Articles

Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana

Helia Garrido Hull*

ABSTRACT

Every day attorneys face ethical dilemmas in trying to meet client needs while complying with professional rules of conduct. Perhaps nowhere is the risk of violating ethics rules more apparent than in states that have diverged from federal drug policy on marijuana. Attorneys currently engaged in marijuana-related counseling may violate federal law even where their actions are otherwise legal under state law. Changes in public opinion regarding the legality of marijuana that are driving some states to legalize or decriminalize certain marijuana-related activities provide no basis for attorneys to breach the covenant they have made with the public to uphold the rule of law. This Article argues that

---

*Associate Professor of Law and Coordinator of the Student Professionalism Enhancement Program, Barry University Dwayne O. Andreas School of Law; B.A. Providence College; J.D. Stetson University College of Law. The author would like to thank her research assistants Pamela LiPetri and Annamaria Farrell for their patience, diligence, and enthusiasm. The author would also like to thank Barry University and Dean Leticia M. Diaz of Barry University School of Law for the financial support to produce this paper. Last but not least, the author would like to thank her husband, Eric V. Hull and children Kayleigh and Tyler for their constant love and encouragement.

attorneys should refrain from counseling clients on the use, possession, and distribution of marijuana until doing so does not violate federal law. Attorneys who favor marijuana legalization should utilize their specialized training and advocacy skills to change the existing law. Current state action to relax ethics standards applicable to marijuana-related activities to insulate attorneys from ethics violations could produce the anomalous result of having an attorney criminally prosecuted under federal law for an action that does not violate state ethics rules. Such a result creates internal inconsistency within the state, confuses the public, and could lead to questions regarding the integrity of the profession.

Table of Contents

Ethics is knowing the difference between *what you have a right to do and what is right to do*.[1]

INTRODUCTION

Since 1970, federal law has prohibited the cultivation, distribution, and possession of marijuana by any person for any purpose other than approved research.[2] The prohibition is founded on a belief that marijuana has no recognized medical use and has a high likelihood of causing addiction. States largely adopted this perspective and enacted similar laws to prosecute the use, possession, and distribution of marijuana. Public opinion on marijuana use has changed markedly over the last few decades, based, in part, on emerging evidence of the medicinal benefits of marijuana to treat certain illnesses. Therefore, several states have enacted laws that legalize or decriminalize certain marijuana-related activities and offenses. To date, 23 states and the District of Columbia allow for comprehensive public medical marijuana programs.[3] These laws, in effect, allow individuals and businesses to engage in marijuana-related activities that are prohibited under federal law.[4] State departure from federal drug policy on marijuana has created unique opportunities for attorneys to specialize in areas of law relevant to marijuana-related activities. But seizing those opportunities may place attorneys at risk of violating rules of ethics that govern attorney actions. Paramount among these rules is the obligation of attorneys to refrain from engaging in, counseling, or assisting a client in conduct that the attorney knows is unlawful.[5] Attorneys who counsel clients in states that have legalized or decriminalized marijuana may be assisting these clients

1. Potter Stewart, Associate Justice, United States Supreme Court.

2. Controlled Substances Act, 21 U.S.C. §§ 801–904 (1970).

3. *State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 25, 2014), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Voters in Oregon, Alaska, and the District of Columbia voted to legalize marijuana in this year's midterm elections. *See* Anna Staver, *Answers: How Will Oregon's Marijuana Law Work?*, KGW.COM PORTLAND (Nov. 6, 2014), http://www.kgw.com/story/news/local/2014/11/06/marijuana-legal-oregon-sales-ballot-measure-passes/18590981/; Suzanna Caldwell & Laurel Andrews, *Alaskans Vote to Legalize Marijuana*, ALASKAN DISPATCH NEWS (Nov. 4, 2014), http://www.adn.com/article/20141104/alaskans-vote-legalize-marijuana; Aaron C. Davis, *With Focus Elsewhere, GOP Congress Shows Little Interest in Blocking Pot Legalization in D.C.*, WASH. POST (Nov. 16, 2014), http://www.washingtonpost.com/local/dc-politics/with-focus-elsewhere-gop-congress-shows-little-interest-in-blocking-dc-pot-law/2014/11/16/f548ab32-69a8-11e4-b053-65cea7903f2e_story.html.

4. These laws take various forms, but all effectively remove criminal sanctions for the medical use of marijuana, define eligibility for such use, and provide some means of access. Under federal law, the use of marijuana is illegal for any purpose except specifically authorized research. 21 U.S.C. § 872(e).

5. MODEL RULES OF PROF'L CONDUCT R. 1.2 (Discussion Draft 1983).

in taking actions that comply with applicable state law, yet violate federal law. As a result, attorneys who specialize in this emerging area and provide advice that complies with state substantive law may nonetheless subject themselves to ethics violations by helping their clients commit federal crimes. In response, some states that have legalized or decriminalized marijuana-related activities have started to evaluate the need to amend state attorney ethics rules to protect attorneys who comply with state law in counseling clients. As amended, however, such rules do nothing to prevent federal prosecution. This dilemma begs the question of whether attorneys should refrain from providing such advice in the first instance.

This Article argues that attorneys should refrain from counseling clients on the use, possession, and distribution of marijuana until doing so does not violate federal law. Part I will provide a brief overview of the historical role of marijuana use in America and the basis for its subsequent ban. Part II will address the emergence of state action to legalize marijuana for medical and recreational use and examines the federal response. Part III will examine the American Bar Association ("ABA") and select, state-specific attorney ethics rules applicable to counseling clients on marijuana-related issues and will argue that an attorney's ethical obligations to the profession militate against counseling clients in this area except under certain narrowly defined circumstances.

I. A BRIEF HISTORY OF MARIJUANA USE IN AMERICA: FROM STAPLE CROP TO ILLEGAL DRUG

Cannabis, more commonly known as marijuana, played an integral role in early American society. It was grown commercially in America for much of its history. As early as the 1600s, European settlers used the stalk of the cannabis plant to produce hemp, a versatile material whose fiber, seed, and oil was utilized to make a multitude of products such as twine, paper, and clothing.[6] Physicians and pharmacists commonly used the cannabis flower to treat a variety of ailments.[7] Marijuana use, which generally refers to the medicinal, recreational, or spiritual use involving the smoking of the flower, was recognized as providing a multitude of medical benefits, and marijuana was listed in the United States

6. D. Mark Anderson, Benjamin Hansen & Daniel I. Rees, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & ECON. 333, 335 (2013); *see also Industrial Hemp Production*, U. KY. C. AGRIC., FOOD & ENV'T (May 2014), http://www.uky.edu/Ag/CCD/introsheets/hempproduction.pdf.

7. Anderson, Hansen & Rees, *supra* note 6, at 335.

pharmacopoeia based on its medicinal value in 1850.[8] Marijuana was so ubiquitous in American society, that, prior to the early 1900s, no social stigma attached to its use.[9]

Fears that increased marijuana use would lead to addiction, violence, and over-dosage fueled social reform movements in the early 1900s that focused on eradicating the evils believed to be inherent in substances such as alcohol, opium, and marijuana.[10] These movements and other concerns led Congress to enact the Marihuana Tax Act of 1937 ("the Act").[11] Because the Tenth Amendment prevents the federal government from directing states to enact specific legislation or require state officials to enforce federal law,[12] Congress elected to utilize a tax as an indirect method to prohibit the production, use, and distribution of cannabis within the states.[13] The Act required all buyers, sellers, importers, growers, physicians, veterinarians, and any other persons who dealt in marijuana commercially, prescribed it professionally, or possessed it to purchase a tax stamp in order to possess marijuana legally.[14] Because Congress set the taxes prohibitively high, the Act effectively discouraged compliance, creating a de facto prohibition.[15] Anyone found in violation of the Act was subject to fines of up to $2000 dollars and imprisonment of up to five years.[16] The Act further authorized the Secretary of the Treasury to grant the Commissioner and agents of the Treasury Department's Bureau of Narcotics absolute administrative, regulatory, and police powers in the enforcement of the

8. *Difference Between Industrial Hemp and Cannabis*, WEEBLY, http://hempethics.weebly.com/industrial-hemp-vs-cannabis.html (last visited Sept. 29, 2014); *see also* Anderson, Hansen & Rees*, supra* note 6, at 335.

9. *See, e.g.*, *Domestic Production of Hemp Encouraged*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (last visited Sept. 29, 2014) (discussing the pre-1900s widespread use of marijuana and the post-1900s regulatory reaction to increasing fears of marijuana-associated crimes).

10. Rosalie Liccardo Pacula et al., *State Medical Marijuana Laws: Understanding the Laws and Their Limitations*, 23 J. PUB. HEALTH & SAFETY 413, 415 (2002).

11. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970), *available at* http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm.

12. *See* U.S. CONST. amend. X.

13. Marihuana Tax Act § 2.

14. *Id.*

15. Marihuana Tax Act § 7; *see also Taxation of Marijuana: Hearing Before the Comm. on Ways & Means, House of Representatives on H.R.6385*, 75th Cong. 7 (1937), http://www.lib.berkeley.edu/doemoff/govinfo/federal/fdlpexhibit/Taxation_of_Marihuana.pdf (noting that the purpose of the tax was to make it virtually impossible for some to acquire marijuana); Laura Kriho, *Marihuana Tax Act of 1937 Rises from the Dead*, BOULDER WEEKLY (Oct. 31, 2013), http://www.boulderweekly.com/article-11910-marihuana-tax-act-of-1937-rises-from-the-dead.html.

16. Marihuana Tax Act § 12.

law.[17] States quickly followed, and by the end of 1937, 46 out of 48 states had officially classified cannabis as a narcotic, similar to morphine, heroin, and cocaine.

The risk of prosecution led to the rapid decline in the open use of marijuana and facilitated the emergence of a black market in marijuana that still exists today. Congress passed the Act despite strong opposition from the medical community, which asserted that medicinal use of cannabis does not cause addiction and may provide important medicinal benefits.[18] The Act remained in effect for nearly three decades and led to the prosecution and incarceration of countless individuals before the U.S. Supreme Court declared it unconstitutional in 1969.[19]

A. Federal Control of Marijuana Today

The Controlled Substances Act ("CSA"), enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[20] replaced the Marihuana Tax Act of 1937. Today, the CSA serves as the key federal drug policy under which controlled substances, including marijuana, are regulated. The Drug Enforcement Administration ("DEA") within the Department of Justice ("DOJ") is the lead federal law enforcement agency responsible for enforcing the CSA.[21] The CSA categorizes all controlled substances into one of five Schedules (classifications) based on medicinal value, harmfulness, and potential for abuse or addiction.[22] Schedule I is reserved for the most dangerous drugs that have a high potential for abuse and no recognized medical use in the United States.[23] No doctor may prescribe Schedule I substances under federal law, and such substances are subject to production quotas by the DEA.[24] Marijuana was placed on Schedule I, in part, because it was no longer being prescribed for medicinal purposes and because some believed that marijuana use posed unreasonable risks of harm.[25] Thus,

17. *Id.* § 14.
18. *American Medical Association Opposes the Marijuana Tax Act of 1937*, MARIJUANA LIBRARY.ORG, http://www.marijuanalibrary.org/AMA_opposes_1937.html (last visited Sept. 29, 2014) (publishing a letter from William C. Woodward, Legislative Counsel, Am. Med. Ass'n, to Pat Harrison, Chairman, Comm. on Fin., U.S. Senate (July 10, 1937)).
19. *See* Leary v. United States, 395 U.S. 6, 16 (1969) (overturning Leary's conviction for possession of marijuana without a tax stamp and holding that a federal tax stamp requirement violated Leary's Fifth Amendment right against self-incrimination).
20. Controlled Substances Act, 21 U.S.C. §§ 801–904 (1970).
21. *See id*. § 878.
22. *Id.* § 812.
23. *Id.* § 812(b)(1)(A)–(B).
24. 21 C.F.R. § 1303.12 (2014).
25. Pacula et al., *supra* note 10, at 416; *see also* 21 U.S.C. § 812(c)(10).

the CSA prohibits the cultivation, distribution, and possession of marijuana for any reason other than to engage in federally approved research.[26]

In addition, the government can impose substantial civil and criminal penalties for violations of the Act.[27] However, the CSA does not prohibit states from enacting laws relating to marijuana as long as those laws do not conflict with federal law.[28] Much of the controversy surrounding marijuana use is based upon conflicting evidence about its efficacy in treating illness and disease and about its potential to cause harm.

B. The Medical Evidence of Marijuana

Marijuana is currently classified as a Schedule I drug based on data suggesting that it has a high potential for abuse and has no currently accepted medical use.[29] Proponents of legalizing marijuana assert that the substance has numerous medicinal uses and that it does not have a high potential for abuse. Opponents argue that marijuana is a gateway drug that leads to more serious drug use and that legalization of marijuana for medical purposes will send the wrong message to the public.[30]

1. The Medicinal Benefits of Marijuana

Studies have revealed that marijuana may be used to treat a host of illnesses including gout, tetanus, convulsions, uterine hemorrhage, and rheumatism.[31] It may help reduce pain, nausea, and spasms, and has been shown to reduce eye pressure associated with glaucoma.[32] It has also been shown to relieve severe pain, nausea, and appetite loss associated with AIDS and chemotherapy patients.[33] The Institute of Medicine ("the Institute") concluded that the "[p]sychological effects of cannabinoids such as anxiety reduction and sedation, which can

26. 21 U.S.C. § 872(e).
27. *See generally id.* §§ 841–65.
28. TODD GARVEY & BRIAN T. YEH, CONG. RESEARCH SERV., R43034, STATE LEGALIZATION OF RECREATIONAL MARIJUANA: SELECTED LEGAL ISSUES (2014), *available at* http://www.fas.org/sgp/crs/misc/R43034.pdf.
29. 21 U.S.C. § 812(b)(1)(A)–(B).
30. Peter A. Clark, *The Ethics of Medical Marijuana: Government Restrictions vs. Medical Necessity*, 21 J. PUB. HEALTH & SAFETY 40, 41, 47–48 (2000).
31. Pacula et al., *supra* note 10, at 415.
32. Eija Kalso, *Cannabinoids for Pain and Nausea: Some Evidence But Is There Any Need?*, 323 BRIT. MED. J. 2, 2–3 (2001); *see also* Clark, *supra* note 30, at 46.
33. Pacula et al., *supra* note 10, at 427.

influence medical benefits, should be evaluated in clinical trials."[34] The Institute found "no conclusive evidence that the drug effects of marijuana are causally linked to the subsequent abuse of other illicit drugs."[35] Evidence of the medical benefits of marijuana have led some to argue that it is unethical to deny a patient access to marijuana-based therapy that relieves pain and suffering.[36] States have responded through ballot measures to legalize or decriminalize certain marijuana-related activities.[37]

2. The Risk of Using Marijuana

Marijuana also has several known risks. The chief psychoactive compound of marijuana, delta-9-tetrahydrocannabinol ("THC"), has been shown to impact the human body in a multitude of negative ways.[38] Marijuana over-activates the endocannabinoid system, causing the user to sense a "high" along with other physiological effects such as disorientation and lack of physical coordination.[39] Marijuana use is known to cause distorted perceptions, impaired coordination, difficulty with thinking and problem solving, and reduction in critical skills such as judgment of distance and reaction time.[40] The impact is often unpredictable because the concentration of the active ingredient, THC, varies according to the particular plant and how it is grown.[41] In many cases, THC remains in the body for weeks or longer.[42] The lingering

34. MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 5 (1999), *available at* http://www.nap.edu/openbook.php?record_id=6376&page=R7.

35. *Id.* at 6.

36. Clark, *supra* note 30, at 41–42.

37. Marijuana legalization refers to those "[l]aws or policies which make the possession and use of marijuana legal under state law." *Answers to Frequently Asked Questions about Marijuana*, WHITE HOUSE, http://www.whitehouse.gov/ondcp/frequently-asked-questions-and-facts-about-marijuana (last visited Sept. 29, 2014). Marijuana decriminalization refers to "[l]aws or policies adopted in a number of state and local jurisdictions which reduce the penalties for possession and use of small amounts of marijuana from criminal sanctions to fines or civil penalties." *Id.* Medical marijuana refers to "[s]tate laws which allow an individual to defend him or herself against criminal charges of marijuana possession if the defendant can prove a medical need for marijuana under state law." *Id.*

38. LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE 2 (rev. and expanded ed. 1997).

39. *DrugFacts: Marijuana*, NAT'L INST. ON DRUG ABUSE, http://www.drugabuse.gov/publications/drugfacts/marijuana (last updated Jan. 2014).

40. *See generally id.*; *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., INVESTIGATING POSSIBLE MEDICAL USES OF MARIJUANA 1–2 (1999), *available at* http://www.policyalmanac.org/crime/archive/hhs_medical_marijuana.shtml.

41. Clark, *supra* note 30, at 44.

42. *The Harmful Effects of Marijuana*, FOUND. FOR DRUG-FREE WORLD, http://www.drugfreeworld.org/drugfacts/marijuana/the-harmful-effects.html (last visited

effects mean that for persistent cannabis users, certain types of impairment can last for several days to weeks after the high wears off. For example, short-term memory loss in current heavy users can last for at least seven days.[43] Further, long term use has been shown to suppress critical components of the immune system[44] and impair mental functions, possibly causing a drop in IQ for users diagnosed as cannabis dependent before age 18.[45] The smoke from marijuana is highly toxic and can cause lung damage.[46] Marijuana tar contains 50 percent more phenols than does tobacco tar.[47] Because marijuana is a Schedule I drug, there is no regulated control on its purity or strength.[48] As such, fungi, which can cause pulmonary fungal infections, can contaminate the marijuana.[49]

In recognition of these problems and in an effort to protect patients who are forced to use marijuana on the black market where it is not being regulated, some states classify marijuana as a Schedule II drug instead of a Schedule I drug.[50] This reclassification on the state level does nothing to change the classification or prohibition of use under federal law.[51] As a result, even in states that have reclassified marijuana, physicians are reluctant to prescribe marijuana because they can still be prosecuted under federal law and have their federally-issued license revoked. These problems, coupled with the known medicinal benefits, have prompted calls to reclassify marijuana at the federal level.

Sept. 10, 2014); *see also* NAT'L DRUG COURT INST., DRUG COURT PRACTITIONER FACT SHEET 5 (Apr. 2006), *available at* http://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf (listing studies showing how long cannabinoids remain detectable in the human body).

43. Harrison G. Pope Jr. et al., *Neuropsychological Performance in Long-term Cannabis Users*, 58 ARCHIVES GEN. PSYCHIATRY 909, 909 (2001). Pope defined current heavy users as "users who had smoked cannabis at least 5000 times in their lives and who were smoking daily at study entry." *Id.*

44. *See generally* Venkatesh L. Hegde, Mitzi Nagarkatti & Prakash S. Nagarkatti, *Cannabinoid Receptor Activation Leads to Massive Mobilization of Myeloid-Derived Suppressor Cells with Potent Immunosuppressive Properties*, 40 EUR. J. IMMUNOLOGY 3358 (2010) (reporting how smoking marijuana can trigger a suppression of the body's immune functions).

45. *See* Madeline H. Meier et al., *Persistent Cannabis Users Show Neuropsychological Decline from Childhood to Midlife*, 109 PROC. NAT'L ACAD. SCI. U.S.A. E2657, E2661, E2662 (2012) (finding a drop in IQ of up to eight points for users who were diagnosed as dependent on cannabis before age 18 and finding no drop in IQ for users diagnosed as cannabis dependent after age 18).

46. Clark, *supra* note 30, at 49.

47. *Id.* at 44.

48. *Id.* at 47.

49. *Id.* at 44.

50. *Id.* at 40, 47.

51. Clark, *supra* note 30, at 40, 47.

C. *Efforts to Reclassify Marijuana Under the CSA*

Once classified, a drug can be reclassified under the CSA from one Schedule to another only through the political process or by administrative action. According to the DEA, a drug must be listed on Schedule I

> if it is undisputed that such drug has no currently accepted medical use in treatment in the United States and a lack of accepted safety for use under medical supervision, and it is further undisputed that the drug has at least some potential for abuse sufficient to warrant control under the CSA.[52]

In 2002, the DEA reviewed a petition to initiate rulemaking proceedings to reschedule marijuana under Schedule III, IV, or V.[53] The petition asserted that rescheduling was warranted because "[c]annabis has an accepted medical use in the United States; . . . is safe for use under medical supervision; . . . has an abuse potential lower than [S]chedule I or II drugs; and . . . has a dependence liability that is lower than [S]chedule I or II drugs."[54] The DEA requested a scientific and medical evaluation and scheduling recommendation from the Department of Health and Human Services ("DHHS"). The DHHS concluded that marijuana has a high potential for abuse, has no accepted medical use in the United States, and lacks an acceptable level of safety for use even under medical supervision.[55] The DHHS also concluded "that long-term, regular use of marijuana can lead to physical dependence and withdrawal following discontinuation as well as psychological addiction or dependence."[56] Based on the DHHS's conclusions and recommendation that marijuana remain in Schedule I, the DEA ruled that it was without authority under 21 U.S.C. § 812(b)[57] to remove marijuana from Schedule I and denied the petition.[58] Thus, under federal law, the cultivation, distribution, or possession of any amount of marijuana for any use other than federally approved scientific research remains illegal and subjects an individual or business to criminal prosecution. The federal government's refusal to reschedule

52. Notice of Denial of Petition, 66 Fed. Reg. 20,038, 20,039 (Dep't of Justice Apr. 18, 2001); *see also* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,552 (Dep't of Justice July 8, 2011).

53. 76 Fed. Reg. at 40,552.

54. *Id.*

55. *Id.*

56. *Id.*

57. Controlled Substances Act, 21 U.S.C. § 812(b) (2006).

58. 76 Fed. Reg. at 40,552.

marijuana, coupled with increasing pressure from citizens groups and the medical community to recognize the value of certain marijuana-related activities, has prompted a growing number of states to reconsider their drug policies.

II. STATE DEPARTURE FROM FEDERAL LAW

In enacting the CSA, Congress did not intend to prevent state involvement in drug control.[59] In response, some states passed legislation in the late 1970s in anticipation of a changing federal position on medical marijuana.[60] Some states rescheduled marijuana so that physicians could legally prescribe the substance under state law. Today, more than one third of states have enacted laws that effectively exempt qualified users of medicinal marijuana from penalties imposed under state law.[61] These changes, however, do nothing to prevent federal prosecution for the same act. Moreover, the changes provide little incentive to increase medical prescriptions for marijuana because physicians who write prescriptions for uses not authorized under the CSA risk losing their right to write prescriptions for other controlled substances.[62] As a result, to avoid federal prosecution, physicians in those states that have legalized medical marijuana often recommend use rather than prescribe use.[63] Other states have enacted laws that allow for the recreational use of marijuana. Currently, Colorado and Washington have laws that legalize the recreational use of small amounts of marijuana by individuals over the age of 21.[64] Washington authorized its sale at state-licensed stores.[65] These states have also added provisions that allow for the regulation and taxation of marijuana.[66]

State departure from federal drug policy has led to legal challenges, and many issues remain unresolved. At base, it remains unclear whether these state laws are preempted by federal law and therefore void, or

59. 21 U.S.C. § 903 (2006).

60. Pacula et al., *supra* note 10, at 416.

61. *State Medical Marijuana Laws*, *supra* note 3.

62. Pacula et al., *supra* note 10, at 424; *see also* 21 C.F.R. § 1306.03 (1997) (requiring state licensure and federal registration under the CSA to dispense a controlled substance).

63. Anderson, Hansen & Rees, *supra* note 6, at 336.

64. GARVEY & YEH, *supra* note 28; *see also* COLO. CONST. art. XVIII, § 16; WASH. REV. CODE ch. 69.50 (2014).

65. Gene Johnson, *Should Washington Lawyers Be Allowed to Smoke Pot?*, KOMONEWS (Nov. 5, 2013, 7:04 PM PDT), http://www.courts.wa.gov/content/publicupload/eclips/2013%2011%2006%20Should%20Washington%20lawyers%20be%20allowed%20to%20smoke%20pot.pdf.

66. GARVEY & YEH, *supra* note 28.

whether and under what circumstances the federal government will seek to enforce the provisions of the CSA within these states.

III. CSA AND FEDERAL PREEMPTION

Congress may enact and enforce laws that govern the cultivation, possession, and distribution of marijuana that occurs solely within a state. States are free to develop their own drug policy and regulatory scheme. However, under the Supremacy Clause, the laws of the United States are the supreme law of the land, and a state law that conflicts with federal legislation is preempted and unenforceable.[67] Express language in congressional enactment, implication from the depth and breadth of a congressional scheme that occupies legislative field, or implication because of conflict with congressional enactment can all preempt state law.[68]

Conflict and obstacle preemption lie at the heart of the CSA preemption debate. Generally, federal law preempts state law and renders it void where simultaneous compliance with both federal and state regulations is impossible ("conflict preemption"), or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ("obstacle preemption").[69] In enacting the CSA, Congress intended to preempt state drug laws only where there was a direct conflict between state and federal law.[70] Section 903 of the CSA provides:

> 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.[71]

State action legalizing or decriminalizing the cultivation, possession, or distribution of marijuana for certain purposes stands in stark contrast to

67. *See* U.S. CONST. art. VI, cl. 2 (commanding that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

68. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 869–74 (2000); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982).

69. *See* Hillman v. Maretta, 133 S. Ct. 1943, 1950 (2013); Arizona v. United States, 132 S. Ct. 2492, 2501 (2012).

70. 21 U.S.C. § 903 (2006).

71. *Id.* (emphasis added).

the federal ban on such activities and appears to create a positive conflict between the CSA and state law. However, state courts have reached different conclusions on whether and when the CSA preempts state law.

In *County of San Diego v. San Diego NORML*,[72] the California Court of Appeal evaluated a state law that required counties to implement a program that permitted certain individuals to apply for and obtain an identification card verifying their exemption from California's statutes criminalizing certain conduct with respect to marijuana.[73] Several counties objected to the requirement, arguing that federal law preempted the program because it posed an obstacle to the congressional intent embodied in the CSA.[74] The court examined the language of § 708 of the CSA and determined that the CSA "preempt[ed] only those state laws that positively conflict with the CSA so that simultaneous compliance with both sets of laws is impossible."[75] The court found that "[b]ecause the CSA law does not compel the states to impose criminal penalties for marijuana possession, the requirement that counties issue cards identifying those against whom California has opted not to impose criminal penalties does not positively conflict with the CSA."[76] Despite finding that Congress did not intend to preempt state laws that pose an obstacle, the court found that the identification card laws do not pose a significant obstacle to specific federal objectives embodied in the CSA because "[t]he purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices."[77] Under this view, a state's decision not to prosecute or impose penalties survives a preemption challenge because it is possible to comply with both state and federal law by refraining from using marijuana.[78] Moreover, an exemption from prosecution is not tantamount to the legalization of marijuana. Rather, it is an exercise of a state's reserved power not to punish under its own state law. Such action does nothing to limit the federal government's ability to use its resources to investigate and prosecute violations of federal law.[79]

72. Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461 (Ct. App. 2008).
73. *Id.* at 469.
74. *Id.* at 467.
75. *Id.* at 481.
76. *Id.*
77. *San Diego NORML*, 81 Cal. Rptr. 3d at 482.
78. *See* City of Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656, 665–67, 673–74 (Ct. App. 2007).
79. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 n.7 (2001) (finding no medical necessity defense under the CSA).

In contrast, state actions that go further than exemption to affirmatively authorize marijuana-related activities raise more difficult preemption problems, and courts that have considered the issue have reached inconsistent results. For example, the Supreme Court of Oregon in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*[80] held that the CSA preempted a provision of the Oregon Medical Marijuana Act,[81] which contained a voluntary identification card provision similar to the California statute.[82] That provision provides that "[a] person who possesses a registry identification card . . . may engage in . . . the medical use of marijuana" subject to certain restrictions.[83] The court ruled that the CSA preempted the provision of the Oregon Medical Marijuana Act which affirmatively authorized the use of medical marijuana because the state law "stands as an obstacle to the implementation and execution of the full purposes and objectives" of the federal act.[84] These conflicting opinions make clear that the law remains unsettled on this issue and presents risks to those acting in the area.

Colorado and Washington recently passed legislation that decriminalizes the possession of small amounts of marijuana for personal, non-medicinal use.[85] These states added provisions to their respective laws authorizing the state to regulate and tax marijuana.[86] The validity of these actions remains unclear. To date, no federal court has directly addressed the question of whether the CSA preempts state marijuana laws that affirmatively authorize the cultivation, possession, or distribution of marijuana or state laws that attempt to regulate or tax marijuana-related activities. Inconsistent state court decisions on preemption serve to highlight the difficulties of predicting how similar state laws will fare when challenged. Although the question of preemption remains largely unanswered, it is clear that those who act pursuant to state authorizations are not immune from federal prosecutions for violations of the CSA.

Fortunately, despite the uncertainty, prosecution in most instances appears unlikely under the Obama administration. The DOJ has adopted a policy of not pursuing individual prosecution for what might otherwise constitute a violation of the CSA in those states that have legalized such

80. Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Or. 2010).
81. OR. REV. STAT. § 475.306 (2013).
82. *Emerald Steel*, 230 P.3d at 536.
83. OR. REV. STAT. § 475.306.
84. *Emerald Steel*, 230 P.3d at 529 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
85. COLO. CONST. art. XVIII, § 16; WASH. REV. CODE ch. 69.50 (2014).
86. COLO. CONST. art. XVIII, § 16; WASH. REV. CODE ch. 69.50.

activity.[87] The DOJ announced that federal prosecutors will not attempt to challenge state laws that allow for the medical and recreational use of marijuana as long as the drug sales do not conflict with eight new federal enforcement priorities, including:

> (1) Preventing the distribution of marijuana to minors;
>
> (2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
>
> (3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
>
> (4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
>
> (5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
>
> (6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
>
> (7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
>
> (8) Preventing marijuana possession or use on federal property.[88]

This policy position is not law and may change at any moment. The divergence of states from federal law creates a legal minefield from which an attorney's only escape is the federal government's current policy not to enforce federal law.

This inconsistency between state and federal law governing the cultivation, distribution, and possession of marijuana poses significant ethical questions for attorneys asked to provide legal advice related to these activities. For example, an attorney who helps a client navigate the complex state regulatory and licensing regimes and succeeds in helping the client open a state- authorized marijuana dispensary provides a valuable service to the client but may violate state ethics rules by assisting the client in breaking federal law. If an attorney advises a client to use marijuana for a medicinal or recreational purpose authorized under state law, he or she may violate ethics rules by assisting the client in the

87. Memorandum from James M. Cole, Deputy Att'y Gen., to All United States Attorneys 3 (Aug. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

88. *Id.* at 1–2.

commission of a crime. Similarly, if the attorney personally uses marijuana for a medicinal or recreational purpose authorized under state law, he or she may violate state ethics laws by committing a crime. These realities should cause attorneys to pause to consider the potential ramifications of assisting clients in actions that currently violate federal law. Unfortunately, some states that have engaged in the democratic experiment of diverging from established federal drug policy have started to relax state ethics standards in ways that indirectly encourage attorneys to enter the minefield.

IV. THE ETHICS OF ADVOCACY: THE ATTORNEY'S DILEMMA

States issue licenses to attorneys and set ethical standards to which attorneys practicing within the state must adhere. Although states are free to relax standards, there are important societal risks associated with such a change that must be considered. Most states have incorporated some portion of the ABA Model Rules of Professional Conduct into their ethics standards. These standards define the basic characteristics and behaviors deemed acceptable for those practicing law. Attorneys engaged in marijuana-related activities, either through the personal use of marijuana or through client counseling, risk violating a number of these ethics rules.

A. ABA Model Rule of Professional Conduct 1.2(d)

Rule 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.[89]

On its face, Rule 1.2(d) appears to provide a bright line test. Attorneys must not assist a client to pursue a course of action that violates established law. However, states that have diverged from the CSA by adopting permissive marijuana-related laws have reached different conclusions on whether or when an attorney's actions violate this Rule.[90]

89. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (Discussion Draft 1983).
90. Colo. Bar Ass'n Ethics Comm., Formal Op. 125 (2013) (discussing the extent to which lawyers may represent clients regarding marijuana-related activities).

Colorado Rule of Professional Conduct 1.2(d) ("RPC 1.2(d)") is identical to ABA Rule 1.2(d).[91] In 2013, the Colorado Bar Association Ethics Committee ("the Committee") was asked to opine on whether, and to what extent, a lawyer may counsel clients regarding the use of, and commerce in, marijuana without violating RPC 1.2(d). The Committee declined to take a bright line approach that restricted attorney counseling to lawful activities and opined that there is a "spectrum of conduct ranging from that which Colo. RPC 1.2(d) clearly permits to that which it clearly prohibits."[92] The Committee opined that attorneys do not violate RPC 1.2(d):

> (1) by representing a client in proceedings relating to the client's past activities; (2) by advising governmental clients regarding the creation of rules and regulations implementing Amendment 64[93] and the Medical Marijuana Code;[94] (3) by arguing or lobbying for certain regulations, rules, or standards; or (4) by advising clients regarding the consequences of marijuana use or commerce under Colorado or federal law.[95]

However, attorneys would violate RPC 1.2(d) if they counsel a client to engage, or assist a client, in conduct that violates federal law.[96] The Committee noted that when an attorney moves from advising or representing a client regarding the consequences of a client's past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct that violates federal law, the attorney violates RPC 1.2(d).[97] Thus, for example, an attorney violates RPC 1.2(d) when he or she assists a client in structuring or implementing marijuana-related transactions that violate the CSA.[98] This includes drafting or negotiating: "(1) contracts to facilitate the purchase and sale of marijuana; or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana even though such transactions comply with Colorado law."[99] Interestingly, the Committee noted that even though public policy may support such attorney action due to the need clients

91. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2014) (providing that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal").
92. Colo. Bar Ass'n Ethics Comm., *supra* note 90.
93. COLO. CONST. art. XVIII, § 16.
94. COLO. REV. STAT. § 12-43-3 (2010).
95. Colo. Bar Ass'n Ethics Comm., *supra* note 90.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

have for assistance in navigating complex business transactions, the rules of ethics bar such action.[100] The Committee also recognized that the state's decision to depart from federal policy on marijuana had the effect of putting lawyers in jeopardy of violating state rules of professional conduct.[101] Without more, this opinion would be consistent with the purpose of RPC 1.2(d) to restrict attorney counseling to lawful activities. However, the Committee went further and recommended that the Colorado Supreme Court adopt marijuana-related amendments to the Colorado Rules of Professional Conduct that insulate a lawyer from discipline by the Colorado Supreme Court for the lawyer's provision of legal services and advice on these same issues.[102]

Three other states that have adopted identical Rule 1.2(d) provisions have considered the Rule's application to state authorized marijuana-related activities. Maine's Professional Ethics Commission opined that Rule 1.2(d) prohibits an attorney from providing legal services that rise to the level of assistance in violating federal law.[103] Connecticut's Ethics Committee found that the Rule "does not make a distinction between crimes which are enforced and those which are not" and advised attorneys to avoid providing assistance to clients that may result in conduct that violates federal law.[104] Arizona, however, has taken a different approach. The Arizona Ethics Committee noted that it would not apply the Rule "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."[105] The Committee opined that any other approach would deprive clients "of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits."[106] In making this decision, Arizona indirectly encourages attorneys to engage in actions that violate federal law and exposes them to criminal prosecution.

Further, in Washington, the state supreme court is reviewing a proposed change to state ethics rules to make clear that lawyers will not violate ethics rules solely because they engage in conduct, or assist clients in engaging in conduct, permitted under Washington law but

100. Colo. Bar Ass'n Ethics Comm., *supra* note 90.
101. *Id.*
102. *Id.*
103. Me. Prof'l Ethics Comm'n Op. 199 (2010).
104. Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 2013-02 (2013) (quoting Me. Prof'l Ethics Comm'n, Op. 1999 (2010)).
105. State Bar of Ariz. Ethics Comm., Op. 11-01 (2011).
106. *Id.*

barred under federal law.[107] Although the Washington State Bar declined to endorse it, the Supreme Court's Rules Committee recommended adopting the proposed changes.[108] The state's Office of Disciplinary Counsel has adopted a similar position by announcing that the state "does not intend to discipline lawyers who in good faith advise or assist clients or personally engage in conduct that is in strict compliance with the [state's marijuana laws] and its implementing regulations."[109]

These and similar amendments to state ethics rules could lead to the anomalous situation where the government may criminally prosecute an attorney for an action that does not violate state ethics rules governing attorney action. Such a result could confuse the public and lead to questions regarding the integrity of the profession. It also creates internal inconsistency with state ethics rules, which can lead to other problems. For example, ABA Rule 1.16(a)(1), adopted in Colorado as RPC 1.16(a)(1), prohibits an attorney from representing, and requires an attorney to withdraw from representing, a client where "the representation will result in violation of the Rules of Professional Conduct or other law."[110] Other rules related to attorney competence and representation are also implicated when the attorney personally engages in the use of marijuana for medicinal or recreational purposes.

B. ABA Model Rules of Professional Conduct 1.1, 1.16, and 8.4(a),(b)

Rule 1.1 provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[111]

Rule 1.16 provides in relevant part:

107. Debra Cassens Weiss, *Can Lawyers Ethically Smoke Pot in States Where it is Legal? One Bar Group Seeks 'Yes' Answer*, ABA J. (Oct. 15, 2013, 10:40 AM CDT), http://www.abajournal.com/news/article/can_lawyers_ethically_smoke_pot_in_states_where_it_is_legal_one_bar_group.

108. Gene Johnson, *Colorado, Washington High Courts Consider Marijuana Use, Legal Advice by Attorneys*, TIMES COLONIST (Nov. 5, 2013 1:48 PM), http://www.timescolonist.com/colorado-washington-high-courts-consider-marijuana-use-legal-advice-by-attorneys-1.685370.

109. Letter from Douglas J. Ende, Chief Disciplinary Counsel, Wash. State Bar Ass'n, to Charles W. Johnson, Assoc. Chief Justice & Rules Comm. Chairman, Wash. Supreme Court (Oct. 24, 2013), *available at* http://www.kcba.org/judicial/legislative/pdf/ende_102413.pdf.

110. *See* COLO. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2012).

111. MODEL RULES OF PROF'L CONDUCT R. 1.1 (Discussion Draft 1983).

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;[112]

Rule 8.4 provides:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;[113]

Colorado has adopted identical provisions as Colorado Rules of Professions Conduct 1.1, 1.16, and 8.4 ("RPC 1.1," "RPC 1.16," and "RPC 8.4"). In 2012, the Colorado Bar Association Ethics Committee opined on whether a lawyer's personal use of marijuana, authorized under the state's Medical Marijuana Code, violated RPC 8.4(b).[114] The Committee recognized that the use of marijuana may "affect a lawyer's reasoning, judgment, memory, or other aspects of the lawyer's physical or mental abilities" and that such medical use "raises legitimate concerns about a lawyer's professional competence."[115] The Committee also acknowledged that "an individual permitted to use marijuana for medical purposes under Colorado law may be subject to arrest and prosecution for violating federal law."[116] Notwithstanding these findings, the Committee opined 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)."[117] 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.[118] The Colorado Supreme Court's Office of Attorney Regulation Counsel advised that lawyers who comply with the medical

112. MODEL RULES OF PROF'L CONDUCT R. 1.16 (Discussion Draft 1983).
113. MODEL RULES OF PROF'L CONDUCT R. 8.4 (Discussion Draft 1983).
114. Colo. Bar Ass'n Ethics Comm., Formal Op. 124 (2012).
115. *Id.*
116. *Id.*
117. *Id.* (citing COLO. RULES OF PROF'L CONDUCT R. 8.4(b)(1) (2012)).
118. *Id.*

marijuana law in personally using cannabis would not run afoul of the state's ethics rules.[119]

Other states are considering similar actions. For example, one county in Washington permits its attorneys to smoke marijuana so long as doing so does not interfere with their ability to represent their clients.[120] That county's ethics advisory opinion on the state's marijuana law noted that an attorney would not commit professional misconduct by maintaining an ownership interest in a marijuana dispensary or by personally possessing marijuana because those actions do not relate to honesty, trustworthiness, or fitness as a lawyer.[121] Washington is considering amending its state ethics rules to allow for such uses. These views are curious given that both states, as part of their character and fitness analysis for attorney licensure, expressly request information on past violations of law and past or present drug use, dependence, abuse, or treatment for all attorneys seeking admission to the state bar.[122]

Although some states have found that the use of marijuana alone does not violate rules of ethics, marijuana use may violate related rules that do impact fitness as a lawyer. ABA Rule 1.1 requires attorneys to provide competent representation. Further, ABA Rule 1.16 prohibits a lawyer from providing representation where the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. An impaired lawyer cannot provide competent legal representation and must withdraw from representation. Colorado's RPC 1.16 is identical to ABA Rule 1.16 and was adopted by the state in recognition 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

119. Johnson, *supra* note 65.

120. Canna Law Blog, *King County Bar Association: Lawyers Can Smoke Pot (and Should Be Able to Practice Pot Law)*, POT-INTELLIGENCER (Oct. 18, 2013), http://pot-intelligencer.com/king-county-bar-association-lawyers-can-smoke-pot-and-should-be-able-to-practice-pot-law-2/; *see also* Letter from Anne M. Daly, President, King Cnty. Bar Ass'n, to Barbara Madsen, Chief Justice & Charles Johnson, Rules Comm. Chairman, Wash. Supreme Court (Oct. 4, 2013), *available at* http://www.kcba.org/judicial/legislative/pdf/kcba_rpc_proposal_100413.pdf.

121. *KCBA Ethics Advisory Opinion on I-502 & Rules of Professional Conduct*, KING COUNTY B. ASS'N (Oct. 16, 2013), http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf.

122. *See, e.g.*, APPLICATION FOR THE WASHINGTON STATE BAR EXAMINATION 13–14 (2014), *available at* http://www.wsba.org/~/media/Files/LicensingLawyer%20Conduct/Admissions/WSBA%20Bar%20Exam%20Application%20%20Sample%20with%20Watermark.ashx; *see also* APPLICATION TO THE PRACTICE OF LAW IN COLORADO 6 (2014), *available at* http://www.coloradosupremecourt.com/BLE/Forms/App%20with%20Forms.pdf.

system, and denigrates the legal profession."[123] To violate RPC 1.16, the condition must "materially impair the lawyer's ability to represent the client."[124] Where such impairment exists, an attorney is prohibited from representing the client.

Available scientific evidence has shown that the use of marijuana causes the user to sense a "high" along with other physiological effects, such as disorientation and lack of physical coordination.[125] Marijuana use is also known to cause distorted perceptions, impaired coordination, difficulty with thinking and problem solving, and declines in critical skills such as judgment of distance and reaction time. For persistent users, the active ingredient that causes these changes remains in the body for weeks or longer causing a user to be impaired to some degree from several days to weeks after the high wears off.[126] For example, short-term memory loss for current heavy users can last for at least seven days.[127] In addition, longer term use has been shown to impair mental functions for users diagnosed with cannabis dependence before age 18, causing a drop in IQ.[128] These physiological responses to marijuana use impair an attorney to some degree, but in each instance questions remain as to whether the effects "materially impair" the attorney with regard to a particular action. In most cases, the question of whether marijuana use has materially impaired the attorney's ability to represent the client will not be considered, if ever, until well after the attorney has acted. By then, damage may have already been done. Moreover, some attorneys will be unaware of, or will deny, that marijuana use materially impaired their ability to represent clients.

When an individual is evaluated for admission to the state bar, his or her marijuana use is of importance.[129] Thus, it is concerning that states interested in providing qualified individuals access to marijuana have taken steps to allow licensed attorneys to lawfully engage in activities that might otherwise provide grounds for the state to deny admission to the state bar. Such action is also inconsistent with previous

123. *See* Colo. Bar Ass'n Ethics Comm., *supra* note 114; ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 03-429 (2003).

124. *See* COLO. RULES OF PROF'L CONDUCT R. 1.16(a)(2) (2012).

125. *See supra* note 39 and accompanying text.

126. *See supra* notes 42–43 and accompanying text.

127. *See supra* note 43 and accompanying text.

128. *See supra* note 45 and accompanying text.

129. George L. Blum, Annotation, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 3 A.L.R. 6th 49 (2005) (addressing cases that are about an applicant's use of marijuana and relationship with marijuana and how that relationship was interpreted by the courts to hinder the applicant's chances of being admitted to the bar).

cases that have held that possession of narcotics is a crime of moral turpitude that justifies attorney disbarment.[130]

V. RECOMMENDATIONS

Public support for marijuana use by qualified individuals has increased over the last few years. In 2013, a Pew Research Center poll reported that 52 percent of Americans support legalizing marijuana.[131] According to a Gallup Poll published in December 2012, 64 percent of Americans believe the federal government should not intervene in states that have elected to legalize or decriminalize such use.[132] These numbers show increasing support for state actions that diverge from the federal drug policy on marijuana. But these changes in public opinion do not justify a departure from the rule of law. Rather they provide unique opportunities for advocacy that both responds to changes in public perception on marijuana use and retains the integrity of the legal profession.

A. Adhere to the Rule of Law

The legal profession is uniquely self-governing, with ultimate authority over the legal profession vested largely in the courts. The intimate relationship between the profession and the processes of government and law enforcement can lead attorneys to depart from the overarching maxim that every citizen is subject to the law. The legal profession's self-governance carries with it special responsibilities to insure that its actions are protective of the public interest and not of members of the bar. Every lawyer admitted to practice in the United States takes an oath to uphold the constitution of the state of admission and to uphold the Constitution of the United States. Each state has enacted rules of professional conduct that prohibit attorneys from engaging in actions, or assisting clients to engage in actions, that violate the law. When an attorney takes steps to circumvent these requirements, his or her actions compromise the integrity of the profession as well as the independence of the profession and the public interest which it

130. Kristine Cordier Karnezis, Annotation, *Narcotics Conviction as Crime Of Moral Turpitude Justifying Disbarment or Other Disciplinary Action Against Attorney*, 99 A.L.R. 3d 288 (1980).

131. *Majority Now Supports Legalizing Marijuana*, PEW RESEARCH CTR. FOR PEOPLE & PRESS (Apr. 4, 2013), http://www.people-press.org/2013/04/04/majority-now-supports-legalizing-marijuana/.

132. Frank Newport, *Americans Want Federal Gov't Out of State Marijuana Laws*, GALLUP (Dec. 10. 2012), http://www.gallup.com/poll/159152/americans-federal-gov-state-marijuana-laws.aspx.

serves. Attorneys play a critical role in the preservation of society and must recognize that they, more than all others, are expected to abide by the duly enacted laws that govern society.

In those states that allow the use of marijuana, attorneys who use marijuana or counsel others on marijuana-related activities face significant ethical issues even where the state has amended its ethics rules to allow for such activity. For example, the first paragraph of Washington's Oath of Attorney provides, "I am fully subject to the laws of the State of Washington and the laws of the United States and *will abide by the same*."[133] Colorado's Oath of admission provides, "I will support the Constitution of the United States and the Constitution of the State of Colorado."[134] These requirements fall outside of state ethics rules and form an independent covenant between the attorney and society to uphold the law. To fulfill these promises, attorneys should refrain from taking any action that violates existing federal law. Instead, attorneys who believe in the legalization of marijuana to help those members of society who may benefit from such use should utilize their specialized skill set to advocate for change.

B. Advocate for Reclassification of Marijuana

There is increasing interest within an emerging number of states to legalize or decriminalize certain marijuana-related activities. Some believe that marijuana is misclassified under the CSA because the drug has certain valuable medicinal qualities that can be used to treat patients for a variety of maladies. Others believe that placing restrictions on the personal use of marijuana violates an individual's rights, while yet others seek to legalize marijuana because there is a public demand that will generate lucrative business opportunities. Regardless of the nature of the interest, attorneys must tread carefully in this area to avoid violating the law.

Attorneys must respect established law and advocate for change where the law is not responsive to a societal need. For those attorneys who believe the current federal drug policy on marijuana is improper, the solution is not to violate the law and hope that the federal government opts not to prosecute the offense. Rather, the appropriate response is to utilize their refined skills of advocacy to change the law. There are at least two reasons to believe that augmented attorney advocacy in this

133. WASH. STATE ADMISSION & PRACTICE R. 5(d) para. 1 (emphasis added).

134. *Colorado Attorney Oath of Admission*, COLO. B. ASS'N, http://www.cobar.org/index.cfm/ID/1653/CLPE/Colorado-Attorney-Oath-of-Admission/ (last visited Sept. 30, 2014).

area will lead to change. First, the current change in public opinion on marijuana is reminiscent of the change that occurred leading to the end of prohibition. Second, states that have legalized marijuana for certain uses have reaped a tax windfall that may entice other states to follow.

1. Learn from Prohibition

There are many parallels that may be drawn between the movement to end the prohibition of alcohol and the movement currently underway to legalize marijuana use. Both substances were banned by acts of Congress. The Eighteenth Amendment[135] established prohibition in the United States by declaring the production, transport, and sale of alcohol illegal.[136] The National Prohibition Act,[137] also known as the Volstead Act, established the regulatory and enforcement framework that gave effect to prohibition by defining which intoxicating liquors were prohibited and which were excluded from prohibition.[138] Similarly, the CSA created Schedules and designated marijuana as a Schedule I narcotic, which had the effect of prohibiting marijuana use by most citizens. Both substances were banned based on fears of how increased use might negatively impact society.[139] In both cases, changes in public opinion led to movements to repeal restrictions placed on each substance.[140] By the time prohibition was repealed, 58 percent of Americans admitted to consuming alcohol, suggesting that they favored legalizing alcohol.[141] In 2013, 52 percent of Americans supported legalizing marijuana.[142] Prohibition ended when enough states rejected it

135. U.S. CONST. amend. XVIII (repealed 1933).

136. *Id.*

137. National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305 (1919) (repealed 1935) (providing for implementation of the Eighteenth Amendment to the U.S. Constitution, which established National Prohibition of alcoholic beverages).

138. *Id.* § 1.

139. *See* Talal Al-Khatib, *Prohibition Repeal Echoes in Marijuana Legalization?*, DISCOVERY NEWS (Nov. 9, 2012, 11:27 AM ET), http://news.discovery.com/history/marijuana-legalization-prohibition-paralells-121109.htm (quoting PBS.org, explaining that alcohol prohibition was driven by a Temperance movement that saw alcohol as a "great evil to be eradicated—if America were ever to be fully cleansed of sin"). Marijuana prohibition was initially rooted in a moralizing argument that marijuana is "a deadly, addictive drug that enslaved its users and turned them into violent, deranged freaks." Martin A. Lee, *Victory for Pot Means Beginning of the End of Our Crazy Drug War*, DAILY BEAST (Nov. 8, 2012), http://www.thedailybeast.com/articles/2012/11/08/victory-for-pot-means-beginning-of-the-end-of-our-crazy-drug-war.html.

140. Al-Khatib, *supra* note 139.

141. *Alcohol and Drinking*, GALLUP, http://www.gallup.com/poll/1582/alcohol-drinking.aspx (last visited Sept. 30, 2014).

142. *See supra* note 131 and accompanying text.

and political will became strong enough to support change.[143] In 1932, Franklin Roosevelt won the presidency based, in part, on a platform promise to repeal prohibition. The following year, Congress relented and enabled states to ratify the Twenty-First Amendment[144] that effectively ended prohibition. Because the popular vote heavily favored repeal by a three to one margin, states quickly ratified the Amendment.[145] State action that departed from federal alcohol policy paved the way for the repeal of prohibition.[146] Similarly, state action in California, Colorado, and Washington to affirmatively authorize the use of marijuana may lead other states to follow and ultimately create sufficient pressure on Congress or the DEA to amend the CSA to remove marijuana from Schedule I. Currently, approximately one third of all states have decriminalized marijuana-related activities, and more are likely to follow.[147] Based on legislative momentum in several states, some believe that by the end of 2014 40 percent of American states will have decriminalized marijuana possession.[148]

Attorneys who believe in good faith that marijuana should be rescheduled to provide for greater access should utilize the skills and knowledge of the law to advocate for such change within the boundaries of the law. Given emerging evidence of the efficacy of marijuana use to treat patients and evidence that marijuana is not a gateway drug, attorneys have ample grounds to attack the DEA's refusal to reschedule marijuana without having to break the very law attorneys have taken a sworn oath to uphold. Even if such actions ultimately fail, there is an alternative reason for attorneys to resist the inclination to break the law. The tax revenue generated in states that have legalized marijuana has been enormous, and that fact alone may create sufficient pressure on other state legislatures to follow.

143. *See* Al-Khatib, *supra* note 139.
144. U.S. CONST. amend. XXI.
145. David J. Hanson, *National Prohibition Act*, ALCOHOL PROBS. & SOLUTIONS, http://www2.potsdam.edu/alcohol/Controversies/National-Prohibition-Act.html#.U4JKSfldVij (last visited Sept. 30, 2014).
146. *Id.*
147. *See States That Have Decriminalized*, NORML, http://norml.org/aboutmarijuana/item/states-that-have-decriminalized (last visited Sept. 30, 2014).
148. *40% of U.S. to Have Decriminalized Marijuana Possession by 2014*, JOINT BLOG (Apr. 14, 2013), http://thejointblog.com/40-of-u-s-to-have-decriminalized-or-legalized-marijuana-possession-by-2014 (explaining the current legislative initiatives underway in several states that may depart from federal marijuana policy).

2. Let Economics Lead the Way

Colorado approved an excise tax and a sales tax on all marijuana sales in the state.[149] To date, recreational and medical marijuana sales in Colorado have resulted in the collection of more than 24 million dollars in state taxes since sales commenced in 2012.[150] The Governor of Colorado recently announced "that the combined sales from both legal medical and recreational marijuana in the state will [approach] one billion dollars in the next fiscal year" and may result in the collection of up to 134 million dollars in taxes and fees.[151] The state reserved revenue from this tax to fund the construction of schools. The state will also distribute a percentage of the total revenue collected to each local government that has one or more retail marijuana stores within its boundaries, with specific amounts apportioned based on sales.[152] The remainder will go into a statewide general fund.[153]

The amount of tax generated in Colorado is likely to increase pressure on other states to take action. If a sufficient number of states see value in taking this approach, public pressure could lead to changes at the federal level. Based on these facts and others, the future of federal prohibition on marijuana appears tenuous at best. As such, it is clear that advocating for change through legal processes should be the preferred approach taken by attorneys.

CONCLUSION

Attorneys occupy a special place in society, having entered into a covenant to uphold the rule of law for the betterment of society. Increasing public disagreement with the prohibition on marijuana poses difficult ethical issues for attorneys who seek to engage in marijuana use or counsel others on marijuana-related activities. Despite recent action to relax the standards of ethics for attorneys in those states that have legalized or decriminalized marijuana use, attorneys must abide by their

149. Matt Ferner, *Colorado Marijuana Taxes Prop. AA Passes: Legal Weed Will Be Taxed*, HUFFPOST POL. (Nov. 5, 2013, 10:11 PM EST), http://www.huffingtonpost.com/2013/11/05/marijuana-taxes_n_4219133.html.

150. *Colorado Marijuana Tax Data*, COLO. DEP'T REVENUE, http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1251633259746 (last visited Sept. 30, 2014).

151. Matt Ferner, *Colorado Recreational Weed Sales Top $14 Million in First Month*, HUFFPOST BUS. (Mar. 10, 2014, 6:03 PM EDT), http://www.huffingtonpost.com/2014/03/10/colorado-marijuana-tax-revenue_n_4936223.html.

152. *Id.*

153. *Id.*

oath to uphold the law by refraining from using marijuana or counseling others to effectively violate federal law.