he intended to further that enterprise, and is thus absolved of his liability as a conspirator).

[65] Written by the American Law Institute in the 1960s, the Model Penal Code's provisions have had an enormous impact on law reform in the United States over the last fifty years.

[66] See, MPC §2.06:

> (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
> (2) A person is legally accountable for the conduct of another person when:
> ...
> (c) he is an accomplice of such other person in the commission of the offense.
> (3) A person is an accomplice of another person in the commission of an offense if:
> (a) with the purpose of promoting or facilitating the commission of the offense, he
> (i) solicits such other person to commit it; or
> (ii) aids or agrees or attempts to aid such other person in planning or committing it; or

the erstwhile accomplice knowingly assisted the principal to commit the offense; it must generally be shown that it was the accomplice's intent to do so. Adopting an intent standard rather than the easier to prove knowledge requirement,[67] the MPC drafters drew on Judge Learned Hand's famous statement in United States v. Peoni that liability as an accomplice requires the defendant to intentionally associate himself with a criminal venture.[68] Parsing a statute that punishes a party who "aids, abets, counsels, commands, induces, or procures" the commission of a crime, Hand noted the ancient origin of this string of verbs, observing that:

> It will be observed that all these definitions . . . demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used – even the most colorless, "abet" – carry an implication of purposive attitude towards it.

That is, under Judge Hand's principle, the defendant must provide aid to a principal because of – and not in spite of – the fact that the conduct of the principal is criminal. Although there remains great controversy regarding this conclusion, it has come to be the majority rule in the United States.[69]

This distinction between knowledge and intent in this context is no idle, semantic one. Holding criminally liable those who, while indifferent to the criminal goals of others, knowingly facilitate the others' conduct would greatly broaden the scope of criminal liability. This is most easily seen in the context of providers of lawful services who make their services available to anyone who can pay. The gas station owner who sells gas to the arsonist and the driver alike, or the website that accepts advertisements from prostitutes and gardeners alike, is not generally liable when its services are misused. This is true even when the provider of services knows that

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> (iii) having a legal duty to prevent the commission of an offense, fails to make proper effort so to do…

[67] While an early draft of the MPC accomplice liability provision set forth knowledge as a sufficient mens rea, that draft was eventually rejected in favor of what the MPC refers to as "purpose." Tent Draft No. 1, 1953: "A person is an accomplice of another person in the commission of a crime if . . .acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission."

[68] U.S. v. Peoni, 100 F.2d 401 (2d Cir. 1938).

[69] See, e.g., U.S. v. Fountain, 768 F.2d 790 (7th Cir. 1985) (Posner, J.):

> Under the older cases, illustrated by Backun v. United States, 112 F.2d 635, 636-37 (4th Cir.1940), and Bacon v. United States, 127 F.2d 985, 987 (10th Cir.1942), it was enough that the aider and abettor knew the principal's purpose. Although this is still the test in some states (see, e.g., Sanders/Miller v. Logan, 710 F.2d 645, 652 (10th Cir.1983)), after the Supreme Court in Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949), adopted Judge Learned Hand's test-that the aider and abettor "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed," United States v. Peoni, 100 F.2d 401, 402 (2d Cir.1938)-it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating 18 U.S.C. § 2, the federal aider and abettor statute. See, e.g., United States v. Paone, 758 F.2d 774, 775-76 (1st Cir.1985).")

some of the persons purchasing her services are using them for nefarious purposes. The rationale for the intent requirement is grounded in part in a respect for and deference to American individualism. The concern is that a knowledge standard would turn every merchant into his brother's keeper, requiring every shop owner to inquire into his client's motives and plans. Rather, a merchant is protected from prosecution as an accomplice so long as she provides the same service to all clients regardless of their plans for her services. [70]

The unwillingness of the criminal law to require merchants to inquire into the affairs of their customers is an example of a broader phenomenon. The criminal law, particularly in the United States, has long been loath to use criminal sanctions to enforce ethics. For example, misprision of felony – the nonreporting of a crime of which an individual is aware – has been rejected in nearly all American jurisdictions.[71] Similarly, American law has generally been unwilling to impose a Good Samaritan requirement on the public.[72] While many other Western nations have passed legislation requiring those capable of giving aid to others in peril to do so when it can be done without risk, the United States has consistently refused to so impose such a requirement.[73] In the United States, one is criminally liable for failing to act only when the law has expressly imposed a duty to act; while parents are obligated to protect children and sea captains are obligated to protect their passengers, there is no general obligation to protect others. In a similar way a merchant is not liable for failing to take steps to keep her lawful goods or services from being misused by her clientele.

As we shall see, this distinction – between liability based on knowledge and liability based on the intent of the would-be accomplice – has significant consequences for attorneys working in the MMJ industry.

B. Coconspirator liability

A conspiracy is an agreement for criminal purposes. As set forth in the United States Code, "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."[74] The conspiracy doctrine differs from the concept of accomplice liability in that conspiracy is both an independent offense and a theory of vicarious liability. That is, a defendant can be charged both with the crime of conspiracy and the substantive crimes committed by each of the others in the conspiracy.[75] In

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[70] People v. Lauria, 59 Cal. Rptr. 628, 635 (1967) ("To require everyone . . . to become an accuser, would be productive of inconvenience . . . and engendering private dissention").

[71] Pope v. State, 284 Md. 309, 352 (1979) (holding that misprision of felony is not a chargeable offense in Maryland). But see Itani v. Ashcroft, 298 F.3d 1213, 1216 (11th Cir.2002) (the essential elements of a misprision of a felony are knowledge of a crime and some affirmative act of concealment or participation); see United States v. Brantley, 461 F. App'x 849, 851 (11th Cir. 2012); see 18 U.S.C.A. § 4 (West).

[72] See, e.g., John. T. Pardun, Good Samaritan Laws: A Global Perspective, 20 LOYOLA L.A. INT'L. & COMP. L. J. 591 (1998).

[73] Quebec Charter of Human Rights and Freedoms, Part 1, chapter 1, Num. 2, http://www.mcgill.ca/files/-equity_diversity/charter.pdf.

[74] 18 U.S.C. § 371 (2012).

[75] See, e.g., Ianelli v. U.S., 420 U.S. 770, 777 (1975) (holding that "conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a dingle

this way, conspiracy law is a more effective, far-reaching tool for prosecutors than is accomplice liability.[76]

As with accomplice liability, there exists an on-going controversy with regard to the mental state necessary to bring a particular party to an agreement into a conspiracy. Clearly it is not enough that the defendant agreed with others who had nefarious goals; for example, the car owner who agrees to lend his car to a friend does not become his friend's coconspirator merely because the car is used in a bank robbery. Rather, some mens rea must be demonstrated with regard to the criminal ends of those with whom the defendant agrees. Although there is less agreement regarding conspiracy than there is regarding accomplice liability, many courts hold that a true intent is required with regard to conspiracy as well.[77] It is not enough that the defendant has knowingly associated with others for criminal purposes; rather it must be shown that she intends to achieve those criminal goals.

Again, this distinction arises most often in the case of merchants. The classic case of People v. Lauria demonstrates the point.[78] Lauria ran an answering service and many of his customers were prostitutes. Based solely on these facts he was charged with conspiring with his clients to commit prostitution and objected by arguing that while he knew of their criminal conduct, he did not intend to join a conspiracy to commit it. The court held that only under certain circumstances could intent to join a conspiracy be inferred from knowledge that one was agreeing with criminals – where the purveyor of legal goods has acquired a stake in the illegal venture[79] (for example, charging unlawful clients a higher rate); where there is no legitimate use

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punishable act."); People v. Madonna, 651 P.2d 378 (Colo. 1982) (holding that a conspiracy charge is separate and distinct from the commission of the crime that was the object of the conspiracy). But see MPC § 1.07(1) (stating that a criminal defendant can be convicted of conspiring to commit an offense or of committing the offense but not both).

[76] A conspiracy may also be charged in any jurisdiction where any of the conspirators did any of the overt acts in furtherance of the conspiracy, the hearsay statements of coconspirators are admissible against one another, coconspirators may be tried together in a single proceeding, and so on. State v. Overton, 298 S.E.2d 695, 716 (1982) (holding jurisdiction existed over those involved in a "criminal conspiracy if any one of the conspirators commits an overt act in furtherance of the conspiracy within the State"); U.S. v. Gooding, 25 U.S. 460, 461 (1827); see also U.S. v. Nixon, 418 U.S. 683, 701 (1974) (holding statements by coconspirators admissible, and not barred as hearsay); U.S. v. Villiard, 186 F.3d 893, 895 (8th Cir. 1999) (holding that the general rule is that coconspirators may be tried together).

[77] See, e.g., Direct Sales Co. v. United States, 319 U.S. 1265 (1943) (finding that the "gist of a conspiracy" is that the defendant knows of the other's illegal purpose and that he "intends to further, promote and cooperate in it.") (emphasis added); U.S. v. Burgos, 94. F.3d 849, 860 (4th Cir. 1996) ("[B]lack letter conspiracy law requires the Government to prove: '(1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means.'") (emphasis added); U.S. v Gomez-Pabon, 911 F.2d 847, 853 (1st Cir. 1990) ("to establish that a defendant belonged to and participated in a conspiracy, the government must prove two kinds of intent: "intent to agree and intent to commit the substantive offense.")

[78] Id.

[79] Id.

for the goods or services (for example, publishing a list that is nothing but the names and addresses of prostitutes); or where an intent to conspire can be inferred from the fact that the volume of business with the buyer is "grossly disproportionate to any legitimate demand"[80] (as where a pharmacist provides a doctor with hundreds of times more painkiller than there is a lawful demand for). The MPC and a majority of states also require true intent. [81]

While true intent rather than knowledge is therefore the linchpin of coconspirator liability, an important caveat is in order, however. The Lauria court concluded that, while knowing agreement with prostitutes was insufficient to make Lauria responsible for the acts of prostitution, knowledge might suffice for conspiracy to commit more serious crimes. [82] The policy arguments in favor of such a holding are obvious. While it seems a heavy burden to deputize law-abiding merchants in the enforcement of victimless crimes and misdemeanors, there is greater revulsion at the idea that a gun merchant could avoid being brought into a murder conspiracy because he merely "knew" that he was selling a gun to a killer but did not "intend" that the killing occur.[83]

Both of these doctrines – accomplice and coconspirator liability – obviously raise serious concerns for attorneys working with those in the MMJ field. The next section investigates the criminal prosecution of lawyers more generally, concluding that while such prosecutions are relatively rare, they are not so infrequent that lawyers should consider themselves beyond the reach of the criminal law.

C. The Criminal Prosecution of Lawyers

Lawyers are obviously not immune from the dictates of the criminal law and – like any other provider of lawful services – are liable as accomplices and conspirators when their provision of legal services satisfies the elements of these doctrines.[84]

As a general matter, it is unusual, though not unheard of, for lawyers to be criminally charged for assisting the criminal activity of their clients through representation.[85] Many cases of lawyer prosecution involve securities fraud or other white collar crime where attorneys are charged as accomplices based on their preparing, filing, and vouching for fraudulent or incomplete documents. For example, in November of 2010 federal officials indicted Lauren Stevens, a former Assistant General Counsel at the pharmaceutical firm GlaxoSmithKline for

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[80] Id. at 633.

[81] See, e.g., MPC § 5.03(1) ("Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.") (emphasis added)

[82] Lauria, 59 Cal. Rptr. at 634.

[83] This policy analysis has also led some jurisdictions to criminalize the knowing facilitation of crimes – independent of any liability as an accomplice or co-conspirator.

[84] See, e.g., The Torture Lawyers, at 209 ("Lawyers also assume that the advice of counsel defense will preclude their own liability. This is completely false.")

[85] See, e.g., Jens David Ohlin, The Torture Lawyers, 51 Harv. Int'l L.J. 193 (2010) ("Although many lawyers have been prosecuted and convicted as accomplices, these cases all involved a level of participation in the criminality that went beyond simple advice-giving."). Fred C. Zacharias, Lawyers As Gatekeepers, 41 SAN DIEGO L. REV. 1387, 1389 (2004).

allegedly providing misleading responses to a government investigation of the firm.[86] The government further alleged that Ms. Stevens obstructed justice by certifying that GSK's submissions to the government were complete when she knew the opposite to be true.[87] On May 20, 2011 the trial judge (having previously quashed the grand jury indictment in the case, requiring the government to refile its charges) granted a defense motion for a judgment of acquittal under Rule 29.[88] The judge stated that he was granting the Rule 29 motion – his first in seven and a half years on the bench – in part because "a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her ...."[89] The judge went on that to hold that

> The institutional problem that causes me a great concern is that while lawyers should not get a free pass, the Court should be vigilant to permit the practice of law to be carried on, to be engaged in, and to allow lawyers to do their job of zealously representing the interests of their client. Anything that interferes with that is something that the court system should not countenance.[90]

Other criminal cases against attorneys have focused on lawyers whose close connection with organized crime or other disfavored groups has brought them within the scope of ongoing criminal enterprises.[91]

Notably, while prosecutors have traditionally been loath to indict attorneys for misconduct that is part and parcel of the practice of law,[92] many defense attorneys believe that criminal prosecution of lawyers acting qua lawyers is an increasingly common tactic against

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[86] http://prescriptions.blogs.nytimes.com/2010/11/09/former-glaxo-lawyer-indicted/

[87] Id.

[88] See http://lawprofessors.typepad.com/files/110510stevens.pdf. The decision to take the case from the jury on the basis of insufficiency of the evidence was non-reviewable.

[89] Id. at 9.

[90] Id. at 10.

[91] U.S. v. Locascio, 6 F. 3d 924 (2nd Cir. 1993) (upholding a conviction in a case in which the government alleged, inter alia, that counsel had served as "house counsel" to the Gamino Crime Family); U.S. v. Abbell, 271 F.2d 1286 (11th Cir. 1998) (upholding the prosecution of two attorneys on conspiracy and money-laundering charges for their role in representing the head of an alleged drug cartel); U. S. v. Nesser, 939 F. Supp. 417, 422 (W.D. Pa. 1996) (holding an attorney liable for drug distribution and money laundering conspiracies through knowledge or willful blindness of the illegal activities which he was found to be furthering by providing his legal services).

[92] See, e.g., Bruce A. Green, The Criminal Regulation of Lawyers, 67 Fordham L. Rev. 327, 328-29 (1998) ("The tension between criminal law and professional norms is most interesting, and most troubling, where the lawyer in question is a criminal defense lawyer. Ordinarily, prosecutors are expected to be professionally detached. Yet, the criminal law gives prosecutors authority to regulate their professional adversaries--criminal defense lawyers. In this situation, the prosecutor's professional judgment and detachment are to be trusted least. Consequently, there is a particular danger not only of overcriminalization, but of overdeterrence--that is, to avoid the possibility of an unwarranted prosecution, lawyers may refrain from engaging in lawful conduct that is professionally desirable.")

those lawyers representing unpopular defendants.[93] Perhaps the most famous recent example of an attorney being prosecuted for her role in the representation of her client is the charging of New York attorney Lynne Stewart with conspiracy to provide material support to a terrorist organization for her role in passing communications between her client and others. Stewart was convicted of conspiracy (and subsequently of perjury), disbarred, and sentenced to ten years in prison.[94] The case led to widespread criticism, particularly among the criminal defense bar, that the prosecution was sending a message to those representing terror suspects that their conduct was being closely monitored.[95] While there is not yet a reported case of an attorney being prosecuted for her involvement in a marijuana company's violations of the CSA, there is no logical reason why accomplice or coconspirator liability should be limited to these few contexts.

A cynical explanation for the relative dearth of cases involving the criminal prosecution of lawyers for assisting their criminal clients is that is an example of lawyers protecting their own. That is, a cynic could argue that prosecutors are unwilling to pursue charges against fellow lawyers out of an ugly version of professional courtesy.[96] A more likely explanation, we believe, is that many prosecutors have a well-grounded concern that prosecuting other attorneys will be perceived as an intrusion into the exclusive power of the courts to regulate attorneys.[97] Put another way, the shortage of prosecutions of lawyers could reflect a sincere belief on the part of prosecutors that attorneys' misconduct should be primarily dealt with as a disciplinary matter rather than a criminal affair.[98]

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[93] See, e.g., Laura Rovner & Jeanne Theoharis, Preferring Order to Justice 61 AM. U. L. REV. 1331 (2012) ("The successful prosecution of Stewart has had a chilling effect on lawyers throughout the country; many will not take these terror cases, and those who do operate with excessive caution about what they say in public and whom they consult for legal strategy. "),

[94] U. S. v. Stewart, 590 F.3d 93 (2d Cir. 2009).

[95] Tamar R. Birckhead, The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend, 43 AM. CRIM. L. REV. 1, 12 ("[T]he prosecution strategy utilized by the government could have reverberations that are felt for decades to come"); Heidi Boghosian, Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 16 (2003) (stating that the message that the indictment of Lynne Stewart sent to lawyers was "direct and unambiguous: represent accused terrorists and you too may be arrested.").

[96] This phenomenon is akin perhaps to the well-documented reluctance of lawyers to testify against other attorneys in professional malpractice lawsuits with regard to breach of a fiduciary duty. W. Bradley Wendel, Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities, 54 VAND. L. REV. 1955, 2017 (2001) (describing as a "conspiracy of silence" the "unwillingness of many lawyers to testify against one another in malpractice suits.").

[97] For a concise, albeit critical, analysis of the inherent powers doctrine, pursuant to which courts have the exclusive power to regulate lawyers, see Charles W. Wolfram, Lawyer Turf and Lawyer Regulation – the Role of the Inherent powers Doctrine, 12 U. ARK. L. J. 1, 6-13 (1989).

[98] But see Bruce A. Green, Prosecutors and Professional Regulation, 25 Georgetown Journal of Law and Ethics 873 (2012) (detailing the suspicion that prosecutors have historically had of professional disciplinary proceedings, believing the organized bar to be captured by criminal defense attorneys)..

Other prosecutors may fear interfering with or undermining attorney-client relationships.[99] The ability of clients to find effective representation is a core requirement of our legal system and, in the context of criminal defense, a constitutional right in many instances.[100] If lawyers fear that the representation of disfavored groups will open them up to investigation and possible prosecution, they are likely to be over-deterred – shying away from lawful, ethical conduct in order to remain above suspicion.[101] Similarly, clients may be more likely to withhold – or be asked to withhold – information about their cases if their lawyers believe that full disclosure by clients will subject the lawyers to criminal liability or discipline.[102] This reticence, in turn, will both undermine the ability of lawyers to represent clients effectively and deprive attorneys the opportunity to dissuade clients from engaging in wrongdoing.[103]

Considering whether lawyers should be prosecuted for aiding their criminal clients' conduct recalls the discussion above about the merits of punishing merchants for knowingly assisting the criminal conduct of their patrons. It is certainly intuitive to argue that the case for punishing knowing facilitation of a crime is stronger vis-à-vis lawyers than it is with regard to other merchants. We argue, however, that countervailing factors make punishing knowing facilitation more rather than less problematic when applied to lawyers. Because lawyers, unlike other providers of goods and services, are rightly seen as serving important, often constitutionally-based societal goods, an interpretation of the rules of professional conduct and criminal law that would have a deleterious effect on the ability of lawyers to serve that role should be carefully limited.[104] Furthermore, because effective lawyering requires a lawyer to

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[99] See, e.g., HAZARD, THE LAW OF LAWYERING at § 5.12 (discussing the unwillingness of prosecutors to pursue anything but the most egregious of attorney behavior).

[100] See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (finding a right to counsel in all felony trials); Rothgery v. Gillespie County, 554 U.S. 191 (2008) (finding that the right to counsel applies to all critical stages following the initial appearance before a magistrate).

[101] See, Green, The Criminal Regulation of Lawyers, supra note XX ("Criminal provisions may also overdeter, discouraging lawyers from engaging in lawful, praiseworthy conduct out of fear that a prosecutor who misconstrues the conduct will launch a criminal investigation or prosecution. ")

[102] See, e.g., Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 111 (7th Cir.1990) (holding that "[t]reating involvement of a lawyer as the key unlocking § 1985 would discourage corporations from obtaining legal advice before acting, hardly a sound step to take.").

[103] Model Rules of Professional Conduct; Rule 1.6, cmt 2 (2012) (Trust "is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.").

[104] See, e.g., Green, The Criminal Regulation of Lawyers, supra note XX, at 386:

> [L]awyers are engaged in a pursuit that society believes to be particularly valuable. The professional participation of lawyers promotes the fair resolution of criminal cases and civil disputes and better enables "members of the public to secure and protect available legal rights and benefits." That is why communications between an attorney and a client are privileged under the law of evidence, while most other communications among

inquire into the affairs of her client, a rule that punishes knowing facilitation will necessarily inhibit a lawyer from effectively representing her client. Unlike say, a gas station attendant or an advertiser who can easily provide their services without making personal inquiries into the affairs of their patrons – application of a knowing facilitation standard to the prosecution of lawyers will necessarily impede the capacity of a lawyer to serve as an effective advocate for her client.

Thus, we argue that requiring a mens reas of true intent is an important protection against prosecutorial overreaching in the event of prosecution of marijuana lawyers as accomplices to violations of the CSA or with conspiring to violate the CSA. In any such prosecution, we argue that the government should have to prove the attorneys' intent to assist clients in the commission of the crime. Similarly, with regard to coconspirator liability, finding that an attorney manifests a true intent to violate the CSA simply because she represents an MMJ client seems farfetched unless, following *Lauria*, the lawyer charges an MMJ client a higher rate than a non-MMJ client for similar services or has an unusually high volume of business with one MMJ client or with MMJ clients generally.

Exactly this approach has been taken by a number of courts who have considered whether those who knowingly facilitate marijuana offenses are liable as a result under an aiding and abetting or co-conspirator theory. For example in Conant v. Walters, the 9th Circuit Court of Appeals considered whether doctors could be enjoined from discussing marijuana with their patients; in arguing in favor of the prohibition, the government argued that doctors recommending marijuana to their patients would be tantamount to aiding and abetting a violation of the CSA. The Court rejected that argument reasoning that:

> A doctor's anticipation of patient conduct . . . does not translate into aiding and abetting, or conspiracy. A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana. 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.[105]

In other words, the Court held that a doctor could not be punished criminally merely for knowingly facilitating criminal conduct by her patient; rather it was only when it was shown that the doctor had an intent to facilitate the criminal conduct of her patient that conduct that the doctor's aid would constitute aiding or abetting or co-conspirator liability. The rationale for this conclusion seems to be the same as in the context of the prosecution of lawyers as their clients' accomplices; making doctors responsible whenever they are aware that they are facilitating their clients' misconduct would have a deleterious effect on the doctor-patient relationship.[106]

Similarly, the California Court of Appeals considered the unusual case of a city seeking to

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> individuals are not. At least in the case of criminal defense lawyers, this professional undertaking has a constitutional dimension as well.

[105] Conant v. Walters, 309 F. 3d 629, 635-36 (9th Cir. 2002) (citations omitted).

[106] See id. at 636 ("The doctor-patient privilege reflects 'the imperative need for confidence and trust" inherent in the doctor-patient relationship and recognizes that "a physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.'") (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

overturn a court order requiring it to return marijuana improperly seized from a criminal defendant named Kha. The Court rejected the proposition that doing so would make the city an aider and abettor of Kha's possession of that marijuana.

> The City ... worries about the possibility it may be viewed as aiding and abetting a violation of federal law if its officers return Kha's marijuana to him. To be liable as an aider and abettor, a defendant must not only know of the unlawful purpose of the perpetrator, he must also have the specific intent to commit, encourage or facilitate the commission of the offense. Stated differently, the defendant must associate himself with the venture and participate in it as in something that he wishes to bring about and seek by his actions to make it succeed.[107]

Though the city would be engaging in conduct that knowingly facilitated Kha's possession of marijuana, the court had no problem discarding the possibility that that knowledge was sufficient to make the city culpable for Kha's possession[108].

D. Conclusion

It is important to remember that charging lawyers as accomplices or coconspirators in violations of the CSA is a tool available to federal – as opposed to state – prosecutors. In other words, an attorney in an MMJ state might be fairly confident that she will not be prosecuted under state law in the state in which she practices. She cannot be so confident, however, that federal prosecutors – who take an oath to uphold the laws and constitution of the United States rather than of any particular state[109] – will be quite so unwilling to charge those they believe to be enmeshed in violations of the CSA. Given how rarely an attorney will have a true intent to facilitate a violation of the CSA, however, federal prosecutors may conclude that in most instances the proper venue in which to deal with lawyers' representation of marijuana clients is not a federal criminal courtroom but rather in an attorney disciplinary proceeding.[110] In order to give substance to our conclusions regarding attorneys' criminal liability, we suggest a similar reading of the relevant laws of professional responsibility.

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[107] City of Garden Grove v. Superior Court, 157 Cal. App. 4th 355 (2007) (citations omitted). See also, San Diego v. San Diego NORML, 165 Cal. App. 4th 798 (2008) (citing Garden Grove for the proposition that employees of San Diego County would not become liable as aiders and abettors of a violation of the CSA by setting up a medical marijuana licensing scheme in the County).

[108] See Garden Grove at 663 "holding the City or individual officers responsible for any violations of federal law that might ensue from the return of Kha's marijuana would appear to be beyond the scope of either conspiracy or aiding and abetting. No one would accuse the City of willfully encouraging the violation of federal law, were it merely to comply with the trial courts order. The requisite intent to transgress the law is so clearly absent here that the argument is no more than a straw man."

[109] 5 U.S.C. § 3331; see also Oath, U.S. OFFICE OF PERSONNEL MANAGEMENT http://www.opm.gov/constitution_initiative/oath.asp (last visited Sept. 30, 2012).

[110] See, Green, The Criminal Regulation of Lawyers, supra note XXX at 391 ("prosecutors should not invoke the criminal law as a way of resolving disagreements within the legal profession concerning how lawyers should properly act on behalf of clients or as a way of choosing among competing conceptions of the private lawyer's appropriate professional role."); but see Bruce A. Green, Prosecutors and Professional Regulation, 25 Georgetown Journal of Law and Ethics 873, 875 (2012) ("prosecutors often express mistrust of professional regulators, their rules, and their processes.")

IV
Representation of Marijuana Clients: Ethical Concerns

A. The Traditional Understanding of Representing, Advising, and Assisting Clients in the Commission of Crimes

Notwithstanding the increased nationalization, even globalization, of law practice,[111] the regulation of lawyers continues to be, for the most part, a state-based affair.[112] While many actors (such as judges, legislators, clients, federal agencies, insurance companies), bodies of law (state-based rules of professional conduct, tort law, criminal law), and forces (competition in the market for legal services, social norms, professional ideology) impact the conduct of lawyers,[113] the principal means of regulation continues to be state-based rules of professional conduct. In particular, the primary limit on a lawyer's capacity to assist a client in criminal conduct is Rule 1.2(d), which states:

> 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.[114]

A plain reading of the Rule appears to suggest that lawyers may generally represent marijuana clients in many ways without risking a violation. Rule 1.2(d) states that a lawyer "may counsel or assist a client to make a good faith effort to determine the validity… or application of the law." Arguably, a lawyer may represent a marijuana client with regard to any and all needs because such representation will often constitute an effort to determine the validity and application of the CSA given state law. While the CSA theoretically preempts contradictory state law, the federal government has not sued to preempt state law as unconstitutional. Nor does the federal government regularly attempt to enforce the CSA against medical marijuana dispensaries and time will tell whether it will enforce the CSA vis-à-vis recreational users or businesses in Colorado and Washington.[115] Consequently, there is an argument to be made that the validity and application of the federal law in question is in doubt, at least until such time as it is clarified by the courts, or by enforcement efforts by the federal government. Indeed, one could even argue

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[111] Eli Wald, Federalizing Legal Ethics, Nationalizing Law Practice and the Future of the American Legal Profession in a Global Age, 48 SAN DIEGO L. REV. 489 (2011).

[112] But see, Daniel R. Coquillette & Judith A. McMorrow, Zacharias' Prophecy: The Federalization of Legal Ethics Through Legislative, Court and Agency Regulation, 48 SAN DIEGO L. REV. 123 (2011).

[113] David B. Wilkins, Who Should Regulate Layers, 105 Harv. L. Rev. 801 (1992).

[114] Model Rules of Professional Conduct, R. 1.2(d) (2012). Although the Model Rules are not themselves binding, they have been influential nationwide; a number of states have adopted large parts of the Model Rules. Rule 1.2(d) has proven particularly persuasive. It has been adopted, almost verbatim, in forty-six states. See Status of State Review of Professional Conduct Rules, AMERICAN BAR ASSOCIATION (Sept. 14, 2011). http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf.

[115] Supra Part I.

that until the interplay between federal and state law is clarified, no lawyer knows her client's conduct to be criminal. While much client conduct that conforms to state medical and recreational marijuana laws certainly appears to violate the language of the CSA, a lawyer could take the position that no conduct can be criminal if the government is aware of the conduct and systematically fails to enforce the law.

Yet we believe that such an interpretation fails the common sense test. Marijuana clients are generally not interested in making a good faith effort to determine the validity and application of the CSA. Rather, they are interested in owning and operating dispensaries, and, in the case of recreational states, selling marijuana to the public for profit. Indeed, most would likely be quite pleased never to have the application of the CSA determined as long as they can operate their businesses or consume their marijuana. And even if engaging in a violation of the CSA to force the government to react constitutes an "effort to determine the validity… or application" of the law pursuant to Rule 1.2(d), one would be hard pressed to characterize the conduct as a "*good faith*" effort given that the underlying objective of the client would be to engage in the conduct, not to determine the meaning of the law. Moreover, it is simply hard to see how drafting an employment contract for a marijuana client constitutes an effort to determine the validity of the CSA. If a lawyer is truly interested in helping a client to make a good faith attempt to determine the validity of the law, she could advise a client to seek a declaratory judgment to that effect or to communicate with the federal government and seek a clarification. Representing marijuana clients with all of their legal needs seems to be just that, and not a "good faith effort to determine the validity, scope, meaning or application of the law." Before representing a marijuana client, therefore, a lawyer would have to contend with the substance of Rule 1.2(d).

Rule 1.2(d) and its many state analogs draw a basic distinction between "counseling to" and "assisting" a client to pursue criminal conduct, which is prohibited, and "discussing" with the client the legal consequences of any proposed course of conduct, which is permitted. Yet this conceptual distinction is sometimes difficult to discern, for two reasons. First, the Rules fail to define the terms "counsel to" and "assist". Second, the meaning of "discuss" is less than clear. As Professor Stephen Pepper notes in an influential paper, "[k]nowledge of the law … is an instrument that can be used to follow the law or to avoid it."[116] Discussing the law with a "bad person" may allow, and in that sense "assist," the client in manipulating, avoiding, or violating the law. For example, discussing with a client the enforcement habits of the relevant law enforcement agencies seems on the one hand to merely amount to talking about the "consequences of any propose course of conduct" but on the other hand strikes many as "assisting" a client to violate the law.[117]

The traditional reading of Rule 1.2(d) attempts to resolve the conceptual ambiguity about the meaning of "assist" and "discuss" with a two-step inquiry. It establishes whether the client's conduct is criminal; and then determines whether the lawyer has actual knowledge that the conduct is criminal as opposed to, for example, mere suspicion.[118] If these two conditions are

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[116] Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L. J. 1545, 1547 (1995).

[117] *Id.*, at 1556-58, 1565-1571.

[118] Although it should be noted that the Rules state that actual knowledge may be inferred from circumstances. Model Rules of Professional Conduct, R. 1.0(k) (2012).

met, then a lawyer cannot represent the client in connection with the conduct and cannot take any action on behalf of the client. All a lawyer can do under such circumstances is to discuss with the client the consequences of the conduct should the client persist in pursuing it. Put differently, the traditional interpretation of Rule 1.2(d) rejects the challenge raised by Pepper and purports to construe the terms "counsel to", "assist" and "discuss" mechanically: a lawyer can always passively discuss and explain to a client the consequences of a proposed course of conduct irrespective of what the client does with the information or how she acts on it, but a lawyer cannot take any active action on behalf of a client when she knows the conduct in question is criminal. A lawyer in such circumstances would be precluded from drafting documents, representing the client, negotiating on her behalf or offering any kind of legal services related to the conduct beyond discussing their consequences with the client.

Under this traditional approach, the application of Rule 1.2(d) in the MMJ and MJ contexts appears to be an easy case. A lawyer can discuss and explain to a client the state of MMJ and MJ law, such as the tension between federal and state law and the enforcement policies of the federal government, including offering analysis of the Ogden and Cole memos and the inconsistent federal record of pursuing both criminal prosecution and civil sanctions against dispensary owners. But because the sale and manufacture of marijuana is a violation of the CSA, a client selling or manufacturing marijuana is committing a crime, and a lawyer called upon not merely to explain and discuss marijuana law but rather to counsel or assist a client in this conduct, for example, by drafting a sales agreement, would have actual knowledge that the client's conduct constitutes a crime. It would seem, therefore, that Rule 1.2(d) forbids lawyers from assisting clients in the commission of this federal crime, regardless of whether their conduct is permitted by state law.

The State of Maine came to a similar conclusion with regard to Maine Rule of Professional Conduct 1.2(e), which directly corresponds to Model Rule 1.2(d). Asked by an attorney whether she could "represent or advise clients under Maine's new Medical Marijuana Act," the Maine Professional Ethics Commission warned against such representation. Directly referencing the Ogden memorandum, the Professional Ethics Commission described the question before it as "whether and how an attorney might act in regards to a client whose intention is to engage in conduct which is permitted by state law and which might not, currently, be prosecuted under federal law, but which nonetheless is a federal crime." Although the Maine Commission did not explicitly state that an attorney may not ethically represent a marijuana business, it described such representation as ethically fraught.

> 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. [119]

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[119] Maine Professional Ethics Commission, Opinion #199, Advising Clients concerning Maine's Medical Marijuana Act, available at: http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article

And it is easy to see why. Bearing in mind that every sale by a dispensary involves a violation of federal law, there is a more than colorable argument that any aid the attorney provides the marijuana client, above and beyond mere explanation of the law, is prohibited.

This traditional interpretation of 1.2(d) has the attractive feature of offering lawyers clear and concise guidance regarding the representation of marijuana clients: it disallows it. At the same time, the interpretation is disturbing in that it deprives clients of representation by lawyers in an area of the law that is complex, heavily regulated and rife with risks. Largely for this reason, the State of Arizona's Committee of the Rules of Professional Conduct came to almost exactly the opposite conclusion than the one reached by the Maine Commission in a report issued in 2011, capturing the very troubling aspects of applying the traditional 1.2(d) approach to the representation of marijuana clients. The Arizona Ethics Committee held:

> [W]e decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.[120]

A few things are notable about this opinion. First, it is explicitly premised on the language of the Ogden memo that those operating in "clear and unambiguous compliance" with state law are not an appropriate target of federal law enforcement. Given the change in federal enforcement following the issuance of the Cole memo, however, it is not at all clear that Arizona will continue to take the position that clear compliance with state law is a sufficient ground to insulate a lawyer from ethical sanction. Second, the Arizona holding is explicitly premised on access to law and a lawyer's role (and duty) to provide services and help clarify the law:

> Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.[121]

Finally, the Arizona opinion does not describe in detail what legal conduct is permitted and prohibited under the opinion. The opinion states that if a lawyer has properly instructed her client on the legal status of her conduct and the client has made an informed decision to engage in that conduct, "[t]he 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 [Arizona law]."

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[120] http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710

[121] *Id.*

What a lawyer ought to do in any given professional situation depends on the specific circumstances and, in particular, on the kind of assistance a lawyer is being asked to provide.

The Arizona opinion rejects the Maine opinion's mechanical reading of the terms "counsel to", "assist" and "discuss". It points out that in a highly regulated society, discussing a course of conduct with a client is simply not enough to allow the client the ability to exercise her autonomy and decide what course of conduct to pursue, noting: "[l]egal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law."[122] Accordingly, the Arizona Committee appears to allow "counseling to" and "assisting" clients as long as their conduct is in "clear and unambiguous compliance" with state law. Yet such a broad reading is simply inconsistent with the traditional interpretation of Rule 1.2(d). Below we present a number of hypotheticals, illuminating both the wide range of lawyer conduct implicated by the split between state and federal law in this area and the importance of treating that conduct in a nuanced way. In doing so, we propose a new reading of Rule 1.2(d) which provides coherent guidance in a variety of circumstances, and strikes an appropriate balance between respecting the objectives of Rule 1.2(d) and providing clients with meaningful access to lawyers in circumstances where such access is most needed.

B. A New Approach to Representing, Advising and Assisting Clients in the Commission of Crimes

The inconsistency between the Maine and Arizona ethics opinions can be resolved by relying on the criminal law distinction between knowledge and intent with regard to accomplice and coconspirator liability. Rather than the traditional reading of Rule 1.2(d), which looks to two elements, the client's criminal conduct and the lawyer's knowledge of that illegality, we suggest a reading of the Rule as consisting of three elements: (1) a client's criminal activity, (2) a lawyer's knowledge that the activity is criminal, and (3) a lawyer's intentional assistance in the prohibited client conduct.[123]

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[122] *Id.*

[123] We concede that unlike section 94(2) of the Restatement, which is entirely consistent with our proposed interpretation – "a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal . . . *with the intent of* facilitating or encouraging the conduct . . ." (emphasis added) – Rule 1.2(d) does not expressly incorporate the language of intent. Certainly one could argue that such a failure to reference intent suggests that intent ought not be read into the Rule. Some support for this contrary position can be found in ABA Formal Opinion 87-353: "as used in Rule 3.3(a)(2), the language 'assisting a criminal or fraudulent act by the client' is not limited to the criminal law concepts of aiding and abetting." [insert cite] But of course, Opinion 87-353 construed Rule 3.3, not 1.2(d) and the distinction is a significant one. In many ways, Rule 3.3 outlining disclosure duties to tribunals stands as an exception to the usual client-centered approach of the Rules. For example, Rules 3.3(a)(3) and 3.3(b) constitute the only mandatory exceptions to the doctrine of confidentiality. The Committee itself noted that its interpretation of Rule 3.3 was guided by the need to "protect against client perjury contaminating the judicial process," a consideration irrelevant in the context of Rule 1.2(d). Put differently, one can consistently hold that in the context of Rule 3.3, disclosure of confidential information to a tribunal is warranted when a lawyer knows of a client's perjury, even if the lawyer does not have the intent to assist the client, and still maintain that in other instances, such as Rule 1.2(d), a lawyer is precluded from assisting a client only when the lawyer forms the necessary state of mind of intent to assist the client.

Principally, we argue, following Professor Pepper, that in a highly regulated society, first-class citizenship and the ability to act autonomously under the law require access to the law, and therefore to lawyers.[124] Without the guidance of lawyers, lay clients would often be unable to ascertain the meaning and application of the law and would therefore be denied the ability to decide how to conduct themselves under the law in an informed manner. If lawyers were to face disciplinary charges for "assisting" clients whenever they merely know of the clients' criminal conduct, lawyers would be inhibited from representing clients and the ability of those clients to meaningfully direct their own conduct would necessarily be compromised.

The traditional interpretation of Rule 1.2(d) attempts to address this concern by permitting lawyers to discuss and explain the law to clients and draws the line at representation beyond such discussion of the law. But, as noted by Pepper, in many complex legal situations this conceptual distinction break down because practically speaking, without the "assistance" of lawyers clients would not be able to pursue the conduct.[125] Consider a client considering applying for a license to own and operate a medical marijuana dispensary. The application process is complex and detailed. If a lawyer is only allowed to discuss the process and the risks inherent in it, but prohibited from "assisting" clients in filling out an application, the practical reality will be denying clients the ability to apply for a license.

We believe that when a state chooses to regulate particular conduct – in this case marijuana – access to law and lawyers becomes a necessary aspect of implementing this policy decision. MMJ states have created a tangle of overlapping legal regimes where conduct is prohibited at the federal level, legal, but heavily regulated at the state level, and subject to zoning and other restrictions at the local level. In this instance, deference to clients' autonomy as well as respect for state sovereignty and principles of federalism compel a reading of Rule 1.2(d) that enhances client access to law and lawyers. Indeed, particularly in instances when the law is in flux, either because different states regulate certain conduct differently or because federal law and state law collide, clients need access to lawyers more than ever. Effectuating state policy thus commands that when a state imposes a regulatory regime upon certain conduct lawyers licensed within that state ought to be permitted to help clients pursue what the state has determined to be desirable conduct.[126]

Access to law and lawyers in a highly regulated society is fundamental to the informed exercise of autonomy by clients. Yet clients' exercise of autonomy is not the only important value lawyers serve.[127] We believe that limiting clients' access to the law and to lawyers is justified in the case of the more serious *mala in se* crimes – things like murder, rape, robbery and

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[124] See, Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 AM. B. FOUND. RES. J. 613, 617.

[125] Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, supra note XX.

[126] A more difficult case arises when a state chooses to criminalize conduct permitted by other jurisdictions or pursuant to federal law, if only because deference to client autonomy and respect of state sovereignty may in this instance point in different directions.

[127] David Luban, The Lysistratian Prerogative: A Response to Stephen Pepper, 1986 AM. B. FOUND. RES. J. 637, 639 (asserting that helping a client to do wrong is wrong regardless of the individual autonomy involved in the action).

assault – but not in the case of mere *mala prohibita* crimes – crimes that are deemed bad merely because they are prohibited.[128] In particular, we conclude that with regard to crimes like violations of the CSA that are *mala prohibita* – acts that are bad merely because they are prohibited – strong policy reasons support the reading of an intent requirement into Rule 1.2(d).

Recall again, Lauria. In that case the court engaged in an elaborate analysis of when the defendant's mere knowledge of the fact that he was facilitating criminal conduct would support a finding that he intended to facilitate that behavior. The court concluded that, on the facts before it, the defendant's mere knowledge that some clients were using his services to engage in prostitution was insufficient to make him his clients' co-conspirator. But the court noted that a different situation might arise if the defendant were charged with conspiring to commit a more serious offense: "[t]he duty to take positive action to dissociate oneself from activities helpful to violations of the criminal law is far stronger and more compelling for felonies than it is for misdemeanors or petty offenses."[129] In other words, where the offense is more serious, it is less of an imposition to ask the provider of lawful services to avoid entangling herself in the misdeeds of her clientele.

Courts have taken a similar approach with regard to accomplice liability. While a true intent is generally required before a defendant may be made another's accomplice, this requirement is sometimes relaxed for more serious offenses. For example, in United States v. Fountain, Judge Posner wrote that a prisoner could be an accomplice to another prisoner's killing of a guard even if the aid he provided could be described only as knowing:

> Compare the following hypothetical cases. In the first, a shopkeeper sells dresses to a woman whom he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish her intent to aid. Indeed, little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation. In the second case, a man buys a gun from a gun dealer after telling the dealer that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting the murder. This liability would help to deter – and perhaps not trivially given public regulation of the sale of guns – a most serious crime. We hold that aiding and abetting murder is established by

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[128] See, e.g., Michael L. Travers, Mistake of Law in Mala Prohibita Crimes, 62 U. Chi. L.. Rev. 1301, 1322 (1995):

> Before the advent of the Industrial Revolution some 150 years ago, the criminal law almost exclusively addressed conduct that was malum in se. Convictions for criminal offenses generally required proof of moral culpability, and the degree to which the criminal law was intertwined with society's moral and religious values made such proof a substantially lighter burden for the prosecution than it would be today. But the Industrial Revolution created pressure on legislatures to pass mala prohibita regulations to protect citizens from the hazards of factory equipment, toxic chemicals, and other products of technological advancement. Lawmakers frequently made the violation of these regulations punishable as a criminal offense.

[129] Id. at XXX.

> proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used.[130]

It is often difficult, however, to determine exactly where the line is to be drawn between those crimes for which the defendant's knowledge makes her culpable and those for which true intent is required. While the Lauria court drew the line between misdemeanors and felonies, we believe a more sensible distinction is between those crimes that are *mala prohibita* and those crimes that are *mala in se*. This is a distinction well known in the criminal law between more serious offenses whose uniform prohibition across societies indicates their inherent blameworthiness, and those less serious crimes – possession offenses and the regulation of vice more generally – about which reasonable minds can differ.[131] Because possession of marijuana, particularly for medical purposes, is a thing bad merely because it is prohibited, we argue that an intent to facilitate such behavior it is necessary in order for an attorney to be deemed to have engaged in unethical or criminal conduct.

To be clear, note that this "access to law and lawyers" justification for requiring intent as a condition of finding attorney misconduct is somewhat different than the one advanced in criminal law. In *Lauria* the court required intent for fear of turning every merchant or purveyor of services into his brother's, or customer's, keeper, and due to its discomfort with asking every shop owner to inquire into her client's motives and plans.[132] Attorneys do, however, by the nature and in the ordinary course of providing legal services, inquire into clients' plans, and sometimes into their motives as well. Yet exactly because lawyers are so fundamental to the exercise of clients' autonomy in a highly regulated society and to clients' ability to attain first-class citizenship as autonomous individuals, it is important that lawyers not become their clients' keepers, and not act as their clients' moral police officers. As a matter of public policy, to ensure the utmost client access to the law and to lawyers, the terms "counsel to" and "assist" in Rule 1.2(d) ought to be read to require a lawyer's intent when the underlying client conduct entails *mala prohibita* crimes.

A possible objection to our proposed reading of Rule 1.2(d) is that lawyers are simply different than the shopkeepers and merchants described in Lauria and Fountain. Above we argue that lawyers should not be charged as accomplices and coconspirators unless they form the intent to help their clients because criminal prosecutions would undermine the attorney-client relationship and prevent lawyers from fulfilling the important and constitutionally sanctioned role they occupy in the criminal justice system.[133] As professionals, however, should lawyers be disciplined if they help clients when they have knowledge of the criminal conduct? Arguably, as members of a self-regulating profession, lawyers should not help their clients when they know that the clients' conduct is criminal. In a classic essay on the meaning of professionalism, Roscoe Pound has defined the term to refer to a group "pursuing a learned art as a common calling in the spirit of public service."[134] The Rules purport to capture this very meaning by summarizing the lawyer's responsibilities as follows: "[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

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[130] 768 F.2d 790 (7th Cir. 1985).
[131] See note XXX, supra.
[132] Lauria, supra note XXX.
[133] Supra note 104 and accompanying text.
[134] Roscoe Pound, The Lawyer from Antiquity to Modern Times.

responsibility for the quality of justice."[135] A gas station owner has no special responsibility whatsoever to maintain and protect the integrity of a system of buying and selling of gasoline. Rather, such an owner is only expected to sell a product at a competitive price. By contrast, lawyers, as members of a self-regulating profession and officers of the legal system owe a special duty to uphold the rule of law and as such ought not to help clients in conduct they know to be criminal.

We argue, however, that the case for a higher mental state requirement is in fact more compelling in the case of lawyers than in the case of other providers of services and goods. Here, the argument goes beyond a concern about chilling the attorney-client relationship. Shopkeepers are exempt from acting as their brothers' keepers because they often are not in a position to act in such a capacity. Lawyers, in contrast, are in position to act as their clients' keepers but should not, because acting in that capacity will usurp the clients' autonomy. Pursuant to the Rules, the client alone determines the objectives of the attorney-client relationship.[136] It is only in instances when clients choose to pursue a course of conduct that entails *mala in se* crimes, or when attorneys form the intent to help clients that lawyers' duty as officers of the legal system should trump their conflicting duty to act as representatives of clients.

Some may argue that in the context of the attorney-client relationship lawyers always form the intent to help their clients. After all, lawyers are retained and paid to help clients. Since a successful and happy client makes for a happy and paid attorney, would not lawyers by definition of their job description form the intent to help their clients? While it is undoubtedly true that lawyers have an obligation to encourage respect for and compliance with the rule of law,[137] finding that a lawyer "wished to bring about" criminal activity simply because she represented a client who engaged in that activity undermines a constitutive tenant of the attorney-client relationship – the principle of non-accountability – pursuant to which "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's . . . activities."[138] That is, while lawyers are retained to represent clients they do not, by virtue of the representation, "endorse" or form the intent to help client pursue their goals. Nor should that intent by inferred from mere knowledge of the clients' goals and conduct.

Indeed, the practice of law often tolerates instances in which lawyers know of clients' criminal conduct but are not required to abstain from offering legal services as a result. A criminal defense attorney, for example, may learn in the course of her representation of a client

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[135] Model Rules of Professional Conduct; Preamble, cmt. 1 (2012).

[136] Model Rules of Professional Conduct; R. 1.2(a) (2012).

[137] Model Rules of Professional Conduct; R. 1.6 cmt 2 (2012).

[138] Model Rules of Professional Conduct; Rule 1.2(b) (2012). On the principle of non-accountability, *see*, Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 Cal. L. Rev. 669, 672-75 (1978) (coining the term "Principle of Nonaccountability" to mean that lawyers are not morally accountable for a client's conduct); William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29, 40-41. While entrenched as a fundamental principle of law practice, non-accountability has long been criticized by leading legal ethics scholars. *See*, David Luban, Lawyers and Justice: An Ethical Study 148-49, 160-74 (1988); David Luban, Legal Ethics and Human Dignity 19-64 (Gerald Postema ed., 2007) (criticizing the principle of non-accountability for protecting lawyers from moral culpability for a client's conduct).

that the client is guilty of the crime with which he was charged. Rather than informing the prosecutor or the court, however, the defense counsel is expected to continue to vigorously defend that client.[139] The expectation is grounded not in ignoring or belittling the gravity of the client's conduct, but rather in allowing defendants the opportunity to defend themselves and holding the government to the standard of proving them guilty beyond a reasonable doubt. Similarly, a defense attorney may, in the course of representation, come to know of her client's ongoing or future criminal plans; yet the Rules never mandate disclosure of that information to the police or victim.[140] Again, the point is not to ignore or endorse the client's conduct, certainly lawyers are encouraged to attempt to dissuade a client from wrongdoing.[141] Rather, the point is to acknowledge and respect the competing value of the sanctity of the attorney-client relationship, in which client trust in the attorney is a fundamental element, so much so, that lawyers do not have a mandatory duty to disclose confidential information.[142] These examples highlight the point that competing principles often overcome our intuition that lawyers ought not to assist those they know have committed, are committing, or will commit crimes.

What is more, a prosecutor often exercises her discretion and, notwithstanding her awareness of the extent of the defendant's misdeeds, decides either not to charge the defendant with any crime or to charge her with a lesser offense than her conduct merits.[143] We do not consider the exercise of prosecutorial discretion a violation of the prosecutor's duty as an officer of the legal system; rather, we acknowledge that competing policy considerations warrant the exercise of discretion and professional judgment. Indeed, federal prosecutors in 18 states and the District of Columbia who exercise their discretion and decide not to charge dispensary owners with violating the CSA have knowledge that the owners are guilty of a federal crime but choose nonetheless not to act on it.

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[139] Monroe H. Freedman, The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966).

[140] The only mandatory exceptions to confidentiality are disclosure meant to prevent fraud on the court in Rule 3.3(a)(3) and perjury in Rule 3.3(b). Model Rules of Professional Conduct, R. 3.3(a)(3); 3.3(b). (2012). Rule 1.6(b) enumerates six exceptions to confidentiality but none are mandatory, even in circumstances when the client's future conduct involves "reasonably certain death or substantial bodily harm." Model Rules of Professional Conduct, R. 1.6(b)(1) (2012).

[141] "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation . . . *This contributes to the trust that is the hallmark of the client-lawyer relationship.* The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. *The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.* Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. *Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.*" Model Rules of Professional Conduct, R. 1.6. cmt 2 (2012) (emphasis added).

[142] Id.

[143] Bruce A. Green, Why Should Prosecutors "Seek Justice"? 26 Fordham Urb. L.J. 607 (1999); Bruce A. Green & Fred C. Zacharias, Regulating Federal Prosecutors' Ethics, 55 Vand. L. Rev. 381 (2002).

Finally, our proposed reading of Rule 1.2(d) is not inconsistent with an approach that takes lawyers' role as officers of the legal system seriously. Prominent critics of the role of lawyers as mere "representatives of clients," such as Professors Bill Simon and David Luban,[144] object to lawyers' zealous representation of clients only when such representation imposes injustice or indignity on third parties, and where lawyers, in response to the injustice indifferently assert no moral accountability for the client conduct they help bring about. Put differently, Simon and Luban call upon lawyers to act as "officers of the legal system" when failing to do so, and, in particular, assisting clients exercise their autonomy and pursue their goals, will result in harsh undesirable outcomes imposed on innocent third parties. For purposes of this Article, we need not take a position in this more theoretical discourse on the morality of lawyers and the possible tension between acting as a representative of clients and as an officer of the legal system. Suffice it to note that while our proposed reading of Rule 1.2(d) is justified in terms of providing clients with access to lawyers and the law such that clients can pursue their autonomy, the representation of marijuana clients does not in any way result in undesirable or unjust outcomes. Indeed, under our proposed reading, in instances when client conduct is morally undesirable, such as in *mala in se* circumstances, mere knowledge rather than intent would suffice under our reading to preclude an attorney from helping a client pursue her criminal conduct.[145]

In the sections that follow we apply this proposed reading of Rule 1.2(d) – one that requires lawyer intent as an element of misconduct – in a number of contexts in which lawyers face the ethical and legal quandary of when and how they may assist marijuana clients.

1. Lawyers' "Personal" Conduct

a. Lawyers' Participation in Marijuana Programs

An initial question has nothing to do with the lawyer's role as advisor or advocate but merely asks whether a lawyer violates her ethical obligations if she participates in a state's MMJ program as a patient. Here the relevant provision is not Rule 1.2(d) but Rule 8.4(b), which generally governs attorney misconduct.[146] In addition to prohibiting violations of the Rules, Rule

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[144] William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics (Harvard Univ. Press, 1998); David Luban, Legal Ethics and Human Dignity (Cambridge Univ. Press, 2007).

[145] We do, however, acknowledge an important limitation of this "access to law and lawyers" policy consideration: it applies most forcefully to individual clients rather than to entity clients. That is, because entities are not capable of exercising autonomy in the same way that individuals do, one cannot justify greater access to law and lawyers to entity clients on the ground that it would allow these clients to exercise greater autonomy. Accordingly, while access to lawyers and autonomy support our proposed reading of Rule 1.2(d) with regard to individual MMJ dispensary owners, they do not offer as compelling a justification for the representation of entities which own and operate MMJ dispensaries. On the other hand, in *Citizens United*, the Supreme Court held that corporations, like individuals, have First Amendment Rights and may make independent expenditures that advocate election or defeat of candidates. 558 U.S. 50 (2010). Thus, although individuals may make a more compelling case for legal representation than can the entities they run, it does not necessarily follow that there is no public interest in entities receiving competent legal advice.

[146] Model Rules of Professional Conduct, R. 8.4(b) (2012).

8.4(b) also governs an attorney's "personal" conduct outside of her professional duties, stating that it constitutes misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[147] Note that the Rule does not state that it is misconduct for the attorney to engage in any criminal conduct; only that conduct which reflects negatively on her trustworthiness or fitness as a lawyer is deemed to be attorney misconduct. In the past this provision has been deemed violated by crimes such as embezzlement, but not by others that do not pertain to a lawyer's trustworthiness or fitness.[148]

It should be noted that registering as an MMJ patient is not itself illegal conduct, even under federal law. What is prohibited under the CSA is the manufacture, sale or possession of marijuana. Thus, an attorney's mere presence on a list of marijuana patients is, without more, neither the commission of an offense nor tantamount to an admission of criminal conduct – it permits the card-holder to purchase marijuana but it does not attest to the fact that they have in fact done so.[149] It is only when the attorney takes the additional step of purchasing or growing marijuana in compliance with state law but in violation of the CSA that she first becomes subject to Rule 8.4(b). At this point, it becomes necessary to determine whether her violation of federal law constitutes misconduct.

There are good reasons to conclude that violating federal law by becoming a patient in a state-sponsored MMJ program should not be deemed professional misconduct. First, possessory crimes, unless they indicate a dependence problem, are generally not deemed to invoke Rule 8.4(b).[150] Second, while conduct involving alcohol and drugs has often been deemed grounds for misconduct, the typical fact pattern involves either additional wrongdoing, such as driving under the influence, or display of disregard for the law.[151] Participants in MMJ programs who are in compliance with state law, however, are not engaged in additional wrongdoing and their conduct does not harm others. Finally, Rule 8.4(b) is usually invoked in instances where lawyers publically conduct themselves in a manner that displays dishonesty or lack of trustworthiness, such as violating clients' trust, not with regard to private conduct such as the discreet consumption of MMJ. Bolstering this reading of Rule 8.4(b), the Colorado Bar Association Ethics Committee, has determined that the violation of the CSA by a lawyer-patient who is in

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[147] Id.

[148] See Fred C. Zacharias, The Purposes of Lawyer Discipline, 45 Wm. & Mary L. Rev. 675, 705-6 (2003).

[149] State lists of patients are confidential. Thus, a lawyer will only be publicly associated with the marijuana registry if she announces her participation. See Article XVIII Sec. 14(e)(3) ("(a) No person shall be permitted to gain access to any information about patients in the state health agency's confidential registry, or any information otherwise maintained by the state health agency about physicians and primary care-givers, except for authorized employees of the state health agency in the course of their official duties and authorized employees of state or local law enforcement agencies which have stopped or arrested a person who claims to be engaged in the medical use of marijuana and in possession of a registry identification card or its functional equivalent, pursuant to paragraph (e) of this subsection (3).")

[150] However, some jurisdictions have imposed discipline for mere possession. See Zacharias, The Purposes of Lawyer Discipline, supra note XXX at 705-6.

[151] Donald H. Stone, The Disabled Lawyers Have Arrived: Have They Been Welcomed with Open Arms Into the Profession? An Empirical Study of the Disabled Lawyer, 27 Law & Ineq. 93, 108-111 (2009).

compliance with state law is not in itself a violation of Colorado's ethical rules. The committee read Colorado ethical rules as requiring a "nexus between the violation of law and the lawyer's honesty, trustworthiness, or the fitness as a lawyer in other respect."[152] Therefore, we conclude that as a general matter participation in an MMJ program as a patient does not violate Rule 8.4(b). For the very same reasons, it is hard to see how attorney participation in recreational marijuana programs in states that permit them would violate Rule 8.4(b).

b. Lawyers' Financial Participation in the Marijuana Industry

Related to the question of whether a lawyer may participate in a state's MMJ industry is whether she may do so as an investor in or owner of a marijuana business. This would seem to present a much closer case which likely constitutes misconduct under Rule 8.4(b). An attorney-patient who believes that marijuana is a useful medicine for her own condition and a lawyer-consumer of recreational marijuana is differently situated from a lawyer-investor in a marijuana dispensary.[153]

The question then becomes whether ownership of a dispensary in violation of federal law amounts to criminal conduct that reflects adversely on one's honesty, trustworthiness, or fitness as a lawyer. Because, as we have seen, fitness as a lawyer includes fidelity to the law and public disrespect for the law has been acknowledged as grounds for discipline, it seems apparent that a lawyer may not own or invest in a marijuana business. Furthermore, in contrast to membership on a list of approved MMJ patients – which is inherently private conduct – ownership of a marijuana dispensary is inherently public; the ownership of marijuana dispensaries is generally a matter of public record. Thus, an attorney's participation in the industry as a dispensary owner is law-breaking of a different kind and could subject the attorney to discipline under Rule 8.4(b) and criminal prosecution under the CSA.[154]

2. Permissible Legal Services

When we turn from a lawyer's personal conduct to her conduct as an attorney, we see that any general statement regarding the representation of those in the marijuana industry is likely to be inaccurate. Rather, a careful analysis of what services a lawyer is asked to provide and why she chooses to provide (or not provide) those services becomes necessary.

a. Criminal Defense

One of the services that lawyers are asked to perform for those in the industry is criminal defense for those prosecuted under either state or federal marijuana laws. A literal reading of the ethical and criminal provisions might lead to a finding that an attorney providing zealous criminal defense, knowing that her client was guilty and would commit future crimes, violates both the criminal law and her ethical obligations.[155] But this simply cannot be right. It is in

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[152] In and Around the Bar CBA Ethics Committee – A Lawyer's Medical Use of Marijuana, Adopted, 41 THE COLO. LAWYER 28 (July, 2012).

[153] Ample case law establishes that Rule 8.4(b) covers a lawyer's private conduct outside of the practice of law. See, e.g., Rule 8.4(b) Preamble, Scope and Terminology PP 5 ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in *the lawyer's business and personal affairs.*")(emphasis added). Therefore, the fact that ownership of a dispensary has nothing to do with an attorney's law practice does not negate liability under the Rule.

[154] Note that the lawyer's criminal liability in this context is direct rather than relying on application of the accomplice or coconspirator doctrines described above.

[155] See, e.g., Green, supra note XXX at 358:

direct conflict with the clear constitutional right of a defendant to the effective assistance of counsel in preparing a defense. A reading of either the rules of professional conduct or of the criminal law that would so directly infringe on an attorney's capacity to represent her client would raise serious constitutional concerns. Thus, a lawyer can always, consistent with both her ethical and criminal obligations, provide criminal defense to a client charged with violating MMJ laws.

b. Political Advocacy and Lobbying

Relatedly, lawyers often make an argument for legal change on behalf of their clients. They may argue that current law, either as written or as interpreted, is unjust, nonsensical, or otherwise ill-considered. This argument can occur in the courtroom, the court of public opinion, or before the legislature.[156] When such advocacy is made in a good faith effort to determine the validity and application of the law, it is explicitly permitted by Rule 1.2(d),[157] thus, a lawyer may always provide to a client lobbying and related legal services aimed at convincing state and federal legislators to amend statutes to legalize MMJ and MJ. Indeed, recall that while general representation of marijuana clients, for example negotiating a commercial real estate lease, likely

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> A lawyer who wages a vigorous defense, knowing that the criminal conspirators are seeking to secure his client's release, might seem thereby to become a co-conspirator himself, since he is acting with knowledge of the conspiracy and in furtherance of one of its aims. Indeed, one might say that the lawyer intends to further one of the conspiracy's objectives, although the reason that this is so is that his own objective as a defense lawyer simply happens to coincide with this objective of the conspiracy. The lawyer's knowledge of the criminal conspiracy and his intent to join generally will not be proven directly, but circumstantially from proof of the facts made known to the lawyer and the lawyer's conduct. Once it is inferred that the lawyer acted with criminal intent, all his otherwise lawful acts, such as investigating the case for trial or filing motions, would seem to become acts in furtherance of the conspiracy.

For Green, as for us, such a result is intolerable. He concludes that "courts should require clear statutory language before interpreting a criminal provision to reach lawyers' professional conduct, at least where the conduct comprises traditional advocacy in accordance with a plausible construction of the professional norms and the line between innocence and guilt therefore turns exclusively on the lawyer's intentions, which a jury can determine only inferentially." Id. at 388.

[156] See, e.g., Model Rules of Professional Conduct, R. 2.1(2012) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); Model Rules of Professional Conduct, R. 5.7 cmt. 9 (2012) ("A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.").

[157] Supra Part IV.A.

does not constitute a "good faith effort to determine the validity of the law,"[158] lobbying services do squarely fall within the purview of Rule 1.2(d) as efforts to ascertain the meaning of the law.

c. Advising Clients Regarding the State of the Law

Discussing with a client the consequences of a particular course of conduct is never a violation of Rule 1.2(d), even under the traditional interpretation.[159] An attorney is clearly allowed to advise a client that owning and operating a dispensary is permitted pursuant to state law, that a licensing scheme exists, and that federal law prohibits the conduct.[160] A lawyer may advise a client that owning and operating an MMJ dispensary is a violation of federal law, that a violation of federal law may lead to the filing of federal criminal charges against the client and a conviction, that a criminal trial as well as a subsequent appeal may serve as an arena from which one could challenge both the law and the public opinion of it, and that if charged with a federal crime one will be able to secure representation in both the trial and the appellate stages. Of course, an attorney would also have to advise the client about the possibly severe consequences of a criminal conviction, the costs of defending the charges and appeals, and the possibility of losing the legal battle.

3. Questionable Legal Services

A number of other instances pose harder questions under Rule 1.2(d): May an attorney assist a client in filling out application forms for a marijuana dispensary license pursuant to the state regulatory scheme? May an attorney assist a client by negotiating a lease for a commercial space out of which the client will operate a medical marijuana dispensary? Draft the lease agreement? Draft purchase and sales agreement to be use in the course of doing business at the dispensary? Advise, negotiate, and draft employment contracts for dispensary employees. Pursuant to our proposed reading, a lawyer may ethically provide these legal services without violating Rule 1.2(d), as long as she does not form the intent to assist the client.

a. Compliance Work

May an attorney assist a client in pursuing a dispensary license pursuant to the state regulatory scheme? On the one hand, holding a license to own and operate a dispensary appears to constitute a necessary step toward the commission of a future federal crime in violation of the CSA. Thus, it could be argued that a lawyer providing legal services in such a context is "assisting" in conduct that she knows to be criminal, in violation of Rule 1.2(d).

Our suggested interpretation, in contrast, would require attorney intent before precluding lawyers from helping clients obtain state licenses to own and operate dispensaries. The policy analysis we presented above in support of our reading is most compelling in the context of compliance work. Because state law creates a regulatory licensing scheme to which clients are entitled to apply, denying clients the assistance of counsel triggers questions of access to law, lawyers, and legal services. Particularly with regard to regulatory compliance – which is often complicated, byzantine, and requires an awareness of the interaction of federal, state, and local law – denying marijuana clients access to legal services has the effect of counteracting the policy goals represented by state marijuana laws.

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[158] Supra note XXX [rule 1.2(d)].

[159] Supra notes 117-9 and accompanying text.

[160] *See*, Geoffrey C. Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?* 35 U. MIAMI L. REV. 669, 671 (1981); Pepper, *Counseling at the Limits of the Law*, *supra* note XXX, at 1588-98.

Helping clients with compliance work does necessitate, however, further analysis of the difference between knowledge and intent, namely, the circumstances under which attorneys' intent can be inferred from their knowledge of the MMJ crime. Once again borrowing from criminal law, we believe that usually there is no reason to read the lawyer's awareness of the client's illegal conduct as being tantamount to intent to facilitate that conduct.[161] Assuming that the attorney merely provides the same services to her marijuana clients that she does to her other business clients, for example, filling in the necessary paperwork to obtain a license – and charges no more for doing so than she does her other clients – she has not acquired a stake in the illegality of the venture and there is no cause to equate her knowledge with intent. Thus, a business attorney who merely provides the same services to MMJ practitioners that she does to the rest of her clients at the same rates does not in our minds run afoul of Rule 1.2(d).

A more complicated case is presented by firms that cater exclusively or primarily to marijuana clientele.[162] In such a case, the health of the firm is inextricably tied to the success of clients who are engaged in violations of federal law. Furthermore, a lawyer who presents herself to the world as offering legal services exclusively to those in violation of federal law comes dangerously close to offering services for which there is no legitimate legal use, as well as to showing disrespect to the law.[163] Like the publisher of an advertising flier consisting entirely of prostitute listings or the tout who provides nothing but information on illegal gambling,[164] the provider of services to marijuana businesses – and only marijuana businesses – toes dangerously close to the sort of entanglement with illegal conduct that both the criminal law and the rules of ethics specifically prohibit.

b. Contract Work

May an attorney assist a client by negotiating a lease for a commercial space out of which the client will operate a medical marijuana dispensary? Draft the lease agreement? Draft a purchase and sales agreement to be use in the course of doing business at the dispensary? Advise, negotiate and draft employment contracts for dispensary employees? As with compliance work, we believe the answer to these questions comes down to the lawyer's state of mind. As long as a lawyer charges marijuana clients rates similar to those charged of non-marijuana clients for negotiating leases, drafting agreements, and advising regarding employment issues, and otherwise keeps a sufficient distance between her individual success and that of her client, the lawyer does not possess the requisite state of mind – intent – to satisfy the assist requirement per Rule 1.2(d).

4. Prohibited Legal Services

May an attorney introduce a client, A, who is a medical marijuana dispensary owner to another client, B, who is a medical marijuana grower for the purpose of having client A purchase marijuana from client B? What if the sale would take place pursuant to state rules that allow

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[161] See, e.g., Lauria analysis, supra notes XXX, and accompanying text.

[162] At least one such firm briefly existed in Colorado. Perhaps for the reasons discussed in this paragraph, however, it has since reorganized as a general-purpose law firm.

[163] Supra notes 153-4 and accompanying text.

[164] See, e.g., Lauria, supra note XXX at 478-79 (citing as examples of services for which there is no lawful purpose a wire service that provided only gambling information, a publication containing only the names and contact information of prostitutes, and the provision of marked cards and loaded dice to casinos).

licensed dispensary owners to buy a certain percentage of the marijuana they sell to patients from another source?[165]

Attorneys often introduce business clients to each other to create synergies for clients and to generate business for themselves. Indeed, experienced lawyers' role as reputational intermediaries is a significant and growing one, especially in the global market for legal services.[166] However, we believe that such attorney conduct violates Rule 1.2(d) when carried out in the context of the MMJ industry. By taking an active role in the transaction – by providing the necessary connections to make it happen – the attorney has done more than disinterestedly provide legal services in connection with the sale. She has, in the words of Learned Hand's famous requirement, "in some sort associate himself with the venture, that [s]he participate in it as in something that [s]he wishes to bring about, that [s]he seek by his action to make it succeed."[167] Unlike the lawyer who merely helps a client draw up a lease or an employment agreement, now the attorney is actively involved in trying to grow the business for two of her clients. Whether she is paid a percentage on the transaction or is doing the work on an hourly basis, the attorney is no longer sufficiently detached from the sale. Indeed, even if the lawyer is not explicitly paid for making the introduction, acting as an intermediary in these circumstances violates Rule 1.2(d). She no longer merely knows that her conduct will facilitate the sale of marijuana; she actively hopes that it will do so. Her clients' happiness – and thus her own – hinges on her ability to make the violation of federal law happen. While the lawyer writing the lease is largely indifferent whether drugs are sold on the premises, the lawyer arranging the sale needs the sale of drugs to occur. Her mens rea is thus one of intent and she violates her ethical obligations – and opens herself to criminal prosecution – when she assists her clients in this way.

To be clear, the takeaway from our proposed interpretation of Rule 1.2(d) is not that lawyers are free to represent marijuana clients without any limitations. Rather, it is that lawyers may represent marijuana clients as long as they do not form the intent to help their clients violate the CSA. Put differently, lawyers may not represent marijuana clients when they intend to help their clients pursue criminal conduct. *People v. Morley*, a Colorado supreme court case nicely demonstrates the boundaries of permitted representation under our reading. Morley was charged with assisting a client pursue the criminal conduct of prostitution.[168] Prostitution is generally regarded as a *mala prohibita* crime, and accordingly, pursuant to our proposed reading, Morley could only be deemed to have violated Rule 1.2(d) if he formed to requisite intent to assist his client.[169] The court found that Morley

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[165] Supra note XXX.

[166] John Flood, Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions, 14 IND. J. GLOBAL LEGAL STUD. 35, 38–44 (2007); Christopher J. Whelan, The Paradox of Professionalism: Global Law Practice Means Business, 27 PENN ST. INT'L L. REV. 465, 466 (2008).

[167] See United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938). The Hand formulation was subsequently referenced by the U.S. Supreme Court in Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1949).

[168] 725 P.2d 510 (Colo. 1986).

[169] Morley was charged not with violating Rule 1.2(d) but rather with the then applicable DR 7-102(A)(7), pursuant to which a lawyer "may not assist a client in conduct that the lawyer knows to be illegal." Morley, at 513. Morley's "clients" were not actual clients but in fact federal agents engaged in a sting operation. *Id.* To simplify the facts of the case, because the court

> refused [the client's] offer of a financial interest in the proposed venture and stated that all his work for the organization would be billed as legal work. He discussed with [the client] the importance of setting up a code system for the women, commented on the dangers of using an out-of-house computer service, and stated that putting the initial money to fund the operation in the [his] trust account rather than a bank account would assure [the client] a degree of anonymity with respect to his role in the scheme. After commenting on the method used to screen the women employed in the scheme, [Morley] cautioned [the client] against advertising and the use of pimps. No definite agreement was reached on a fee, although the [Morley] did mention to [the client a] . . . a $1,000 retainer. After the scheme was outlined, [Morley] told [the client] he would consider different ways in which to put the service together and would make some contacts. At this meeting and in later conversations, [Morley] also advised [the client] about various ways to structure the proposed activity in order to avoid problems with local law enforcement agencies . . . [Morley subsequently] arranged for [the clients] to meet [a local prostitution ringleader] at dinner . . . The following day . . [Morley] again met with the [clients] and proposed that he be paid a fee of $5,000 for providing the organization with contacts . . . It was agreed at this meeting that the respondent would provide additional contacts and that he would receive $1,500 payable in two to three weeks with the balance of $2,500 payable once the prostitution business was in operation. [Morley] kept a record of his meetings with [the clients] on a ledger sheet titled in [clients'] name. The respondent entered these meetings on the ledger sheet as conferences with "clients.[170]

The Court held that "[t]he respondent in this case knowingly counseled what he believed was an illegal prostitution scheme, and he actively pursued participants for that purpose. The respondent's misconduct was nothing short of a calculated effort to assist others in this ostensibly illegal enterprise, was undertaken over a considerable period of time for his own profit, and could not have been accomplished without an egregious disregard of basic professional ethics."[171] Morley was disbarred. Our proposed reading would similarly find a grave violation of Rule 1.2(d) on these facts. As the quote from the court's findings demonstrates, the attorney in question clearly formed the intent to assist the client. Morley did not merely help the clients apply for a license for an escort service, negotiate a commercial real estate lease or draft employment contracts. Rather, he helped disguise the criminal activity, offered services for which no legitimate legal use existed, charged his clients for services he did not offer non-prostitution clients, and, per our discussion above of prohibited legal services, charged clients for introducing them to others for the very purpose of pursuing further criminal activity. Morley's conduct illustrates that lawyers can, and unfortunately sometimes do, form the intent to assist a client in criminal conduct. When they do, they are violating Rule 1.2(d) and ought to be sanctioned to the fullest extent.

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found that Morley believed the agents to be his clients and that he formed an attorney-client relationship with them, we refer to the agents as Morley's clients.

[170] Id., at 512-3.

[171] Id., at 518-9.

C. May a Lawyer Ever Assist a Client in the Commission of a Crime?

In the previous section we argued that an attorney may generally provide legal services for marijuana clients without running afoul of her ethical obligations or the constraints of the criminal law. In particular, we proposed a reading of Rule 1.2(d) pursuant to which a lawyer can generally help marijuana clients with most of their legal needs and does not *assist* clients so long as she does not form the intent to counsel to or assist her clients' criminal conduct. Because we construe the term *assist* to require intent to help clients, pursuant to our proposed reading of Rule 1.2(d) lawyers can often help clients without *assisting* them, but may never assist clients in the commission of a crime.

As we have seen, however, the traditional approach to Rule 1.2(d) takes a very different approach, essentially prohibiting lawyers from offering legal services to marijuana clients. Under the traditional approach, may a lawyer ever help a marijuana client in violation of Rule 1.2(d)? Scholars of legal ethics agree that as officers of the legal system lawyers have a prima facie duty to obey the law, including the rules of professional conduct which are, after all, binding state law. Some scholars even argue that while all citizens have a duty to obey the law, as officers of the legal system lawyers have a heightened duty to obey the law.[172] However, in order to demand attorneys' obedience, the law in question must be just, or at least not unjust.[173] Are marijuana laws so unjust as to warrant a lawyer's violation of Rule 1.2(d) as construed by the traditional approach?

1. Unjust Laws

In the MMJ context, federal law criminalizing the conduct of MMJ practitioners might be considered unjust because some MMJ patients suffer from ailments for which marijuana proves to be a useful medicine. Client conduct that is meant to improve access to MMJ for those who would benefit from its medical properties can thus be seen as both legitimate and just, particularly when such conduct is consistent with state law and policy. Federal law can similarly be seen as unjust to the extent that it precludes the operation of MMJ dispensaries by owners with the primary intention of providing access to customers in pain and in need. Accordingly, one could argue that lawyers assisting such clients would be helping their clients violate an unjust law and might be morally justified in doing so, the technical violation of Rule 1.2(d) and subsequent discipline notwithstanding.

This line of reasoning is contradicted by two MMJ realities, however. First, as we have seen from the exponential growth in the number of "patients" in Colorado and other states following the issuance of the Ogden memo, there is reason to believe that a substantial number of these users are primarily recreational, not medical. Second, many dispensary owners enter the MMJ market for profit, rather than for ideological reasons. If the client's primary rationale is profit making, not providing access to medical patients in pain, the "unjust law" rationale for violating federal law loses its currency. Put differently, if a lawyer's assistance is based on a sincere desire to help increase access to medicine and on the desire of some clients to address the needs of their patients, the lawyer will be better positioned to justify violating Rule 1.2(d) and invoke the law's unjust characteristics as a reason for the violation. But since the motivation of

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[172] See David B. Wilkins, In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law, 38 WM. & MARY L. REV. 269 (1996).

[173] William H. Simon, Should Lawyers Obey the Law? 38 WM. & MARY L. REV. 217 (1996); Wilkins, In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law, supra note 195.

many clients appears to be profit maximization, they (and subsequently their lawyers) cannot in good faith claim to have violated the law (and Rule 1.2(d)) because it unjust.[174] In short, it seems clear that marijuana laws, while perhaps erroneous,[175] are not unjust. We hope that our proposed reading of 1.2(d) is adopted, such that Rule 1.2(d) is not deemed violated in the majority of marijuana representations. However, in jurisdictions that continue to follow the traditional interpretation, a lawyer may not justify a violation of Rule 1.2(d) on the ground that the criminal law she assists the client in breaking is unjust.

Yet can the "access to law and lawyers" reasoning we use to justify drawing the distinction between knowledge and intent in construing Rule 1.2(d) also be employed to justify violations of that Rule? Again, in jurisdictions that adopt our proposed interpretation such an argument would be unnecessary because Rule 1.2(d) would not be violated in most instances of marijuana representation. In jurisdictions that continue to the follow the traditional interpretation of Rule 1.2(d), however, lawyers could use the "access to law and lawyers" rationale as the justification for their decision to "assist" marijuana clients. Of course, a lawyer violating Rule 1.2(d) on principled grounds will nonetheless be subject to discipline.[176] Our point, to be clear, is not that lawyers violating Rule 1.2(d) should be exempt from disciplinary action. Rather, we argue that in jurisdictions that follow the traditional interpretation that limits marijuana clients' access to lawyers, a lawyer could attempt to justify her conduct and seek a reduced sanction on the ground that her conduct was meant in good faith to help clients exercise their autonomy.

2. Justice and Equality under the Law

The marijuana scenario, however, does provide an illuminating example of the possible discriminatory consequences of denying clients access to the law and lawyers. The traditional

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[174] Just as many clients wish to enter the MMJ arena with the intent to make money rather than to provide access medical access to patients, so do many lawyers wish to represent these clients not because of an ideological commitment to helping clients, but rather because representing MMJ clients is a means of making a living in a highly competitive legal services market. The focus on a lawyer's motivation not unusual in evaluating the appropriateness of a lawyer's conduct: Rule 7.3, for example, draws a similar distinction in assessing a lawyer's in-person solicitation of clients. If the solicitation is driven primarily by "the lawyer's pecuniary gain," then it is disallowed, but if the primary reason is ideological commitment to the client's cause, then in-person solicitation is generally allowed. See Model Rules of Professional Conduct, Rule 7.3(a) (2012); Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978). One could argue analogously that if a lawyer's primary motivation for serving an MMJ client is a pecuniary one, then a lawyer is not justified in violating Rule 1.2(d) on the grounds that the underlying law is unjust; by contrast, if the lawyer's primary motivation is ensuring access to patients in pain and in need, then the violation of Rule 1.2(d) may be morally justified.

[175] See, e.g., Americans for Safe Access v. D.E.A., (Case # 11-1265 DC Cir.) (lawsuit challenging the DEA's refusal to recategorize marijuana from Schedule 1).

[176] In this sense a marijuana lawyer is not unlike a medical marijuana practitioner. The Supreme Court has held that in a prosecution under the CSA, a defendants' assertion that he was manufacturing or distributing marijuana for medical purposes is strictly irrelevant to his guilt. See United States v. Oakland Cannabis Buyers' Collective, 532 U.S. 483 (2001). A lawyer's motive for violating Rule 1.2(d) is thus like a criminal defendant's motive for violating a criminal statute; it cannot absolve him of responsibility but it can be relevant in the determination of an appropriate sanction.

approach to construing Rule 1.2(d) to prohibit lawyers from assisting clients pursuing marijuana endeavors practically means that relatively unsophisticated clients with little knowledge of the law, and, in particular, of how to navigate the complex marijuana regulatory permitting scheme, will not be able to pursue their marijuana objectives.[177] Sophisticated clients, on the other hand, will be able to engage in the same conduct without the assistance of lawyers. In other words, interpreting Rule 1.2(d) to preclude attorneys from assisting marijuana clients raises questions of equal access and distribution of access among different types of clients. Clients hailing from higher socioeconomic classes, as well as the more educated and affluent, are likely to fare better than others.

Similarly, some marijuana clients may be powerful enough to get lawyers to assume the risk of violating Rule 1.2(d) and assist them, resulting in further inequalities of access. Consider a well-to-do real estate entrepreneur who owns several commercial properties and who has a stable relationship with a midsize or large law firm which would like to keep her business. The entrepreneur approaches the law firm seeking advice about leasing commercial real estate space to an MMJ dispensary. The law firm is concerned about the potential violation of Rule 1.2(d) but is eager to keep the entrepreneur as a client. It either decides to advise the client and assume the risk of disciplinary enforcement for violation of Rule 1.2(d), or it refers the case to another lawyer, perhaps one still developing her client base who is not likely to pass up the referral, keeping the client advised and content. Either way, the client ends up being represented in negotiating the lease with the MMJ entrepreneur-tenant. The tenant, on the other hand, may be unable to secure representation. Consequently, the well-off real estate owner is more likely to end up with the better end of the deal.

Recall that in jurisdictions that would follow our proposed interpretation Rule 1.2(d) would usually not be violated by an attorney's representation of marijuana clients. However, in states that continue to follow the traditional interpretation, lawyers may consider violating Rule 1.2(d) and offering legal services to marijuana clients that suffer inequality and injustice by being denied access to law and lawyers while other, more powerful and privileged clients, benefit from the guidance of lawyers. Once again, a lawyer violating Rule 1.2(d) on principled grounds will nonetheless be subject to discipline, but a lawyer explaining her conduct to the disciplinary authority could attempt to justify her conduct and seek a reduced sanction on the ground that her conduct was designed to mitigate the discriminatory and unfair impact of the marijuana laws on less powerful and privileged clients.

D. Enforcement of Criminal Law and Discipline

We have not yet considered whether state regulatory agencies *should* seek to discipline attorneys who represent marijuana clients. If regulation counsel believes that lawyers are helping clients in violations of the CSA, surely disciplinary action is called for: recall that Rule 1.2(d) states in relevant part that "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal." In prohibiting counseling to and assistance to criminal conduct, Rule 1.2(d) does not distinguish between conduct that is criminal pursuant to

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[177] Steve Elliott, Colorado Medical Grower Bartkowicz Gets 5 Years In Prison, Toke of the Town (Jan. 28, 2011), http://www.tokeofthetown.com/2011/01/colorado_medical_grower_bartkowicz_gets_5_years_in.php (Chris Bartkowicz made a plea bargain in which he is serving 5 years for growing 224 marijuana plants for medical marijuana patients).

state law and conduct that is criminal pursuant to federal law. A federal crime is a crime in every state jurisdiction, meaning that a lawyer who counsels or assists a client in criminal conduct that violates criminal federal law is violating the rules of professional conduct in her *state*, and a state regulatory agency should enforce its own rules of professional conduct. As should be clear by now, however, we believe that regulation counsel generally ought not seek to discipline attorneys for helping marijuana clients. In a majority of cases, Rule 1.2(d) is simply not going to be violated by attorney conduct in this area because it will rarely be the attorney's intent to aid her client's criminal conduct.

Moreover, even if our proposed interpretation of Rule 1.2(d) requiring attorney intent to aid the client as opposed to mere knowledge of the criminal conduct is rejected, state disciplinary agencies should still refrain from enforcing Rule 1.2(d) against lawyers who help marijuana clients. Having established a legal apparatus legalizing medical and recreational marijuana, the state should be estopped from then seeking to discipline lawyers who help clients operate within the confines of that same apparatus. Put differently, as long as the regulation and discipline of lawyers continues to be state-based, a state and its disciplinary agency should be estopped from sanctioning lawyers who help clients in conduct that is permitted by state law.

It should be noted that such an approach by state regulatory agencies may open the door to attempts by the federal government to regulate and discipline marijuana attorneys. If state regulatory counsel fail to discipline lawyers who brazenly "assist" clients engage in the flouting of federal law, federal officials may feel compelled to intercede and regulate lawyers' conduct themselves. Indeed, outside of the marijuana context, the federalization of legal ethics has been a growing phenomenon. An ever-increasing number of federal agencies have acted in recent years to regulate lawyers appearing and practicing before them,[178] and it is not inconceivable that the DEA, for example, may join the trend and attempt to regulate MMJ lawyers.[179] But it is unlikely. The federal agencies that have recently began or stepped up their efforts to regulate the conduct of lawyers appearing and practicing before them have done so under a clear direction from Congress. The DEA has no such mandate and experience suggests that if the DEA purported to

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[178] Coquillette & McMorrow, Zacharias' Prophecy: The Federalization of Legal Ethics Through Legislative, Court and Agency Regulation, supra note XXX.

[179] On the other hand, many of the federal agencies that have recently moved to regulate lawyers' conduct have a more convenient and obvious arena in which to regulate lawyers: securities attorneys, for example, regularly appear and practice before the SEC. See George A. Riemer, Sec v. State Bars? Preemption Showdowns Could Be on the Horizon, OR. ST. B. BULL., Dec. 2003, at 21; Rhonda McMillon, ABA and Other Bar Groups Work to Limit Federal Regulation of Lawyers, ABA JOURNAL (Dec. 1, 2010), available at http://www.abajournal.com/magazine/article/let_the_states_do_it_aba_working_to_limit_federal_regulation_of_lawyers/. Tax attorneys routinely appear and practice before the IRS. See Jay Miller, Protected Thoughts? IRS Threatens Attorney Work-Product Doctrine, 84 WIS. LAW. 12 (Oct. 2011). MMJ attorneys, in contrast, would not be in anyway appearing or practicing before the DEA, so an attempt by the federal government to regulate MMJ attorneys would have to entail some creative maneuvering to establish jurisdiction. Yet in the new world of the federalization of legal ethics one should not be too quick to rule out the possibility of federal regulation of MMJ lawyers, especially in the absence of meaningful state regulation.

regulate lawyers without such authority, it should expect harsh opposition from the practicing bar.[180]

Finally, if regulation counsel were to attempt to discipline marijuana lawyers pursuant to the traditional interpretation of Rule 1.2(d), a lawyer's good faith assertion that she violated the rule in order to enhance client autonomy or avoid discriminatory consequences for under-privileged clients should be taken into account as a mitigating factor, at least in the sanctions stage of the disciplinary process.[181]

V
Conclusion

Criminal law pays relatively little attention to the practice of law. Like everyone else, criminals who happen to be lawyers should be prosecuted. But attorneys are generally insulated from criminal liability for the actions they take representing their clients. And by and large this is the right result. Compelling policy reasons such as protecting the attorney-client relationship from intrusion by prosecutors suggest that criminal law ought to defer to legal ethics and the disciplinary apparatus when it comes to the regulation of lawyers. As a result, marijuana lawyers, like all lawyers, generally should not fear criminal prosecution.

The traditional interpretation of the pertinent rules of professional conduct, on the other hand, treats marijuana lawyers as both outlaws and crusaders. By disallowing most marijuana related representations, legal ethics renders marijuana lawyers outlaws who engage in professional misconduct and therefore are subject to discipline; and at the same time it regards these lawyers as crusaders who may pay an imposing professional price for their commitment to serve clients in need of legal representation. Marijuana lawyers, however, are neither outlaws not crusaders. Rather, like most other lawyers, they are simply trying to strike an effective balance between their role as representatives of clients and their role as officers of the legal system. Borrowing from accomplice and coconspirator liability in criminal law, our proposed interpretation of applicable rules of professional conduct, which prohibits helping clients in

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[180] See, e.g., Charles W. Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 S. TEX. L. REV. 665, 704-7 (1995). Without regulatory disciplinary action against marijuana lawyers at the state level (per our proposed interpretation of Rule 1.2(d)) and at the federal level (no clear authority for the DEA to do so), should federal prosecutors seek to charge marijuana attorneys criminally as accomplices or coconspirators under the CSA? We believe not, for the two reasons discussed above. First, lawyers in most circumstances lack the intent necessary to be liable as accomplices or coconspirators. Second, because of the likely significant chilling effect of charging lawyers as accomplices on the attorney-client relationship, prosecutors ought to defer to disciplinary agencies and allow them to take the lead role in regulating lawyers' professional conduct. This outcome, to be sure, does not amount to giving lawyers a free pass at aiding and abetting violations of criminal law. If lawyers form the necessary intent they could be charged as accomplices and coconspirators and should certainly be disciplined for violating Rule 1.2(d).

[181] To be clear, regulation counsel should only refrain from disciplining MMJ lawyers for helping MMJ clients. Of course, if MMJ lawyers otherwise engage in professional misconduct and violate the rules of professional conduct, for example, by charging MMJ clients unreasonable fees, regulation counsel should discipline such misbehavior just as it would any other lawyer's.

relatively minor criminal conduct (*mala prohibita*) only when the lawyer intends to assist the conduct, would allow marijuana lawyers to strike an appropriate balance between their competing roles by permitting these attorneys to help marijuana clients with the majority of their legal needs.

IS ASSISTING MEDICAL MARIJUANA DISPENSARIES HAZARDOUS TO A LAWYER'S PROFESSIONAL HEALTH?

ALEC ROTHROCK†

Colorado Rule of Professional Conduct 1.2(d) states, in part, that a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal."[1] A lawyer who provides legal services to a medical marijuana dispensary does not assist in his client's violation of *Colorado* criminal laws banning the possession and sale of marijuana as long as the dispensary qualifies as a caregiver under article 18, section 14 of the Colorado Constitution and complies with that section and other legal requirements.[2]

Is the lawyer therefore in compliance with Colo. RPC 1.2(d)?

The answer is "no," not if the same conduct violates federal criminal law.

The analysis and answer are no different under Amendment 64 to the Colorado Constitution with respect to a lawyer's assistance of a client in the recreational marijuana business.[3]

I. IS MEDICAL MARIJUANA LEGAL?

In 2000, Colorado voters passed an amendment to the Colorado Constitution creating limited exemptions from C.R.S. § 18-18-406, which makes unlawful the possession, use, and sale of marijuana.[4] Since that time, hundreds of medical marijuana dispensaries have opened for business in the State of Colorado.

As with any new business owner, a lawyer may be engaged to provide a variety of legal services incident to the creation of the business, including:

- forming the entity that will operate it;
- drafting and negotiating buy-sell agreements among the owners;
- drafting and negotiating loan documents or documents raising capital for the business;

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1. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
2. COLO. CONST. art. 18, § 14.
3. *Id.* art. 18, § 16.
4. *Id.* art. 18, § 14.

- assisting in preparing applications for required licenses;
- registering trademarks;
- helping to draft and negotiate the documents necessary to purchase or rent the property from which the business operates; and
- furnishing an opinion letter opinion regarding the client's legal rights and risks.

And that is just to get the business up and running, to say nothing of the need for legal services to the ongoing business.

Yet 21 U.S.C. § 841(a)(1)[5] continues to make the possession, use, and sale of marijuana illegal at the federal level, even though it affects some purely intrastate activities.[6] Indeed, in the so-called Ogden Memo, adopted in October 2009, the United States Department of Justice directed federal prosecutors to focus their resources elsewhere than on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"; however, the memo confirmed that the conduct remains illegal under federal law.[7] Since the release of the Ogden Memo, U.S. Attorneys in different jurisdictions have taken less sanguine public positions on the enforcement of 21 U.S.C. § 841(a)(1).[8]

II. COLORADO RULE OF PROFESSIONAL CONDUCT 1.2(D) DECONSTRUCTED

A. Colorado Rule of Professional Conduct 1.2(d) Applies to Conduct Made Criminal Under any Law

Colorado Rule of Professional Conduct 1.2(d) applies to conduct made criminal under any law. It states as follows:

> 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.[9]

Colorado Rule of Professional Conduct 1.2(d) thus prohibits the distinct activities of (1) counseling a client to engage in criminal conduct

5. 21 U.S.C. § 812(c) lists "marihuana" as a controlled substance within the meaning of 21 U.S.C. § 841(a)(1).

6. Gonzales v. Raich, 545 U.S. 1, 22 (2005).

7. Memorandum for Selected United States Attorneys from David W. Ogden (Oct. 19, 2009), *available at* http://blogs.usdoj.gov/blog/archives/192.

8. *E.g.*, Letter from John F. Walsh, United States Attorney, to Stanley L. Garnett, District Attorney (Mar. 20, 2012), *available at* http://www.justice.gov/dea/pubs/states/newsrel/2012/den032012.pdf

9. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).

and (2) assisting a client in criminal conduct. The lawyer must also "know" that the client's conduct is criminal. These terms are described below. First, however, there is a threshold question about whether Rule 1.2(d) prohibits lawyer counseling and assistance of conduct that is not illegal under state law but is illegal under federal law.

For purposes of Rule 1.2(d), if certain conduct is criminal under any jurisdiction's law, the fact that it is not criminal under the concurrently applicable law of another jurisdiction is irrelevant. Also, a federal no-prosecution policy is not a change in the law, and by its nature, it is temporary.

Ethics opinions from two other states reach diametrically opposed conclusions regarding the effect of the federal government's no-prosecution policy on lawyers' obligations under Rule 1.2(d). A Maine ethics opinion states that Rule 1.2(d)

> does not make a distinction between crimes which are enforced and those which are not. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. . . . [T]here is no guarantee that, with a change in policy, administration, or resources, the federal law might ultimately be enforced to the chagrin of lawyers whose conduct enabled the dispensaries.[10]

In contrast, an Arizona ethics opinion interprets the Ogden Memo as creating a "safe harbor for conduct that is in 'clear and unambiguous compliance' with state law" unless and until a court holds that federal law preempts Arizona's medical marijuana law.[11] The Arizona opinion concludes by stating that it "decline[s] to interpret and apply" Rule 1.2(d) in a way that prevents lawyers from assisting clients in engaging in activities authorized by state law, "thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits."[12]

Arizona's opinion is flawed. It suggests that Arizona's medical marijuana law either displaces federal law within the State of Arizona or protects Arizona citizens from the application of federal law. If this was the intent of the opinion, it represents a misunderstanding of federalism. If, instead, the intent of the opinion was to hold up the current no-prosecution policy as a "safe harbor," it ignores the clear words of Rule 1.2(d) and incautiously encourages Arizona lawyers to rely on a policy

10. Maine Op. 199, "Advising Clients Concerning Maine's Medical Marijuana Act" (July 7, 2010).
11. Section IV, Analysis, Arizona Op. No. 11-01 (February 2011).
12. *Id.*

that could change at any time. Like it or not, the federal law remains unchanged and in force in every corner of Arizona.

B. Discussing the Legal Consequences of a Proposed Course of Conduct and Making Good Faith Arguments Under the Law

Lawyers have an important role in the medical marijuana business. Colorado Rule of Professional Conduct 1.2(d) in fact permits them to engage in this role. Specifically, Rule 1.2(d) permits lawyers to "discuss the legal consequences of any proposed course of conduct with a client and . . . counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[13] There is no more important function for lawyers in our society.

Colorado Rule of Professional Conduct 1.2(d) permits—and clients expect lawyers to give—an "honest opinion about the actual consequences that appear likely to result from a client's conduct."[14] Provided the lawyer does not encourage the client to break the law, discussing the "legal consequences" of a proposed course of conduct may include a discussion not only of what the law is, but also of the likelihood of its enforcement in a given situation.[15] In a working paper, Professors Sam Kamin and Eli Wald of the University of Denver Sturm College of Law, relying on the *Restatement (Third) of the Law Governing Lawyers*, agree with this point and argue that a lawyer can "advise a client that enforcement of the law, at least vis-à-vis dispensaries operating within the confines of the state's regulatory apparatus, is a low priority."[16] Such advice would not violate Rule 1.2(d); whether it is sound advice at the time it is given is another matter.

Lawyers are not ethically responsible if the client uses this information to engage in a crime or fraud. The lawyer's responsibility may be "especially delicate" when the "client's course of action has already begun and is continuing."[17] A lawyer may not "continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent."[18]

A leading treatise offers the example of the lawyer who advises a client that it is unlawful to claim certain tax deductions but also that the likelihood that the Internal Revenue Service will discover them in an

13. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
14. *Id.* 1.2 cmt. 9.
15. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1588 (1995).
16. Sam Kamin & Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?* 27 (2012), *available at* http://works.bepress.com/sam_kamin/3.
17. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10.
18. *Id.*

audit is minimal.[19] According to the authors, there is no "wholly satisfactory" answer to whether the lawyer assisted the client in criminal conduct, in violation of Rule 1.2(d), or simply explained the law and the legal consequences of the client taking the deductions.[20]

Applying the analysis of a 1985 ABA Formal Ethics Opinion, however, if the lawyer had a good faith belief that the deductions were lawful, or that there was a good faith argument in support of taking them, Rule 1.2(d) would not prohibit the lawyer from advising the client about the option of taking the deductions. This would be the case even if the lawyer believed that it was more likely than not that the client's position would fail if challenged.[21]

Counseling or assisting a client to make a "good faith effort to determine the validity, scope, meaning or application" of a law does not mean advising a client to break the law without telling anyone.[22] The lawyer must advise the client to affirmatively challenge the law either to test its validity or applicability in the client's circumstances or to protest against what the client considers a greater evil.[23] This is what the Comment to Rule 1.2(d) describes as a "course of action involving disobedience."[24]

For example, a New Hampshire lawyer advised her client—the mother in a child abuse case—to violate a statute making it unlawful to disclose information without the court's permission that might identify the child or parent involved in a hearing in such a case.[25] In hopes of currying public favor, the mother gave extensive documentation about the hearing to a local newspaper. In a subsequent lawyer discipline case, the lawyer argued that the Comment authorizing a "course of action involving disobedience" permitted her to "self-determine the validity of the

19. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 5.14, at 5-47 to -48 (3d ed., 2012 Supp.). Another commentator expressed the view that Rule 1.2(d)'s language permitting a lawyer to discuss the legal consequences of a proposed course of conduct must refer to circumstances in which either the client's intentions or the law itself is ambiguous. Otherwise a lawyer could "discuss" with a client "various methods of operating a proposed drug-smuggling ring, murdering a political rival or disgruntled spouse, or cheating a trusting business partner," as long as the lawyer's advice remained "personally uncommitted" and did not "heat up to the level of 'counsel' or 'assist.'" CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 694 (1986).

20. 1 HAZARD & HODES, *supra* note 19, § 5.14, at 5-48.

21. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 352 (1985).

22. *See* W. William Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019, 1022 n.7 (1999) (writing that this part of Rule 1.2(d) "requires distinguishing between good faith test case litigation, classic civil disobedience by appealing to higher law, and *surreptitious* civil disobedience, which is no different than law-breaking" (emphasis in original)).

23. 1 HAZARD & HODES, *supra* note 19, § 5.15, at 5-48, -49.

24. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 12 (2012).

25. Werme's Case, 839 A.2d 1 (N.H. 2003).

statute and advise her client to disobey it because she concluded that [it] is unconstitutional" under the First Amendment.[26]

The New Hampshire Supreme Court disagreed. It observed that the Comment modified a rule that required a "good faith effort to determine the validity, scope, meaning or application" of the law. There were at least two "good faith" options available to the lawyer: (1) seek permission from the court in the child abuse case to disclose the information, and (2) file an action seeking a declaratory judgment that the statute was unconstitutional.[27] The New Hampshire Supreme Court affirmed a reprimand issued by an inferior disciplinary tribunal.[28]

C. The Counseling Prohibition

On the prohibited side of the Rule 1.2(d) spectrum, a lawyer may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[29] For example, a Minnesota criminal defense lawyer was found to have counseled clients to engage in criminal conduct by referring female clients to another client who operated a prostitution business if they could not afford to pay his fees.[30]

A 1952 ABA Formal Opinion admonishes that there is a "sharp distinction . . . between advising what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction."[31] The legal distinction is sharp but the factual difference may be subtle. As the Comment to Rule 1.2 points out, sometimes there is a fine line between presenting an analysis of the law and suggesting the means by which the client may violate it.[32]

A leading authority refers here to a distinction between "innocent discussion" and "active participation"—passive/active distinction.[33] Another authority describes the counseling prohibition in much the same way, stating that it prohibits a lawyer from advising a client about the legality of proposed conduct "with the intent of facilitating or encouraging the client's action."[34] Perhaps this active/passive distinction, or focus on the lawyer's intent, is what the Comment means when it states that a

26. *Id.* at 2.
27. *Id.* at 3.
28. *Id.*; *see* 1 HAZARD & HODES, *supra* note 19, § 5.15, at 5-48 (implying that client must act "openly").
29. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
30. *In re* Olkon, 605 F. Supp. 784, 790 (D. Minn. 1985).
31. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 281 (1952); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-5 (1980) ("A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.").
32. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 9.
33. 1 HAZARD & HODES, *supra* note 19, § 5.13, at 5-40.
34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. a (2000).

lawyer may not "knowingly" counsel a client to engage in criminal (or fraudulent) conduct,[35] an adverb absent from the Rule itself.

This focus on the lawyer's state of mind suggests a subjective analysis. One of these same legal authorities states that it also is important to understand the "level of certainty that the client will actually misuse the information."[36] This inquiry is objective in nature.

A classic law school hypothetical that illustrates the counseling prohibition is that of the lawyer who advises a client about which countries do not have extradition treaties with the United States.[37] Another is the lawyer whose client has a "large amount of undeclared income in cash who wants to know how *small* a cash transaction must be before banks are relieved of the duty to report it."[38]

D. The Assisting Prohibition

Rule 1.2(d)'s prohibition against assisting a client in conduct the lawyer knows to be criminal is the most significant impediment to a lawyer who provides legal services to a client in the medical marijuana industry. "Assistance" is a term that requires some connection between the lawyer's conduct and the client's criminal conduct. However, the proximity of the connection leaves bar prosecutors with considerable latitude, checked only by the disciplinary tribunal and superior appellate tribunals.

The Comment to Colorado Rule of Professional Conduct 1.2(d) offers limited help in circumscribing the term. It states, "The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."[39] "Criminal" can be substituted for "fraudulent" in this sentence. If the lawyer believes that the client expects the lawyer to provide this kind of assistance, another Rule of Professional Conduct requires the lawyer to "consult" with the client about the limitations on the lawyer's assistance.[40] Several Colorado attorney discipline cases involve prohibited assistance to a client, including the lawyer who assisted his client in criminal impersonation by failing to disclose her true identity to the district attorney or the court in a criminal trespass case,[41] and the lawyer who assisted a client in emptying his bank

35. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 9.
36. 1 HAZARD & HODES, *supra* note 19, § 5.13, at 5-40.
37. *Id.* at 5-40.1 (emphasis in original).
38. *Id.*; *see also* People v. Gifford, 76 P.3d 519, 520 (Colo. O.P.D.J. 2003) (holding respondent lawyer counseled client was in violation of Colo. RPC 1.2(d) by advising client to offer real estate to his ex-wife in exchange for ex-wife's and another witness's recantation of testimony in a pending criminal matter).
39. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10.
40. *Id.* 1.4(a)(5); *accord id.* 1.2 cmt. 13.
41. People v. Casey, 948 P.2d 1014 (Colo. 1997).

accounts and supplying him with money preparatory to fleeing with his minor child to avoid a child custody order.[42]

A leading treatise states that both the counseling and assisting prohibitions in Rule 1.2(d) "track[ ] standard principles of accessorial liability."[43] For example, "Pursuant to 18 U.S.C. § 2, a defendant may be charged as a principal in the commission of a substantive criminal offense whenever he 'aids, abets, counsels, commands, induces or procures its commission. . . .' In order to prove a crime of aiding and abetting, the government must prove that the defendant associated with the criminal venture, that he purposefully participated in it, and that he sought by his actions to bring it about."[44]

An ABA Formal Opinion holds that assisting a client in a crime or fraud may include a lawyer's failure to disavow her own work product if she discovers that her client has used the work product to further a crime or fraud.[45] The example given in the ABA Opinion is that of outside counsel to a small lighting fixture company that was in the process of obtaining a $5 million unsecured loan from a bank. After issuing an opinion of counsel attesting to, among other things, the enforceability of the company's lighting fixture contracts against the client's customers, outside counsel discovers that for the past three years, the chief executive officer and the treasurer of the company have been creating millions of dollars worth of false lighting installation contracts. In other words, a material portion of outside counsel's opinion letter is false. Outside counsel believes that her continuing representation of the client in the matter would "discourage inquiry into the soundness of the loan and perhaps even encourage the bank to make further extensions of credit." The opinion concludes that the lawyer must withdraw from the representation of the company in that matter and disavow her opinion letter, even if doing so will effectively disclose information that the lawyer is obligated to keep confidential.[46]

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42. People v. Chappell, 927 P.2d 829 (Colo. 1996).

43. 1 HAZARD & HODES, *supra* note 19, § 5.12, at 5-36. Engaging in criminal conduct usually constitutes disciplinable conduct, whether or not the lawyer is convicted. COLO. R. CIV. P. 251.5(b); COLO. RULES OF PROF'L CONDUCT R. 8.4(b) (2012).

44. United States v. Wang, 898 F. Supp. 758, 761 (D. Colo. 1995); *see also* COLO. REV. STAT. § 18-1-603 (2012) ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.").

45. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 366 (1992).

46. *See* . COLO. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (lawyer must decline or withdraw from representation if representation would violate Colo. RPC 1.2(d), inter alia, or "other law"). Colo. RPC 1.2 cmt. 10 and Colo. RPC 4.1 cmt. 3 state that if necessary to avoid assisting a client in a crime or fraud, a lawyer not only must withdraw from the representation but also must "disaffirm an opinion, document, affirmation or the like." The latter goes on to state that in "extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under [Colo. RPC 4.1(b)] the lawyer is

Examples of improper "assistance" tend to arise in a non-litigation setting. In a litigation setting, a lawyer's representation of a client related to medical marijuana is less likely to constitute impermissible "assistance" if the client's conduct is completed, or if the client is making a "good faith effort to determine the validity, scope, meaning or application of the law," as discussed above.

An isolated criminal defense representation involving allegedly illegal use or possession of marijuana does not constitute assistance of the crime in violation of Rule 1.2(d), even though the lawyer's objective in the representation is to gain or preserve the client's freedom, which, at a basic level, permits the client to engage in the same conduct again.[47] After all, the same could be said about virtually any criminal defense representation.

Criminal defense representation for past conduct is not permissible, however, when a lawyer "accepts a retainer from an organization, known to be unlawful, and agrees in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities." [48] For a lawyer to undertake such an arrangement, the enterprise must be "lawful."[49] This distinction conjures an image of swarthy men involved in organized crime, but from the perspective of federal law, a dispensary owned by Rotary Club members also may be considered an "unlawful" organization.

But the entire purpose of some litigation is to permit the client to engage in conduct illegal under federal law. A lawyer who fights to obtain unemployment compensation for an employee discharged from employment for using marijuana in compliance with state medical marijuana law, but in violation of the employer's "zero-tolerance drug policy," assists the client's continued violation of federal law prohibiting the use of marijuana.[50] However, the lawyer does not violate Rule 1.2(d) if the

required to do so, unless the disclosure is prohibited by Rule 1.6." In turn, Colo. RPC 1.6(b)(3) and (4) permit a lawyer to reveal information relating to the representation in order to prevent fraud by a client or substantial financial injury that may result from a client's crime or fraud, but only if the client has "used the lawyer's services."

47. People v. Sexton, No. 10CA1206, 2012 WL 503648 (Colo. App. Feb. 16, 2012).

48. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 281 (1952); *accord* United States v. Castellano, 610 F. Supp. 1151, 1165–66 (S.D.N.Y. 1984) (quoting ABA Formal Op. 281 with approval); *see also id.* ("[I]t need hardly be [be]labored that an attorney may not agree with an illegal syndicate to represent its members or employees with respect to future violations of the law." (second alteration in original) (quoting *In re Abrams*, 266 A.2d 275 (N.J. 1970)) (internal quotation marks omitted)).

49. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 12 (2012) (stating Rule 1.2(d) "does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise"); ABA Defense Function Standard 4-3.7(c) ("Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.").

50. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

representation constitutes a "good faith effort" to determine the "meaning" of the unemployment compensation statute involved. A lawyer who challenges a trial court's restriction on a divorce client's parenting time, imposed because the client's use of medical marijuana allegedly endangered the client's minor child, assists the client's violation of federal law but does not violate Rule 1.2(d) if the lawyer's services represented a good faith effort to determine the application of law of child endangerment.[51]

Similarly, a lawyer who seeks to permit a client on probation to use medical marijuana notwithstanding a condition of the client's probation requiring him not to "commit another offense" while on probation assists the client to violate federal law, but does not violate Rule 1.2(d) if the action constituted a good faith effort to determine the meaning of a state probation statute and the medical marijuana provisions of the Colorado Constitution.[52] A lawyer who represents a dispensary in opposing a zoning ordinance that has the effect of closing the client's operation is seeking to keep the client stay in business, a business activity that violates federal law, but does not violate Rule 1.2(d) if done in a good faith effort to determine the validity of the ordinance.[53]

E. Knowledge of Criminal Conduct

With respect to both the counseling and assisting prohibitions, the lawyer must "know" that the client's conduct is criminal. Knowledge means actual knowledge of the fact in question. [54] A reckless state of mind does not constitute knowledge.[55] However, knowledge may be, and often must be, inferred from the circumstances.[56]

It is not clear from Colorado Rule of Professional Conduct 1.2(d) whether the emphasis of the knowledge requirement is on the lawyer's awareness of the client's activities or on the lawyer's awareness of their criminal nature.[57] It may be both, although it is doubtful that a lawyer's ignorance of the law would excuse a violation of Rule 1.2(d).

Nor is willful ignorance of a client's activities likely to serve as a valid defense to a Rule 1.2(d) violation. In a 1981 informal opinion, the ABA Committee on Ethics and Professional Responsibility construed a virtually identical rule in the ABA Model Code of Professional Respon-

51. *In re* Marriage of Parr & Lyman, 240 P.3d 509 (Colo. App. 2010).
52. People v. Watkins, 282 P.3d 500 (Colo. App., 2012).
53. Giuliani v. Jefferson Cnty. Bd. Cnty. Comm'rs, No. 11CA1919, 2012 WL 5360940 (Colo. App. Nov. 1, 2012).
54. COLO. RULES OF PROF'L CONDUCT R. 1.0(f).
55. *Id.* 1.0 cmt. 7A.
56. *Id.* 1.0(f).
57. *Compare id.* 1.2(d) ("[L]awyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent." (emphasis added)), *with id.* 1.2 cmt. 9 ("Paragraph (d) prohibits a lawyer from *knowingly* counseling or assisting a client to commit a crime or fraud." (emphasis added)).

sibility to mean that "[a] lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting . . . criminal conduct and without relying on past client crime . . . to achieve results the client now wants. Otherwise, the lawyer has a duty of further inquiry."[58] This language is not inconsistent, at least according to some commentators, with a lawyer's operating assumption that a client is using the lawyer's counsel for lawful purposes.[59]

In their paper, Professors Kamin and Wald rely on the *Restatement (Third) of the Law Governing Lawyers* to argue that a lawyer does not assist a client within the meaning of Rule 1.2(d), unless the lawyer has an "actual intent to encourage the commission of the crime."[60] The *Restatement* defines "assisting" in this context as "providing"—with the "intent of facilitating or encouraging the client's action"—"other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency."[61]

One problem with this interpretation is that Rule 1.2(d) itself does not require proof of the lawyer's intent, and the *Restatement* does not have the force of law. Although some Rules of Professional Conduct, including Rule 1.2(d), require bar counsel to prove a lawyer's knowledge of certain facts, few if any require bar counsel to prove the lawyer's intent. The lawyer's intent is generally relevant as a matter of proof only for purposes of determining the appropriate sanction for a rule violation.[62]

III. APPLICATION OF COLORADO RULE OF PROFESSIONAL CONDUCT 1.2(D) TO REPRESENTATION OF MEDICAL MARIJUANA DISPENSARIES

In most instances, a lawyer will know when a client is engaging a lawyer's services to establish a medical marijuana dispensary. This will usually be the client's stated purpose in consulting the lawyer, and the client needs no encouragement from the lawyer to embark on the venture. The client may even request that the lawyer analyze the laws—state and federal—that apply to the operation of the proposed business. So far, so good under Colorado Rule of Professional Conduct 1.2(d). For the lawyer, the delicate ethical concern lies in knowing the difference be-

58. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981).

59. Michael M. Mustokoff, Jonathan L. Swichar & Cheryl R. Herzfeld, *The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following* United States v. Anderson, 9 ANNALS HEALTH L. 107, 118 (2000).

60. Kamin & Wald, *supra* note 16, at 29.

61. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. a (2000).

62. *E.g.*, *In re* Roose, 69 P.3d 43, 48 (Colo. 2003) (discussing difference between knowledge and intent for purposes of determining appropriate level of discipline under ABA Standards for Imposing Lawyer Sanctions).

tween "directing, suggesting, or assisting in criminal . . . conduct, on the one hand, and providing information about the law . . . on the other."[63]

It is possible to draw distinctions under Colorado Rule of Professional Conduct 1.2(d) between conduct that does and does not further a client's federal criminal conduct. With the exception of the legal opinion, all of the activities described above would likely fall under the vague definition of assistance, unless perhaps dispensary activities are only one possible business activity of the enterprise. The proximity of the lawyer's services to the dispensary's core activities is likely to be a critical factor, so helping a small dispensary is more ethically risky than helping a far flung enterprise whose activities may or may not include these core activities.

It is readily apparent that drawing lines between providing information, on one hand, and providing counseling or assistance, on the other, is largely a self-defeating exercise. There are a good many public policy reasons why Rule 1.2(d) should not smother lawyer assistance to clients in the medical marijuana industry, but these reasons do not change the plain wording of Rule 1.2(d). And, of course, Colorado Rule of Professional Conduct 1.2(d) is not interpreted one way for medical marijuana violations of federal law and another way for all other crimes. Lawyers who represent medical marijuana dispensaries in a business setting almost cannot help but violate the rule.

The possible disciplinary consequences for this conduct are an entirely different matter. They depend on matters largely outside lawyers' control, namely the initiation of a request for investigation with Colorado's Office of Attorney Regulation Counsel (OARC), and OARC's prosecution policy.

No Colorado lawyer has been publicly disciplined, or even subjected to public charges, based on counseling or assisting a client to participate in the medical marijuana business in compliance with state law. There is no indication that OARC interprets Colorado Rule of Professional Conduct 1.2(d) in the elastic way that federal courts have historically interpreted the Commerce Clause in federal constitutional jurisprudence. OARC's policy on disciplinary prosecution for providing standard legal services to state-law abiding members of the medical marijuana industry seems to be one of tolerance, not unlike the policy on criminal prosecution taken by the Justice Department in the Ogden Memo. Of course, just as the dispensaries must rely on the criminal prosecution policy of the current President's administration, so too must Colorado lawyers rely on the disciplinary prosecution policy of OARC and its supervisor, the Colorado Supreme Court.

63. Pepper, *supra* note 15, at 1588.

To: Colorado Supreme Court Standing Rules Committee

From: Office of Attorney Regulation Counsel (OARC)

Re: Proposed Amendments to Colo. RPCs re: Medical and Recreational Use of Marijuana

Date: April 26, 2013

I. Introduction.

The Standing Rules Committee appointed a subcommittee to address possible changes to the Colorado Rules of Professional Conduct due to two recent amendments to the Colorado Constitution that address medical and recreational use or possession of marijuana. The Subcommittee has proposed two changes: one a comment to Colo. RPC 8.4 and the other a new Rule 8.6. The Office of Attorney Regulation Counsel is opposed to both proposals as explained below.

As everyone knows, the use or possession of marijuana is a crime under federal law.[1] It is also still a crime in Colorado unless one follows the medical marijuana laws and the soon-to-be personal use marijuana laws in obtaining and possessing certain limited amounts. There are gray areas in the interpretation of the amendments to the state constitution.

OARC submits that the issue is whether this committee should suggest to the Supreme Court that it make any changes to the Colorado Rules of Professional Conduct in this particular area at this time. OARC submits that the proposals are premature and not necessary. The proposed rule and comment take discretion away from OARC to handle allegations of misconduct in this area. There is no need to do so. OARC should maintain the discretion to handle these cases under the current rules in the same manner it has in the past. Should OARC's exercise of discretion not comport with appropriate views of attorney misconduct, there are checks on OARC. The

[1] 21 U.S.C. § 841 (a) (1) provides that it shall be unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute a controlled substance. 21 U.S.C. § 812 (c) includes marihuana as a controlled substance. 21 U.S.C. § 846 makes it a crime to conspire to violate § 841.

Attorney Regulation Committee, the Presiding Disciplinary Judge, Hearing Boards and ultimately the Supreme Court are checks on OARC's discretion.

OARC understands that any attorney whom it investigates incurs expenses and experiences anxiety. It may be that an attorney decides not to engage in certain conduct based on the fear of being investigated by OARC. That does not mean that the Supreme Court of Colorado should relieve this anxiety by stating attorneys are permitted to violate federal laws without any possible consequences on their licenses to practice law.

The subcommittee states in its report, "A prosecutor has no discretion to decide that certain conduct is inimical to society and should be prosecuted, if the legislature has not seen fit to criminalize the conduct." The U.S. Attorney still has the discretion to prosecute federal drug laws pursuant to acts of Congress. Under the current Rules of Professional Conduct, an attorney is subject to discipline if he/she violates federal law. Of course, if the Supreme Court were to adopt the subcommittee's proposals, OARC would follow those rules. But until that time, or until the Congress changes drug laws, an attorney may still be subject to discipline for violating federal criminal laws and for counseling or assisting a client in doing so.

II. Personal Use of Marijuana.[2]

OARC has never had a written policy about its exercise of discretion in any area of attorney misconduct, and all matters are addressed on a case-by-case basis.[3] Such case-by-case review would include matters involving personal use of marijuana; however, OARC receives few requests for investigation in which it is alleged an attorney has used or possessed small amounts of marijuana.

OARC has already stated that the office will follow the will of the Colorado electorate on this issue. Personal use of marijuana in Colorado in

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[2] Personal use of medical marijuana has been addressed by the Colorado Bar Association Ethics Committee in Opinion 124, adopted April 23, 2012. OARC views the Opinion as well reasoned and persuasive.

[3] *See In re Attorney F*, 285 P.3d 322, 327 (Colo. 2012) ("As we have previously observed, 'individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases.'") (quoting *In re Rosen*, 198 P.3d 115, 121 (Colo. 2008)).

compliance with state law is not an area of misconduct that OARC considers a violation of Colo. RPC 8.4(b) even if a violation of federal law. Of course, any attorney who uses marijuana lawfully under state law and violates other rules such as those involving competence, adequate communication, or diligence is still subject to discipline.

From a historical perspective, before passage of both of the marijuana amendments, an attorney's personal use or possession of marijuana in Colorado in small amounts was never the sole misconduct in an attorney disciplinary case or a diversion matter as far as anyone in OARC remembers.[4] Of course, such conduct standing alone *could* have been the subject of a disciplinary case. Based upon our collective memories there are very few cases in which a lawyer was alleged to have violated a law involving personal use or possession of marijuana. The only cases that we remember involving such an allegation were dismissed.

Before passage of either the state medical marijuana statute or Amendment 64, C.R.C.P. 251.5(b) and Colo. RPC 8.4(b) were the rules arguably applicable to an attorney's use of marijuana.[5] As many members of the Committee remember, C.R.C.P. 251(b) was changed in 2011 so that it mirrored Rule 8.4(b). OARC supported that change. Before that change, it was possible that a lawyer could have been subject to discipline under C.R.C.P. 251.5(b) for committing any criminal act even if it did not reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects as required by Rule 8.4(b). Since the change, in order to violate Rule 8.4(b) and C.R.C.P. 251.5(b) there must be clear and convincing evidence that an attorney's criminal conduct reflects adversely on a lawyer's honesty, trustworthiness or fitness in other respects to practice law.[6]

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[4] In 2011 OARC entered into a diversion agreement with an attorney who was convicted of violating a Wyoming criminal law for personal use of marijuana. Additionally, in *People v. Jensen*, 10 PDJ 035, (Colo. O.P.D.J. Jan. 7, 2011) a hearing board imposed a six-month suspension on an attorney who entered an *Alford* plea to one charge of possession of more than one gram of psilocybin, a controlled substance. In that case the attorney had also been charged with possession of marijuana with intent to distribute. That marijuana charge was dismissed in the criminal matter.

[5] Colo. RPC 8.4(b) provides in pertinent part: It is professional misconduct for a lawyer to ... commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

[6] *See, e.g., People v. Rotenberg*, 911 P.2d 642, 643 (Colo. 1996) (a conviction for driving under the influence of intoxicating liquor adversely reflects on the attorney respondent's fitness to practice law).

OARC has not viewed conduct involving personal use of small amounts of marijuana, standing alone, as a violation of Colo. RPC 8.4(b). Any reflection on the attorney's fitness to practice is not significant enough to warrant discipline or diversion.

There are other minor criminal infractions that an attorney may commit that are relatively insignificant, such as having a dog at large or littering. Minor criminal conduct that does not involve violence or dishonesty usually results in a dismissal by OARC. The exercise of discretion here is based on the judgment that such conduct does not reflect adversely on an attorney's fitness to practice law. If an attorney is convicted of a crime OARC should be free to exercise its discretion and determine if the conduct reflects adversely on the lawyer's fitness to practice law.

As far as conduct involving the personal use of marijuana, OARC submits that there is no reason to change the rule to carve out a specific area of conduct from a general rule.

III. Marijuana Cultivation and Sale Not For Personal Use

Amendment 64 allows personal use and possession of marijuana in addition to operation of cultivation facilities, product manufacturing facilities and retail stores.[7] The subcommittee's proposals appear to allow an attorney to own and operate a state-licensed marijuana cultivation and retail facility. This part of this memo discusses the propriety of the proposed rule changes involving an attorney's cultivation and retail sale.

Both the proposed comment to Colo. RPC 8.4(b) and the proposed Rule 8.6 state that an attorney shall not be subject to discipline if engaging in conduct lawful under Colorado law even if a violation of federal law. Under these proposals attorneys would be permitted to operate a marijuana-related facility, as the Amendment 64 Task Force has dubbed the new operations, without jeopardizing their licenses to practice law.

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[7] The state legislature has not yet enacted statutes as mandated by Amendment 64. The Task Force on Implementation of Amendment 64 established by Governor Hickenlooper has issued its Report dated March 13, 2013.

None of us know how the adult-use marijuana industry will be legislated and regulated. Amendment 64 mandates that the State begin accepting and processing licenses no later than October 1, 2013, and begin issuing licenses by January 1, 2014. Until the legislature acts, it is not clear how ownership and operation of facilities will be permitted.

OARC does not support the subcommittee proposals that would permit a licensed attorney to own or operate a marijuana-related facility. Federal laws prohibit cultivation and distribution of marijuana. Unless and until the federal government changes its laws, the integrity of the bar is diminished by allowing attorneys to cultivate or distribute significant amounts of marijuana in violation of federal law, even if lawful under the state constitution.

There have been no cases brought to the attention of OARC in which the sole alleged conduct was a lawyer engaging in the sale of medical marijuana pursuant to a Colorado license.

IV. Advice to Clients and Assisting Clients

The subcommittee is also proposing a new Rule 8.6. This proposed rule would permit attorneys to 1) advise clients about conduct that violates federal law; and 2) assist clients in conduct that is a violation of federal criminal law. OARC submits that the Committee should not recommend to the Court that attorneys be permitted to advise a client how to violate federal law or to assist clients in violation of federal law. An attorney's knowing assistance to a client and participation in a crime itself should still be subject to regulation, and initiation of disciplinary proceedings if warranted under OARC's discretion.

A. Current Rule 1.2(d)

Under the current rules, Colo. RPC 1.2(d)[8] prohibits a lawyer from advising a client how to violate a law, or from assisting a client in violating a

[8] Colo. RPC 1.2(d) provides: 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.

law.[9] It is never a violation of any rule for a lawyer to advise a client about whether the client's intended conduct violates a law. And, of course it is never a violation of any rule for a lawyer to represent someone charged with a crime. However, there is a sharp distinction between advising what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction.[10] As Alexander Rothrock has written, factual differences in this area can be subtle.[11] Regulation of an attorney's conduct may be determined by those differences.

With regard to attorneys giving advice, there are many different situations in which a lawyer might be in the position of advising a client concerning the new marijuana laws and regulations in Colorado. Under the current rules, an attorney's advice about licensing requirements under state marijuana laws would in general not be any problem. An attorney's advising and assisting clients in the rule making or licensing process for medical or adult-use marijuana facilities would be permitted under RPC 1.2(d).[12] However, as the rules currently stand, the attorney must not go further and assist a client in conduct that is a violation of federal criminal law.

B. Proposed Rule and Comment

The subcommittee's proposals would allow certain conduct by an attorney to assist a client with no repercussions on the attorney's license to practice law even if the attorney is convicted of a federal crime.

Some lawyers might be heavily involved in transactions which violate federal law. Once again, it is difficult to state categorically that attorneys

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[9] Denver University Law School professors Wald and Kamin have proposed an amendment to Rule 1.2(d) that would require proof that an attorney *intended* to aid or abet their client's criminal activity as opposed to assisting their clients *knowing* the client was engaged in criminal conduct. *See* "Marijuana Lawyers: Outlaws or Crusaders," Eli Wald and Sam Kamin, *Oregon Law Review,* forthcoming (2013). The subcommittee rejected this proposal. OARC's view is that this distinction between knowing assistance and intentional assistance is not helpful to cure the current ambiguity and could lead to litigation about the difference.

[10] ABA Comm. On Prof'l Ethics & Grievances, Formal Op. 281 (1952); *see* Alexander Rothrock, "Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health?" 89 Denver University Law Review 1047, 1052 (2012).

[11] *Id.*

[12] *See* Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 2013-02, Jan. 16, 2013).

involved in such situations would always be subject to discipline. The facts of each case are critical.

There are too many unforeseen situations that could arise that should still be subject to regulation of an attorney's license to practice law. For these reasons, OARC is opposed to the subcommittee's proposals.

V. Conclusion.

OARC understands the subcommittee's desire to clarify what is currently a vague area of legal ethics. However, the Committee should not be recommending to the Supreme Court that lawyers can violate federal law with no possible response from the attorney regulation system. While personal use of marijuana in compliance with state law has not been a significant enough concern to warrant discipline that may not be true for advising a client to violate federal law, or assisting the client to do so.

CBA
COLORADO BAR ASSOCIATION
Established in 1897

April 24, 2013

Marcy Glenn, Chair
Colorado Supreme Court Standing Committee on
Rules of Professional Conduct
Holland & Hart, LLP
P.O. Box 8749
Denver, Colorado 80203-8749

Dear Marcy:

I write to formally advise you, in my capacity as Chair of the Ethics Committee of the Colorado Bar Association, that the Ethics Committee last Saturday, April 20, approved a resolution to support the proposed changes to the Colorado Rules of Professional Conduct concerning the ability of lawyers to represent clients in connection with issues concerning the use of medical and recreational marijuana. The resolution stated as follows:

> The Ethics Committee of the Colorado Bar Association encourages the Supreme Court Standing Committee on the Rules of Professional Conduct to recommend to the Supreme Court the adoption of a rule which provides that an attorney will not be subject to discipline for providing advice to a client regarding conduct which is lawful under Colorado law.

This motion was approved overwhelmingly by the Committee, in the context of the Committee's continued discussion of a proposed formal opinion concerning the ethical issues associated with lawyers' representation of clients concerning medical and recreational marijuana issues.

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I will try to attend the Committee's meeting on Friday, May 3rd, at which time I would be happy to provide further input if the committee believes it would be helpful.

Very truly yours,

Dan Taubman

Daniel M. Taubman, Chair
Ethics Committee,
Colorado Bar Association

cc: Hon. John Webb

DMT/pg

Court of Appeals Nos. 12CA0595 & 12CA1704
Arapahoe County District Court No. 11CV1464
Honorable Elizabeth B. Volz, Judge

Brandon Coats,

Plaintiff-Appellant,

v.

Dish Network, L.L.C.,

Defendant-Appellee.

JUDGMENT AFFIRMED AND ORDER REVERSED

Division A
Opinion by CHIEF JUDGE DAVIDSON
Márquez*, J., concurs
Webb, J., dissents

Announced April 25, 2013

Thomas K. Carberry, Denver, Colorado; The Evans Firm, LLC, Michael D. Evans, Denver, Colorado, for Plaintiff-Appellant

Martinez Law Group, P.C., Meghan W. Martinez, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

¶ 1 The primary question before us is whether federally prohibited but state-licensed medical marijuana use is "lawful activity" under section 24-34-402.5, C.R.S. 2012, Colorado's Lawful Activities Statute. If it is, employers in Colorado would be effectively prohibited from discharging an employee for off-the-job use of medical marijuana, regardless that such use was in violation of federal law. We conclude, on reasoning different from the trial court's analysis, that such use is not "lawful activity."

¶ 2 We also address whether a section 24-34-402.5 claim is equivalent to a tort for purposes of the mandatory attorney fees provision of section 13-17-201, C.R.S. 2012. We conclude that the answer to this question is also no. Thus, we affirm in part and reverse in part.

I. Background

¶ 3 After being terminated, plaintiff, Brandon Coats, filed a complaint against his former employer, defendant, Dish Networks, L.L.C.

¶ 4 According to the complaint, plaintiff, a quadriplegic, is licensed by the state of Colorado to use medical marijuana pursuant to the Medical Marijuana Amendment, Colo. Const. art.

XVIII, § 14 (Amendment). Plaintiff alleged that he used marijuana within the limits of the license, never used marijuana on defendant's premises, and was never under the influence of marijuana at work. Defendant fired plaintiff after he tested positive for marijuana, which established a violation of defendant's drug policy. Nothing in the record indicates that defendant had any other justification for the discharge.

¶ 5 Plaintiff filed this action, claiming that his termination violated the Lawful Activities Statute, section 24-34-402.5, an employment discrimination provision of the Colorado Civil Rights Act (CCRA). The statute prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours," subject to certain exceptions. § 24-34-402.5. Defendant filed a motion to dismiss, arguing that the use of medical marijuana was not "lawful activity" because it was prohibited under both state law and federal law.

¶ 6 The trial court addressed only the state law issue, and relying on *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 978 (Colo. App. 2011), decided that plaintiff's medical marijuana use was not "lawful activity" under Colorado law. *Id.* (Amendment did not

establish state constitutional right to state-licensed medical marijuana use, but rather created an affirmative defense from prosecution for such use). The court therefore dismissed the complaint for failure to state a claim. Subsequently, the court granted defendant's motion for attorney fees pursuant to section 13-17-201, agreeing with defendant that plaintiff's claim was a tort for purposes of that statute.

¶ 7 Plaintiff separately appealed the judgment of dismissal and the attorney fees award. We have consolidated the cases. On different reasoning, we affirm the judgment dismissing plaintiff's complaint for failure to state a claim. *See In re Marriage of Rodrick*, 176 P.3d 806, 810 (Colo. App. 2007) ("[a]n appellate court may affirm a trial court's correct judgment based on different reasoning than the trial court used"). However, we reverse the order granting defendant its attorney fees.

II. State-Licensed Medical Marijuana Use Is Not "Lawful Activity" for Purposes of Section 24-34-402.5

¶ 8 At the time of plaintiff's termination, all marijuana use was prohibited by federal law. *See* 21 U.S.C. § 844(a); *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (state law authorizing possession and

cultivation of marijuana does not circumscribe federal law prohibiting use and possession); *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." (citations omitted)). It remains so to date.

¶ 9 Plaintiff acknowledges that medical marijuana use is illegal under federal law, but argues that his use was nonetheless "lawful activity" for purposes of section 24-34-402.5 because the statutory term "lawful activity" refers to only state, not federal law. We disagree.

¶ 10 Like the trial court, we accept as true all averments of material fact and view the allegations of the complaint in the light most favorable to the plaintiff. *See Hemmann Management Services v. Mediacell, Inc.*, 176 P.3d 856, 858 (Colo. App. 2007). Interpreting the statutory term "lawful activity" presents a question of law that we review de novo. *See Dubois v. People*, 211 P.3d 41, 43 (Colo. 2009). When interpreting a statute, we aim to ascertain and give effect to the intent of the legislature based on the plain and ordinary meaning of the statutory language. *See McCall v. Meyers,*

94 P.3d 1271, 1272 (Colo. App. 2004). We may also examine the legislative history to discern the policy objective of a statute and to ensure that our interpretation is consistent with the legislature's intent. *See Allstate Ins. Co. v. Schneider Nat'l Carriers, Inc.*, 942 P.2d 1352, 1356 (Colo. App. 1997), *aff'd sub nom. Farmers Ins. Exch. v. Bill Boom Inc.*, 961 P.2d 465 (Colo. 1998).

¶ 11 Section 24-34-402.5(1), C.R.S. 2012, provides in pertinent part:

> It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . . .

¶ 12 The statute does not define the word "lawful." Thus, we must look to its ordinary meaning. *See Marks v. Koch*, 284 P.3d 118, 123 (Colo. App. 2011) ("When a statute does not define its terms but the words used are terms of common usage, we may refer to dictionary definitions to determine the plain and ordinary meanings of those words."); *Mounkes v. Indus. Claim Appeals Office*, 251 P.3d 485, 487 (Colo. App. 2010) ("if the statutory language is clear and unambiguous, we give the words their ordinary meaning and apply the statute as written"); *Cerbo v. Protect Colorado Jobs, Inc.*, 240

P.3d 495, 501, n.4 (Colo. App. 2010) (to determine meaning of statutory term, we may look to dictionary definitions).

¶ 13 The plain and ordinary meaning of "lawful" is that which is "permitted by law." *Black's Law Dictionary*, 965 (9th ed. 2009); *see, e.g., Hougum v. Valley Memorial Homes*, 574 N.W.2d 812, 820 (N.D. 1998) (interpreting the word "lawful" in the North Dakota Human Rights Act to mean "authorized by law and not contrary to, nor forbidden by law" (citing *Black's Law Dictionary* 797 (5th ed. 1979))).

¶ 14 Thus, because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law, *see, e.g., Raich*, 545 U.S. at 29 (federal Controlled Substances Act applies to state activities including marijuana use), for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be "lawful" under the ordinary meaning of that term. Therefore, applying the plain and ordinary meaning, the term "lawful activity" in section 24-34-402.5, means that the activity – here, plaintiff's medical marijuana use – must comply with both state and federal law. *See generally*

Matthew C. Macy, *Employment Law and Medical Marijuana — An Uncertain Relationship*, 41 Colo. Law. 57, 60 (Jan. 2012) (observing that medical marijuana's continuing illegality under federal law "likely will be sufficient to remove the employee from the protection of § [24-34-]402.5").

¶ 15 Based on the premise that the legislature intended that section 24-34-402.5 protect employees, plaintiff contends that we must read "lawful activity" to include activity that is prohibited by federal law, but not state law. However, while we agree that the general purpose of section 24-34-402.5 is to keep an employer's proverbial nose out of an employee's off-site off-hours business, *see* Hearing on H.B. 90-1123 before the S. Comm. on Business Affairs and Labor, 57th Gen. Assemb., 2d Sess. (Mar. 12, 1990) (statements of Sens. Meiklejohn, Wells, and Martinez), we can find no legislative intent to extend employment protection to those engaged in activities that violate federal law.

¶ 16 First, while the statute promotes a "hands-off" policy for a broad range of off-the-job employee behavior, it still maintains the larger balance between employer and employee rights reflected in Colorado's law of at-will employment. *See* § 24-34-402.5(1)(a),

C.R.S. 2012 (employers may terminate an employee for lawful off-the-job activity if it "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to . . . employment activities and responsibilities"); *see, e.g., Wisehart v. Meganck*, 66 P.3d 124, 126 (Colo. App. 2002) (at-will employment in Colorado allows either the employee or the employer to terminate employment at any time without cause; this balance "promotes flexibility and discretion for employees to seek the best position to suit their talents and for employers to seek the best employees to suit their needs").

¶ 17 Second, there is no reference in the legislative discussions to the word "lawful," or to whether, by the term "lawful activity," the legislature intended to include activities prohibited only by federal law. *See* Hearing on H.B. 90-1123 before the H. Comm. on Agriculture, Livestock and Natural Resources, 57th Gen. Assemb., 2d Sess. (Jan. 24, 1990); Second Reading of H.B. 90-1123 before the H., 57th Gen. Assemb., 2d Sess. (Feb. 5, 1990); Third Reading of H.B. 90-1123 before the H., 57th Gen. Assemb., 2d Sess. (Feb. 7, 1990); Hearing on H.B. 90-1123 before the S. Comm. on Business Affairs and Labor, 57th Gen. Assemb., 2d Sess. (Mar. 12, 1990);

Second Reading of H.B. 90-1123 before the S., 57th Gen. Assemb., 2d Sess. (Mar. 23, 1990).

¶ 18 Yet, notwithstanding state police powers generally, there are numerous activities, often of major import, that are controlled or regulated exclusively by federal law. *See, e.g.*, 8 U.S.C. § 1227(a)(1)(A) (no Colorado state law counterpart; persons entering United States without documentation subject to removal); 17 U.S.C. § 506 (no Colorado state law counterpart; establishes offense of infringing copyrights on certain works); *see also* U.S. Const. art. VI, cl. 2 (Supremacy Clause).

¶ 19 Thus, forbidding a Colorado employer from terminating an employee for federally prohibited off-the-job activity is of sufficient policy import that we cannot infer, from plain statutory language to the contrary and silence in the legislative discussions, the legislative intent to do just that. *See Allstate Ins. Co.*, 942 P.2d at 1356 ("One of the primary uses of legislative history as an aid to statutory construction is to discern the policy objective to be achieved by a statute, so that a court may consider the consequences of a proposed construction and adopt a reading that will achieve consequences consistent with legislative intent.");

Grossman v. Columbine Medical Group, Inc., 12 P.3d 269, 271 (Colo. App. 1999) (it is for the legislature, and not the courts, to enunciate the public policy of the state); *see also Shipley v. People*, 45 P.3d 1277, 1282 (Colo. 2002) (special offender statute requiring specific "term" for sentencing did not limit court's discretion to impose penalties aside from incarceration because nothing in statutory language or legislative history suggested such intent); *cf. Roe v. TeleTech Customer Care Management (Colorado) LLC*, 257 P.3d 586, 597 (Wash. 2011) (state medical marijuana amendment did not establish a public policy in favor of medical marijuana use on which a claim for wrongful discharge in violation of public policy could be based because, in part, that would require employers to allow employees to violate federal law).

¶ 20 Moreover, a review of Colorado statutes shows that if the legislature had wanted to insulate employees from discharge for off-the-job activities illegal only under federal law, it knew how to accomplish that goal. *Compare, e.g.*, § 8-75-101(2)(a)(I), C.R.S. 2012 ("any other state law"), *with* § 18-17-103(6), C.R.S. 2012 ("unenforceable under state or federal law"), § 11-59.7-104(1)(b)(I)(B), C.R.S. 2012 ("obligation under federal law"), *and* §

33-6-115.5(1), C.R.S. 2012 (cannot interfere with "lawful" hunting, trapping, or fishing); *see generally Students for Concealed Carry on Campus, LLC v. Regents of University of Colorado*, 280 P.3d 18, 23 (Colo. App. 2010) ("Had the legislature intended to exempt universities, it knew how to do so."), *aff'd*, 2012 CO 17.

¶ 21 In support of plaintiff's assertion that under the statute, activity that violates federal law is "lawful," the dissent cites to cases stating that state courts construing a term in a state statute usually decline to seek guidance from a federal definition of that term. *See, e.g., Cox v. Microsoft Corp.*, 290 A.D.2d 206, 206-07, 737 N.Y.S.2d 1, 2 (2002) (federal case law is irrelevant to state court's determination of whether trebling of damages is "penal" as that term is used in state statute). While this proposition is generally true, any federal definition of "lawful activity" was of no relevance to our analysis here.

¶ 22 In a different argument, relying on *People v. Tilehkooh*, 113 Cal. App. 4th 1433, 7 Cal. Rptr. 3d 226 (2003), plaintiff also contends that interpreting the term "lawful activity" to implicate both state and federal law improperly "compels" Colorado to enforce federal criminal law. We disagree, and instead follow the reasoning

of *People v. Watkins*, 2012 COA 15, ¶ 33, which rejected the proposition set forth by the California court in *Tilehkooh* that the state court was effectively enforcing federal law through a state statute by revoking probation based on a violation of federal law. *See Watkins*, ¶¶ 33-34. Just as revoking state probation for a violation of federal law does not result in a federal charge or sentence, section 24-34-402.5 does not enforce federal law by excluding from its protection individuals who were terminated for violating federal law.

¶ 23 Thus, because plaintiff's state-licensed medical marijuana use was, at the time of his termination, subject to and prohibited by federal law, we conclude that it was not "lawful activity" for the purposes of section 24-34-402.5. Based on this disposition, we need not address plaintiff's arguments concerning whether the Amendment created a state constitutional right to medical marijuana use.

III. Defendant is Not Entitled to Attorney Fees Pursuant to Section 13-17-201

¶ 24 After the court dismissed plaintiff's claim, defendant moved for attorney fees pursuant to section 13-17-201, which mandates an

award of reasonable attorney fees to a defendant when a court dismisses, pursuant to C.R.C.P. 12(b), an "action[] brought as a result of . . . an injury . . . occasioned by the tort of any other person." § 13-17-201.

¶ 25 The court granted defendant's motion, determining that section 13-17-201 applied because plaintiff's claim constituted a tort claim. On appeal, plaintiff contends that this conclusion was incorrect. We review this issue de novo, and agree with plaintiff. *See Robinson v. Colorado State Lottery Division*, 179 P.3d 998, 1009 (Colo. 2008) (reviewing de novo whether section 13-17-201 applies).

¶ 26 Initially, we reject defendant's assertion that plaintiff failed to properly preserve this issue for our review. To the contrary, plaintiff's response to defendant's motion sufficiently alerted the trial court that plaintiff was contesting the characterization of his claim as a tort for the purposes of section 13-17-201. *See Qwest Services Corp. v. Blood*, 252 P.3d 1071, 1087-88 (Colo. 2011) (issue of lack of limiting instruction preserved for appeal even though party failed to ask for limiting instruction because party "directed the trial court's attention" to the issue).

¶ 27 To determine whether section 13-17-201 applies to plaintiff's claim, we "focus on the manner in which [the claim was] pleaded." *Dubray v. Intertribal Bison Co-op.*, 192 P.3d 604, 607 (Colo. App. 2008); *see also Robinson*, 179 P.3d at 1009 (the controlling issue is how the plaintiff has characterized the claim in the complaint).

¶ 28 Here, the complaint pleaded a single claim based on a violation of section 24-34-402.5, which, as discussed, is an employment discrimination provision of the CCRA. *See Watson v. Public Service Co.*, 207 P.3d 860, 865-66 (Colo. App. 2008) (General Assembly placed section 24-34-402.5 within the "discriminatory or unfair employment practices" section of the CCRA). The complaint does not refer to or imply a tort claim, and the only damages plaintiff specifically requests are back pay and benefits (the sole remedies authorized by section 24-34-402.5); *cf. Goodson v. American Standard Ins. Co.*, 89 P.3d 409, 415 (Colo. 2004) (traditional tort principles include availability of compensatory damages for emotional distress, pain and suffering, inconvenience, fear and anxiety, and impairment of quality of life).

¶ 29 Defendant asserts, nevertheless, that a section 24-34-402.5 claim is the equivalent of an invasion of privacy tort, and, even if

not, exhibits sufficient general tort characteristics to be equivalent to a tort claim. We disagree with both arguments.

A. A Section 24-34-402.5 Claim Is Not an Invasion of Privacy Tort

¶ 30 The only invasion of privacy torts recognized in Colorado that are possibly analogous to a section 24-34-402.5 claim are intrusion upon seclusion and unreasonable disclosure of private fact. These torts protect an individual's privacy interest by prohibiting both an intentional intrusion on that interest and the discovery and disclosure of private information. *See Doe v. High-Tech Institute, Inc.*, 972 P.2d 1060, 1065 (Colo. App. 1998) (intrusion upon seclusion is intentional intrusion upon seclusion or solitude that would be offensive to a reasonable person; unreasonable disclosure of private fact requires disclosure of private fact to the public, which would be highly offensive to reasonable person).

¶ 31 In contrast, by its plain terms, section 24-34-402.5 offers no protection against intrusion into privacy or discovery and disclosure of private information. Instead, it protects an employee from discriminatory termination based on lawful, off-the-job activity.

¶ 32 Relying on *Gwin v. Chesrown Chevrolet, Inc.*, 931 P.2d 466, 469 (Colo. App. 1996) (without analysis, treating a section 24-34-

402.5 claim as a privacy tort), defendant argues that section 24-34-402.5 is at its essence a privacy statute because it prohibits termination based on private activity. We disagree. While section 24-34-402.5 prohibits termination based on lawful, off-the-job activity that happens to be private, the private nature of the activity is not required by section 24-34-402.5. To the contrary, section 24-34-402.5 also prohibits termination based on lawful, off-the-job activity that is not private. *See generally Banks v. Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416, 1424 (D.C. Cir. 1986) (two discrimination statutes not analogous where one "does not apply to many forms of discrimination remediable under [the other]"). Therefore, we disagree with defendant and *Gwin*, and conclude that a section 24-34-402.5 claim is not equivalent to an invasion of privacy tort because the interests protected by each are different.

B. A Section 24-34-402.5 Claim Does Not Exhibit Sufficient General Tort Characteristics

¶ 33 We are aware of no general authoritative definition of a tort to which we could usefully compare a section 24-34-402.5 claim. *See, e.g.*, 1 Stuart M. Speiser et al., *The American Law of Torts* 5 (2003) ("[T]he abstraction 'tort' is not only nebulous but also protean. . . .

'A really satisfactory definition of a tort has yet to be found'" (quoting Prosser, *Law of Torts* 1 (4th ed.))).

¶ 34 However, the primary purpose of tort law is to compensate plaintiffs for injuries wrongfully suffered at the hands of others. *See id.* at 12 ("There are broad judicial utterances to the effect that, [][t]he primary purpose of tort law is that of compensating plaintiffs for the injuries they have suffered wrongfully at the hands of others.[]"); *Robinson*, 179 P.3d at 1003 (claim lies in tort for purposes of Colorado Governmental Immunity Act (CGIA) when "injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law, and . . . relief seeks to compensate the plaintiff for that injury"); *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1176 (Colo. 2000) (for purposes of CGIA, torts are claims seeking "compensatory relief for personal injuries suffered as a consequence of prohibited conduct," whereas claims seeking to "redress discriminatory conduct and . . . not compensate the plaintiff for any personal injuries" are not torts).

¶ 35 Defendant argues that plaintiff's complaint alleged a tort because it sought compensation, in the form of back pay, for the

injury of being terminated based on lawful, off-the-job activity in violation of section 24-34-402.5.

¶ 36 However, as discussed, section 24-34-402.5 is located in the "discriminatory or unfair employment practices" section of the CCRA. This placement demonstrates the General Assembly's intent that the purpose of the statute is not to compensate an individual for breach of a statutory duty, as defendant suggests, but to eliminate workplace discrimination based on lawful, off-the-job activity. *See Brooke v. Restaurant Services, Inc.*, 906 P.2d 66, 71 (Colo. 1995) ("the [CCRA] is not designed primarily to compensate individual claimants, but to eliminate unfair or discriminatory practices as defined by the Act"); *Conners*, 993 P.2d at 1174 (CCRA was designed primarily to eliminate discrimination and "any benefits to an individual claimant, such as the recovery of back pay, are 'merely incidental' to the Act's greater purpose of eliminating workplace discrimination" (quoting *Brooke*, 906 P.2d at 71)); *Watson*, 207 P.3d at 866 (the CCRA "does not create" "a tort claim in the nature of compensation for personal injuries" (citing *Conners*, 993 P.2d at 1174)).

¶ 37 Moreover, in contrast to the broad compensation for pain and suffering, harm to reputation, emotional distress, and other injuries often available in a tort claim, section 24-34-402.5 authorizes only back pay and benefits that would have been due absent the discriminatory termination. § 24-34-402.5; *cf. Goodson*, 89 P.3d at 415 (traditional tort principles include availability of compensatory damages for emotional distress, pain and suffering, inconvenience, fear and anxiety, and impairment of quality of life). Thus, section 24-34-402.5 excludes most traditional tort remedies, and simply restores the plaintiff to the wage and employment position he or she would have had absent the unlawful discrimination.

¶ 38 We are not persuaded to the contrary by defendant's citation to federal cases stating, in other contexts, that federal statutory discrimination claims are torts. Indeed, in most federal decisions analyzing whether a particular federal statutory discrimination claim sounds in tort, the result turns on the purpose of the statute and the nature of the remedy that Congress has provided, an approach consistent with our analysis and result here. *See and compare, e.g., United States v. Burke*, 504 U.S. 229, 241 (1992) (Title VII employment discrimination claim "whose sole remedial

focus is the award of back wages" does not redress a tort-like personal injury), *criticized on other grounds by O'Gilvie v. United States*, 519 U.S. 79 (1996), *with Curtis v. Loether*, 415 U.S. 189, 195-96 (1974) (discrimination claim based on fair housing provision of federal Civil Rights Act of 1968 sounds in tort because it is analogous to other recognized torts, but, "[m]ore important, the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law"), *and Meyer v. Holley*, 537 U.S. 280, 285 (2003) (relying on reasoning of *Curtis*, 415 U.S. at 195-96, to determine whether federal discrimination claim sounds in tort); *see also McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1255 (10th Cir. 1988) (acknowledging split of authority on the issue of whether § 1981 claim sounds in tort or contract); *see generally Wilson v. Garcia*, 471 U.S. 261, 268, 277 (1985) (when forced to decide what state cause of action most closely resembles § 1983 claim for purposes of determining statute of limitations, court focused its analysis on "characteriz[ing] the essence of the [§ 1983] claim" and the remedies provided by § 1983), *superseded by statute*, 28 U.S.C. § 1658, *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377-78 (2004) (28 U.S.C. § 1658 provides

statute of limitations for § 1983 claims); *Banks*, 802 F.2d at 1424 (adopting *Wilson v. Garcia* analysis for same issue regarding § 1981 claims and holding that particular state statute not analogous to § 1981 because state statute "does not apply to many forms of discrimination remediable under § 1981").

¶ 39 Accordingly, we disagree with the trial court and conclude that plaintiff's claim was not a tort for purposes of an attorney fees award pursuant to section 13-17-201. Based on this disposition, we also decline defendant's request under section 13-17-201 for attorney fees on appeal.

¶ 40 The judgment dismissing plaintiff's complaint is affirmed and the order awarding attorney fees to defendant is reversed.

JUDGE MÁRQUEZ concurs.

JUDGE WEBB dissents.

JUDGE WEBB dissenting.

¶ 41 In my view, "lawful activity" under section 24-34-402.5, C.R.S. 2012, Colorado's off-duty conduct statute, should be measured by state law. I further conclude that use of marijuana in a manner permitted by the Medical Marijuana Amendment, Colo. Const. art. XVIII, § 14 (MMA), is lawful. Therefore, I respectfully dissent from that portion of the majority opinion which affirms dismissal of plaintiff's section 24-34-402.5 claim, but otherwise concur.

I. Lawful Activity is Determined by Colorado Law

¶ 42 Colorado criminal law is not coterminous with federal criminal law. Some differences arise from powers held exclusively by the federal government. *See Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012) ("States are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance."). Other differences reflect legislative priorities.

¶ 43 Section 24-34-402.5 does not define "lawful activity." Nor does it refer to either state law or federal law. Therefore, the statute is ambiguous because that phrase could incorporate state law, federal law, or both. *See People v. Trusty*, 53 P.3d 668, 676 (Colo.

App. 2001) ("When the statutory language is susceptible of more than one reasonable interpretation, leading to different results, the statute is ambiguous.").

¶ 44 The majority fills this void with an indisputable dictionary definition of "lawful," which clearly encompasses illegality under both state and federal law. However,

> [D]ictionaries must be used as sources of statutory meaning only with great caution. "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

United States v. Costello, 666 F.3d 1040, 1043 (7th Cir. 2012) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)).

¶ 45 This is so because, "Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings." *Id.* at 1044. Statutory interpretation, by contrast, "demands careful attention to

the nuances and specialized connotations that speakers of the relevant language attach to particular words and phrases in the context in which they are being used." *Id.*; *see City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 592 (Colo. 1997) (citing *Cabell v. Markham* with approval); *Allstate Ins. Co. v. Schneider Nat'l Carriers, Inc.*, 942 P.2d 1352, 1356 (Colo. App. 1997) (same), *aff'd sub nom. Farmers Ins. Exch. v. Bill Boom Inc.*, 961 P.2d 465 (Colo. 1998).

¶ 46 For these reasons, I look for "the spirit of a statute and not simply the letter of the law." *People v. Manzanares*, 85 P.3d 604, 607 (Colo. App. 2003). I begin with the legislative history because "[o]ne of the primary uses of legislative history as an aid to statutory construction is to discern the policy objective to be achieved by a statute, so that a court may consider the consequences of a proposed construction and adopt a reading that will achieve consequences consistent with legislative intent." *Allstate Ins. Co.*, 942 P.2d at 1356.

¶ 47 The legislative discussion of the off-duty conduct statute reflected a desire to protect employees' autonomy in their off-the-job activities, such as smoking and eating patterns that lead to obesity.

Consistent with this concern, the statute *protects employees* who engage in lawful conduct from discriminatory discharge, as opposed to *empowering employers* to discharge based on an employee's "unlawful" conduct. Narrowing the scope of employee protection by looking beyond state law to activities that are proscribed only at the federal level would limit this protection. But doing so would contradict the principle that, as a remedial statute, "section 24–34–402.5 should be broadly construed." *Watson v. Public Service Co.*, 207 P.3d 860, 864 (Colo. App. 2008).

¶ 48 When the General Assembly has intended to define a term with reference to both state and federal law, it did so specifically. For example, in section 18-17-103(6), C.R.S. 2013, "'Unlawful debt' means a debt incurred or contracted in an illegal gambling activity or business or which is unenforceable under state or federal law in whole or in part as to principal or interest because of the law relating to usury." *See also* § 11-60-102, C.R.S. 2012 (specifying "the laws of this state," "laws of the United States," and the laws of "any of the states thereof"). Other statutes refer to violations of "federal or state law." *See, e.g.*, 25-1.5-103(2)(b.5), C.R.S. 2012. Comparing such statutes to the off-duty conduct statute shows that

the absence of any reference to federal law in the latter is probative of legislative intent. *See, e.g., Students for Concealed Carry on Campus, LLC v. Regents of University of Colorado*, 280 P.3d 18, 23 (Colo. App. 2010) ("Had the legislature intended to exempt universities, it knew how to do so."), *aff'd*, 2012 CO 17.

¶ 49 Congress has legislated extensively in the field of employer-employee relations. *See, e.g.*, 29 U.S.C. § 621 et seq. (Age Discrimination in Employment Act); 42 U.S.C. § 12132 et seq. (Americans with Disabilities Act); 42 U.S.C. § 2000e et seq. (Title VII of the Civil Rights Act of 1964). However, none of these statutes, nor any other of which I am aware, broadly protects employees from discharge based on engaging in lawful off-the-job conduct.

¶ 50 The parties do not cite, nor have I found, a Colorado case addressing whether a court should consider federal law in determining the scope of a Colorado statute that, like the off-duty conduct statute, has no federal counterpart. Courts in other states have declined to do so. *See Cox v. Microsoft Corp.*, 290 A.D.2d 206, 207, 737 N.Y.S.2d 1, 2 (2002) ("Federal case law is at best persuasive in the absence of state authority; it is largely irrelevant to a peculiarly local question . . . . In drafting CPLR 901(b), the

Legislature must be deemed to have chosen its language with reference to New York law, not its federal counterpart."); *cf. State v. Cote*, 286 Conn. 603, 619, 945 A.2d 412, 421-22 (2008) ("Had the legislature included a similar provision to apply to § 22a–131a, defining the pertinent terms consistent with, or by reference to, federal law, such action also would have expressed a clear intent to have the federal definitions control."); *Nika v. State*, 124 Nev. 1272, 1288-89, 198 P.3d 839, 850-51 (2008) ("Our conclusion that the interpretation and definition of the elements of a state criminal statute are purely a matter of state law is reinforced by the fact that jurisdictions differ in their treatment of the terms 'willful,' 'premeditated,' and 'deliberate' for first-degree murder.").

¶ 51 The absence of any federal analogue to the off-duty conduct statute suggests that protecting employees' off-the-job autonomy is primarily a matter of state concern. If Congress perceived a national problem with such state statutes (as it well might, given multi-state employers' interest in uniform personnel administration), it could have resolved that problem with legislation empowering employers to discharge employees who have engaged in conduct that violated any federal law. To date, Congress has not

done so. Recognition that protecting employees from discharge based on their off-duty conduct is primarily a matter of state concern favors measuring "lawful" based on state law.

¶ 52 Looking only to state law in construing the off-duty conduct statute is also consistent with the authority for Colorado statutes that regulate the employer-employee relationship: "a proper exercise of the police power." *Dunbar v. Hoffman*, 171 Colo. 481, 484, 468 P.2d 742, 744 (1970); *see also Smith-Brooks Printing Co. v. Young*, 103 Colo. 199, 209, 85 P.2d 39, 44 (1938). Under the federal constitution, this power is reserved to the states. U.S. Constitution amend. X; *see, e.g., Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true.").

¶ 53 The language in section 24-34-402.5(1)(a) of the statute, under which an employer may terminate an employee for lawful off-the-job activity if it "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to . . . employment activities and responsibilities," does not suggest interpreting "lawful" to include federal criminal prohibitions. If an employee's off-the-job activity

violated only federal criminal law, that activity might well warrant termination based on "a bona fide occupational requirement" of the position. But if the employee's activity was unlawful *only* under federal law, *and* it did not relate to such a requirement, then the employee would be protected from termination. This outcome would be consistent with the balancing of employer and employee interests in the statute.

¶ 54 For these reasons, I would interpret "lawful," in the off-duty conduct statute, as measured solely by Colorado law. This interpretation requires me to take up an issue that the majority had no reason to address -- whether plaintiff's use of medical marijuana, as described in the complaint, was lawful.

II. Marijuana Use Compliant with the MMA is Lawful

¶ 55 The dissenting opinion in *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970, 978 (Colo. App. 2011) (Gabriel, J., dissenting), concluded that the MMA "established a right to possess and use medical marijuana in the limited circumstances described therein." I endorse this view. Paraphrasing the analysis could disserve the author and would needlessly lengthen this opinion. *See also* Emma

S. Blumer, Comment, *Beinor v. Industrial Claims Appeals Office*, 57 N.Y.L. Sch. L. Rev. 205, 206 (2012/2013).

¶ 56 To be lawful under the off-duty conduct statute, however, conduct need not rise to the level of a constitutional right. Hence, I briefly set forth the reasons why marijuana use compliant with the MMA is at least lawful.

- The MMA states, "A patient's medical use of marijuana, within the following limits, is lawful." Colo. Const. art. XVII, § 14(4)(a).
- The so-called Blue Book refers to the MMA in terms of "legally possess" and "legalize the medical use of." Colorado Legislative Council, Research Pub. No. 475-0, *An Analysis of 2000 Ballot Proposals.*
- Enabling legislation states that the MMA "sets forth the lawful limits on the medical use of marijuana." § 18-18-406.3(1)(f), C.R.S. 2012.
- A division of this court has recognized that under section 18-18-406(1), C.R.S. 2012, "a patient's medical use of marijuana within the limits set forth in the Amendment

is deemed 'lawful' under subsection (4)(a) of the Amendment." *People v. Watkins*, 2012 COA 15, ¶ 23..

¶ 57 Finally, unlike the trial court, I do not read *Watkins* as supporting dismissal of the off-duty conduct claim. *Watkins* dealt with probation conditions under section 18-1.3-204(1), C.R.S. 2012, which a court deems "reasonably necessary to ensure that the defendant will lead a law-abiding life." In contrast, the purpose of the off-duty conduct statute is to protect employees' autonomy in their off-the-job activities.

III. Conclusion

¶ 58 I would reverse the dismissal of plaintiff's off-duty conduct claim. Insofar as that dismissal stands affirmed, however, I concur in the majority's conclusion that defendant is not entitled to recover attorney fees, either below or on appeal.