

## Marijuana Lawyers: Outlaws or Crusaders?

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#### INTRODUCTION

The legal regulation of marijuana is in a state of flux in the United States. 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 further 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, it becomes a business. Businesses have employees, shareholders, and creditors. 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, give advice about tax law, write leases and employment agreements, and help navigate the labyrinth of regulatory compliance.

This usual relationship is necessarily complicated by the fact that the manufacture and sale of marijuana remains a federal offense

punishable by up to life in prison.<sup>1</sup> 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,<sup>2</sup> attorneys who take on marijuana clients face the possibility of 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 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.<sup>3</sup>

Using specific examples, we give much-needed guidance to attorneys engaged in this emerging and problematic area of practice.

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<sup>1</sup> See 21 U.S.C. §§ 841(a)–(b)(1)(A), 960(a)–(b)(1) (2006).

<sup>2</sup> See *infra* Part III.

<sup>3</sup> See *infra* Part II.

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 (CSA),<sup>4</sup> 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; 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. Moreover, 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.

## I

### 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<sup>5</sup> 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.<sup>6</sup> In large part because of these negative

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<sup>4</sup> Controlled Substances Act, 21 U.S.C. §§ 801–889 (2006).

<sup>5</sup> 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.

<sup>6</sup> See, e.g., Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 *HAMLIN J. PUB. L. & POL'Y* 117, 119 (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)).

associations, Congress passed the Marijuana Tax Act in 1937, removing the drug from the list of approved pharmaceutical substances.<sup>7</sup>

Two generations later, President Nixon pushed Congress to “get tough” on drugs, following what many saw as the self-indulgent excesses of the 1960s.<sup>8</sup> Congress responded by passing the CSA,<sup>9</sup> 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.<sup>10</sup> All Schedule I narcotics are deemed by the Drug Enforcement Agency (DEA) to have no approved medical use and a high potential for abuse.<sup>11</sup> Although several seemingly more dangerous substances are listed as less serious Schedule II drugs,<sup>12</sup> 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.<sup>13</sup>

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<sup>7</sup> Marijuana Tax Act, Pub. L. No. 238, § 4, 50 Stat. 553, 553 (1937); *see also* Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 749 n.244 (1998) (“[P]rohibition has more to do with politics and racism than with [marijuana’s] diminished pharmacological importance.”); *infra* note 26 (noting the continuing racially disparate impact of marijuana prohibition in the United States).

<sup>8</sup> Michael Berkey, *Mary Jane’s New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL’Y & ETHICS 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.”); Brooke Mascagni, *The Politics of Exclusion in California’s Marijuana Reform Movement*, 15 UDC/DCSL L. REV. 33, 35 (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.”).

<sup>9</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, tit. II, 84 Stat. 1236, 1242 (codified as amended at 21 U.S.C. §§ 801–889 (2006)).

<sup>10</sup> 21 U.S.C. § 812(c).

<sup>11</sup> *See id.* § 812(b).

<sup>12</sup> Opium, phencyclidine (PCP), cocaine, and amphetamines are among the drugs in Schedule II. Other serious drugs are subject to the less restrictive regulation of Schedule III: ketamine, anabolic steroids, and barbiturates.

<sup>13</sup> In response to raids by DEA agents 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.” 153 CONG. REC. H8484 (daily ed. July 25, 2007) (the Hinchey-Rohrabacher Amendment).

## 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*, the United States Supreme Court rejected a Commerce Clause challenge to Congress's power to regulate the intrastate cultivation and consumption of marijuana.<sup>14</sup> Because intrastate marijuana production affects the interstate market for marijuana, the Court held it was properly the subject of Congressional regulation under the Interstate Commerce Clause.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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<sup>14</sup> *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

<sup>15</sup> *Id.* at 17–22. 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). In *Filburn*, the Court has found wheat grown on Filburn's property for personal consumption was a proper subject of federal regulation under the Commerce Clause. *Filburn*, 317 U.S. at 17–26.

<sup>16</sup> 21 U.S.C. § 841(b)(1)(B).

<sup>17</sup> *See id.* § 881.

<sup>18</sup> *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11360 (West 2012) (“Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of two, three or four years.”). Even in Colorado and Washington, the production and sale outside of the regulated recreational

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 cost of their incarceration at more than \$1 billion.<sup>19</sup> 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.<sup>20</sup>

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 medical marijuana (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.<sup>21</sup>

### *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

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marijuana industries remains criminal. *See, e.g.*, COLO. CONST. art. 18, § 16(4). (withdrawing some, but not all, cultivation, sale, and manufacture of marijuana and marijuana-infused products from Colorado's criminal laws.)

<sup>19</sup> Paul Armentano, *Pot Prisoners Cost Americans \$1 Billion a Year*, ALTERNET (Feb. 9, 2007), <http://www.alternet.org/rights/47815/>; *see also* CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf>.

<sup>20</sup> *Crime in the United States 2010*, THE FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested> (last visited Mar. 1, 2013).

<sup>21</sup> The term "recommendation" is carefully chosen; while Congress and the DEA may determine what drugs may and may not be prescribed by licensed physicians, the 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 believed it was appropriate for their treatment. *Conant v. Walters*, 309 F.3d 629, 632 (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. *Id.* at 638.

substance.<sup>22</sup> 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.<sup>23</sup> Others have praised it as a powerful medicine, effective at treating pain, nausea, and other ailments.<sup>24</sup> 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.<sup>25</sup> Finally, the racial disparity in the enforcement of marijuana laws has become difficult for many to ignore.<sup>26</sup>

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.<sup>27</sup> In addition, many municipalities have told their law enforcement units to

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<sup>22</sup> See, e.g., *Ams. for Safe Access v. Drug Enforcement Admin.*, No. 11-1265 (D.C. Cir. Jan. 22, 2013), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/12CBD2B55C34FBF585257AFB00554299/\\$file/11-1265-1416392.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/12CBD2B55C34FBF585257AFB00554299/$file/11-1265-1416392.pdf) (lawsuit by advocacy group challenging the DEA's refusal to reclassify marijuana).

<sup>23</sup> See, e.g., *About Marijuana*, NORML, <http://norml.org/marijuana> (last visited Mar. 1, 2013) (“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.”).

<sup>24</sup> See, e.g., *Medical Marijuana*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/-marijuana/medical/> (last visited Mar. 1, 2013) (“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.’”).

<sup>25</sup> See, e.g., JEFFREY A. MIRON & KATHERINE WALDOCK, CATO INST., *THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION* (2010), <http://www.cato.org/sites/cato.org/files/pubs/pdf/DrugProhibitionWP.pdf> (finding that ending marijuana prohibition would result in more than \$8 billion in additional revenue for the federal government annually).

<sup>26</sup> See, e.g., Liane Membis, *Legalizing Marijuana is Civil Rights Issue*, *California NAACP Says*, CNN (July 7, 2010), [http://articles.cnn.com/2010-07-07/politics/naacp.marijuana.support\\_1\\_international-faith-based-coalition-bishop-ron-allen-marijuana-laws?\\_s=PM:POLITICS](http://articles.cnn.com/2010-07-07/politics/naacp.marijuana.support_1_international-faith-based-coalition-bishop-ron-allen-marijuana-laws?_s=PM:POLITICS).

<sup>27</sup> See *States that Have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Mar. 1, 2013) (listing states).



treat the possession of marijuana as their lowest priority.<sup>28</sup> 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.<sup>29</sup>

But provision for 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.<sup>30</sup> Easy access to medical recommendations,<sup>31</sup> "medical" marijuana dispensaries with names like Dr. Reefer and Rocky Mountain High,<sup>32</sup> and aggressive

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<sup>28</sup> Phillip Smith, *Feature: Lowest Law Enforcement Priority: Marijuana Initiatives Face the Voters in Five Cities*, STOPTHEDRUGWAR.ORG (Oct. 26, 2006, 4:51 PM), [http://stopthedrugwar.org/chronicle/2006/oct/26/feature\\_lowest\\_law\\_enforcement\\_p](http://stopthedrugwar.org/chronicle/2006/oct/26/feature_lowest_law_enforcement_p).

<sup>29</sup> ALASKA STAT. ANN. § 17.37.010 (West, Westlaw through 2012 2d Reg. & 3d Special Legis. Sess.); CAL. HEALTH & SAFETY CODE § 11362.5 (West 2012); COLO. CONST. art. 18, § 14; HAW. REV. STAT. §§ 329-121 to -128 (West, Westlaw through 2012 Reg. Legis. Sess.); ME. REV. STAT. ANN. tit. 22, § 2383-B (West, Westlaw through 2011 2d Reg. Legis. Sess.); MICH. COMP. LAWS ANN. §§ 333.26421–.26430 (West, Westlaw through 2012 Reg. Legis. Sess.); MONT. CODE ANN. §§ 50-46-101 to -344 (West, Westlaw through 2011 legislation); NEV. REV. STAT. ANN. §§ 453A.010–.810 (West, Westlaw through 2011 Reg. Legis. Sess.); N.J. STAT. ANN. § 24:6I-1 (West, Westlaw through 2012 legislation); N.M. STAT. ANN. §§ 26-2B-1 to -7 (West, Westlaw through 2012 2d Reg. Legis. Sess.); OR. REV. STAT. §§ 475.300–.375 (2011); R.I. GEN. LAWS ANN. §§ 21-28.6-1 to -13 (West, Westlaw through 2012 Reg. Legis. Sess.); VT. STAT. ANN. tit. 18, §§ 4472–41 (West, Westlaw through 2011-2012 Legis. Sess.); WASH. REV. CODE ANN. §§ 69.51A.005–.903 (West, Westlaw through 2012 legislation).

<sup>30</sup> Laura Cosgrove, *Medical Marijuana Cards Easy to Get, Some Say; Police Focus On Regulating Dispensaries, Not Doctors*, MERCURYNEWS.COM (June 29, 2011), [http://www.mercurynews.com/mosaic/ci\\_18375000](http://www.mercurynews.com/mosaic/ci_18375000); Buck Fleming, *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>.

<sup>31</sup> 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, Annotation, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R. 6th 353, §§ 2, 13–17 (2009).

<sup>32</sup> See William Breathes, *Medical Marijuana Dispensary Review: Rocky Mountain High—Cherry Creek*, DENVER WESTWORD (Feb. 3, 2011, 12:59 PM), <http://blogs>

advertising and marketing campaigns by MMJ dispensaries, have led in some places to a backlash against the MMJ industry.<sup>33</sup> While this criticism led to retrenchment in some states, in others it has led 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.<sup>34</sup>

The final move from MMJ to full legalization proved a difficult one, however. Until 2012, no state had taken the additional step of removing its own prohibition and sale of the drug for recreational purposes.<sup>35</sup> 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.<sup>36</sup> The measure was polling strongly throughout the state headed into the

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.westword.com/latestword/2011/02/medical\_marijuana\_dispensary\_review\_rocky\_mountain\_high\_cheer\_creek.php; Heath Urie, “*Dr. Reefer*” *Seeks Patient Support Ahead of Federal Sentencing*, DAILY CAMERA (May 2, 2011, 6:07 PM), [http://www.dailycamera.com/boulder-county-news/ci\\_17977095](http://www.dailycamera.com/boulder-county-news/ci_17977095).

<sup>33</sup> *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/>; 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-Denver-.html>.

<sup>34</sup> See, e.g., Norimitsu Onishi, *Marijuana Only for the Sick? A Farce, Some Angelinos Say*, N.Y. TIMES, Oct. 7, 2012, <http://www.nytimes.com/2012/10/08/us/california-fight-to-ensure-marijuana-goes-only-to-sick.html?ref=us&r=0> (“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.”); Michael Roberts, *Medical Marijuana v. Recreational Use: NORML Controversy, Colorado Connection*, DENVER WESTWORD BLOGS (Jan. 25, 2012, 12:25 PM), [http://blogs.westword.com/latestword/2012/01/medical\\_marijuana\\_norml\\_controversy\\_colorado.php](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”).

<sup>35</sup> Many in the marijuana law reform movement dislike the term “recreational use” and prefer the phrase “adult use.” See Interview by Brandon Feivor with Doug Fine, author of TOO HIGH TO FAIL: CANNABIS AND THE NEW GREEN ECONOMIC REVOLUTION (2012), on ROYALPURPLENEWS.COM (Nov. 28, 2012), available at <http://royalpurplenews.com/?p=9235> (“I don’t use the term recreational, I prefer adult social use. I do believe the best solution for public safety in the U.S. is removing cannabis from the Federal Controlled Substances Act entirely, and letting states regulate it for adult use like alcohol.”).

<sup>36</sup> See, e.g., John Hoeffel, *Holder Vows Fight Over Prop. 19*, L.A. TIMES (Oct. 16, 2010), <http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016>.

final weeks before the election when Holder expressed the federal government's staunch opposition to the initiative. Proposition 19 lost by seven percentage points.<sup>37</sup>

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 Washington and Colorado.<sup>38</sup> These two successful 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.<sup>39</sup> Both states are presently moving ahead with these plans while keeping an uneasy eye on the federal government's response.<sup>40</sup>

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.

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<sup>37</sup> See, e.g., Kevin Fagan, "Proposition 19 Defeat Shows Great Divide over Pot," SF GATE (Nov. 7, 2010, 4:00 AM), <http://www.sfgate.com/politics/article/Proposition-19-defeat-shows-great-divide-over-pot-3167559.php> ("Many agreed that one of the stiffest blows to Prop. 19 was U.S. Attorney General Eric Holder's announcement Oct. 14 that if Californians passed the measure, he would still 'vigorously enforce' the federal ban on possessing, growing or selling the drug. Shortly afterward, the Field Poll and several other surveys that once had Prop. 19 leading showed that the initiative had done an about-face. By election day, the Field Poll had the measure down by seven points - almost exactly the eventual margin of defeat.").

<sup>38</sup> Jack Heely, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 7, 2012, <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>.

<sup>39</sup> See COLO. CONST. art. 18, § 16(3) ("Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado Law . . . (a) [p]ossessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana."); WASH. REV. CODE § 69.50.4013 (2012) ("The possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.").

<sup>40</sup> In the interest of full disclosure, we note that Professor Kamin sits on Colorado's marijuana regulation task force. See Gov. Hickenlooper Signs Amendment 64 Proclamation, *Creates Task Force to Recommend Needed Legislative Actions*, COLO. (Dec. 10, 2012), <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251634887823>.

### 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,<sup>41</sup> it has so far chosen not to do so. The CSA explicitly disclaims an intent to preempt the field of regulation.<sup>42</sup> However, even if the federal government sought 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.<sup>43</sup> Furthermore, it cannot enlist unwilling state or local officials in the enforcement of federal laws.<sup>44</sup>

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.<sup>45</sup> These enforcement actions demonstrate the difficulty of trying to determine exactly how

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<sup>41</sup> 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 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.”).

<sup>42</sup> See 21 U.S.C. § 903 (2006) (“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.”).

<sup>43</sup> See *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.”).

<sup>44</sup> *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.”).

<sup>45</sup> See Jennifer Medina, *U.S. Attorneys in California Set Crackdown on Marijuana*, N.Y. TIMES, Oct. 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 (Apr. 22, 2012, 12:45 PM), [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](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).

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)<sup>46</sup> as a harbinger of a potential change in policy with regard to federal enforcement of marijuana laws.<sup>47</sup> These supporters found further encouragement in 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."<sup>48</sup>

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.<sup>49</sup> 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."<sup>50</sup> 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.<sup>51</sup>

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<sup>46</sup> A web search for the image in the fall of 2012 revealed that it had appeared on more than 250 different websites.

<sup>47</sup> 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](http://stopthedrugwar.org/speakeasy/2008/nov/06/will_obama_end_medical_marijuana).

<sup>48</sup> David Johnston & Neil A. Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensaries*, N.Y. TIMES, Mar. 18, 2009, <http://www.nytimes.com/2009/03/19/us/19holder.html>.

<sup>49</sup> Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Just., on Investigating and Prosecutions in States Authorizing the Med. Use of Marijuana (Oct. 19, 2009), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf> [hereinafter Ogden Memo].

<sup>50</sup> *Id.* at 1.

<sup>51</sup> See *In California, Marijuana Dispensaries Outnumber Starbucks*, NPR (Oct. 15, 2009), <http://www.npr.org/templates/story/story.php?storyId=113822156> ("[T]here are more medical marijuana dispensaries than Starbucks . . . ."); W. Zachary Malinowski,

A close reading of the Ogden memo shows that the optimistic interpretation of those who rushed into the marijuana business in 2009 was either careless or delusional. 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: “The 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.”<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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 memo—a second memo on essentially the same topic, written by Deputy Attorney General James Cole, was released by the Justice Department. 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

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*Colorado’s Marijuana Dispensary Boom, Now Undergoing Regulation, Leads to Explosion of Patients Seeking Licenses*, 420MAGAZINE <http://www.420magazine.com/forums/medical-marijuana-news/138451-colorado-s-marijuana-dispensary-boom-leads-explosion-patients-seeking-licenses.html> (last visited Mar. 1, 2013) (noting that after the 2009 memo from the Obama administration, the number of patients seeking medical marijuana cards shot up to over 1000 per week).

<sup>52</sup> Ogden Memo, *supra* note 49, at 1.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.*

revenue projections of the millions of dollars based<sup>55</sup> on the planned cultivation of tens of thousands of cannabis plants.

The Cole memo 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 seriously many had misread 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 [CSA], 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.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> For a federal government with limited enforcement resources, the specter of civil forfeiture is an incredibly powerful tool.<sup>60</sup> Similar

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<sup>55</sup> Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Just., on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Med. Use 1 (June 29, 2011), *available at* <http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf> [hereinafter Cole Memo].

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Feds Warn, Indict California Medical Marijuana Dispensary Operators*, KABC-TV (Oct. 7, 2011), <http://abclocal.go.com/kabc/story?section=news/state&id=8383655> (describing recent federal law enforcement actions against California marijuana dispensaries).

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

crackdowns have since taken place in Washington state, Colorado, and Montana.<sup>61</sup>

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 (IRS) 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.<sup>62</sup> Using this provision, the IRS has sought to collect back taxes from those it believes wrongfully claimed deductions.<sup>63</sup> This provision could decimate the industry; few businesses can afford to pay income tax on their gross receipts.<sup>64</sup> Combined with the increasing unwillingness of banks and credit card

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<sup>61</sup> Jamie Kelly, *Former Grizzly Pleads Not Guilty to Federal Drug Charges*, MISSOULIAN (Jan. 19, 2012, 8:00 PM), [http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article\\_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4](http://missoulian.com/news/state-and-regional/former-grizzly-pleads-not-guilty-to-federal-drug-charges/article_5166136a-4304-11e1-a886-0019bb2963f4.html#ixzz1k1FXdfT4); *Medical Marijuana: Federal Crackdown, Similar to That in California, Begins in Colorado*, HUFF POST (Jan. 12, 2012, 4:28 PM), [http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal\\_n\\_1202725.html](http://www.huffingtonpost.com/2012/01/12/medical-marijuana-federal_n_1202725.html).

<sup>62</sup> See Letter from Andrew J. Keyso, Deputy Assoc. Chief Counsel, U.S. Dep't of the Treasury, to Congressman Barney Frank, U.S. House of Representatives (Dec. 10, 2010), available at <http://www.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.").

<sup>63</sup> Al Olson, *IRS Ruling Strikes Fear in Medical Marijuana Industry*, NBCNEWS.COM (Oct. 5, 2011), [http://bottomline.msnbc.msn.com/\\_news/2011/10/04/8153459-irs-ruling-strikes-fear-in-medical-marijuana-industry](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.").

<sup>64</sup> In addition, in September 2011, the Bureau of Alcohol, Tobacco, Firearms, and Explosives sent a letter 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, Assistant Dir., Enforcement Programs and Servs., Bureau of Alcohol, Tobacco, and Firearms, to All Fed. Firearms Licensees (Sept. 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 *Montana Objects to Gun Ban for Medical Pot Users*, BOZEMAN DAILY CHRON. (Oct. 3, 2011, 5:24 PM), [http://www.bozemandailychronicle.com/news/state/article\\_09ada53e-ee17-11e0-a232-001cc4c002e0.html](http://www.bozemandailychronicle.com/news/state/article_09ada53e-ee17-11e0-a232-001cc4c002e0.html). The ban has also 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, 9:20 PM), <http://www.vegasinc.com/news/2011/oct/18/nevada-woman/>.



companies to do business with the industry,<sup>65</sup> it is becoming harder and harder for marijuana businesses to continue to do business at all.

These recent actions make clear that even if the federal government does not prosecute everyone actively violating the CSA—and realistically, it cannot achieve anything like full enforcement—other modes of enforcement besides criminal prohibitions still have teeth. Many benefits of American life carry 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.<sup>66</sup> 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,<sup>67</sup> the adult population in the state is over 3.5 million.<sup>68</sup> If this difference in size is any indication, state decriminalization can be expected to lead to a growth in the industry by at least an order of magnitude. This potentially explosive growth in the marijuana business will create large opportunities for investors but

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<sup>65</sup> See, e.g., John Ingold, *Last Bank Shuts Doors on Colorado Pot Dispensaries*, DENVERPOST.COM (Oct. 1, 2011, 1:14 PM), [http://www.denverpost.com/news/marijuana/ci\\_19016660](http://www.denverpost.com/news/marijuana/ci_19016660); Jonathan Martin, *Medical-Marijuana Dispensaries Run Into Trouble at the Bank*, THE SEATTLE TIMES (Apr. 29, 2012, 8:00 PM), [http://seattletimes.com/html/localnews/2018103547\\_maribanking30m.html](http://seattletimes.com/html/localnews/2018103547_maribanking30m.html).

<sup>66</sup> See 42 U.S.C. § 1437d(l)(6) (2006) (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 STATE OF NEV. BD. OF PAROLE COMM'RS, SAMPLE PAROLE AGREEMENT, available at [http://www.parole.nv.gov/sites/parole/files/pdf/pubmeet/Institutional\\_Parole\\_Agreement\\_draft.PDF](http://www.parole.nv.gov/sites/parole/files/pdf/pubmeet/Institutional_Parole_Agreement_draft.PDF).

<sup>67</sup> See COLO. DEP'T OF PUB. HEALTH AND ENV'T, MEDICAL MARIJUANA REGISTRY PROGRAM UPDATE (Sept. 30, 2012), <http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044> (last visited Mar. 1, 2013).

<sup>68</sup> *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU (2010), <http://factfinder2.census.gov/faces/tableservices-/jsf/pages/productview.xhtml?src=bkmk> (last visited Mar. 1, 2013).

also an exponential increase in the number of people affected by the current web of overlapping and contradictory state and federal regulation.

## II

### 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.<sup>69</sup> As we shall see, these doctrines have significant implications for persons—landlords, wholesale suppliers, employees, and particularly lawyers—who do 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.<sup>70</sup> Today, one is generally liable for a crime if one

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<sup>69</sup> 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 [CSA] . . . .” See Cole Memo, *supra* note 55, at 2.

<sup>70</sup> 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]t 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

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.<sup>71</sup> 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.<sup>72</sup>

Following the lead of the Model Penal Code (MPC),<sup>73</sup> 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.<sup>74</sup> That is, it is generally insufficient to show merely that the erstwhile accomplice knowingly assisted the principal to commit the offense; it must generally be shown that it

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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.”).

<sup>71</sup> See Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000) (“For decades, the American courts and legislatures have debated whether knowledge or ‘true purpose’ should be the required mens rea for accomplice liability.”).

<sup>72</sup> See, e.g., *People v. Lauria*, 59 Cal. Rptr. 628, 635 (Cal. Ct. App. 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 was thus absolved of his liability as a conspirator).

<sup>73</sup> Written by the American Law Institute in the 1960s, the MPC's provisions have had an enormous impact on law reform in the United States over the last fifty years. See Paul H. Robinson & Markus D. Dubber, *An Introduction to the Model Penal Code*, 10 NEW CRIM. L. REV. 319, 320 (2007) (“Promulgated in 1962, the code prompted a wave of state code reforms in the 1960s and 1970s, each influenced to some extent by the Model Penal Code.”).

<sup>74</sup> *Infra* note 77; see MODEL PENAL CODE §2.06 (1985):

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

was the accomplice's intent to do so. Adopting an intent standard rather than the easier to prove knowledge requirement,<sup>75</sup> 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.<sup>76</sup> 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:

[A]ll 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.<sup>77</sup>

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 is probably the majority rule in the United States.<sup>78</sup>

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

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<sup>75</sup> 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." MODEL PENAL CODE § 2.04(3) (Tentative Draft No. 1 1985) ("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." (emphasis added)).

<sup>76</sup> See *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

<sup>77</sup> *Id.*

<sup>78</sup> See *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985). 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, for example, *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 (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).

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 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.<sup>79</sup>

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.<sup>80</sup> Similarly, American law has generally been unwilling to impose a Good Samaritan requirement on the public.<sup>81</sup> 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,<sup>82</sup> the United States has consistently refused to so impose such a requirement. 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.

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<sup>79</sup> *People v. Lauria*, 59 Cal. Rptr. 628, 635 (Cal. Ct. App. 1967) (rejecting accomplice liability where a provider of answering services made those services available on the same terms to prostitutes and lawful users alike).

<sup>80</sup> *Pope v. State*, 396 A.2d 1054, 1078 (Md. 1979) (holding that misprision of felony is not a chargeable offense in Maryland). *But see* 18 U.S.C. § 4 (2006); *United States v. Brantley*, 461 F. App'x 849, 851 (11th Cir. 2012); *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002) (stating that the essential elements of a misprision of a felony are knowledge of a crime and some affirmative act of concealment or participation).

<sup>81</sup> *See, e.g.*, John. T. Pardun, Comment, *Good Samaritan Laws: A Global Perspective*, 20 LOYOLA L.A. INT'L. & COMP. L.J. 411, 591 (1998).

<sup>82</sup> Québec Charter of Human Rights and Freedoms, R.S.Q., ch. C-12, pt. 1, ch. 1, no. 2 (2006).

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 marijuana 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.<sup>83</sup>

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.<sup>84</sup> In this way, conspiracy law is a more effective, far-reaching tool for prosecutors than accomplice liability.<sup>85</sup>

As with accomplice liability, there exists an ongoing 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

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<sup>83</sup> 18 U.S.C. § 371.

<sup>84</sup> See, e.g., *Ianelli v. United States*, 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 single punishable act”); *People v. Madonna*, 651 P.2d 378, 388 (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* MODEL PENAL CODE § 1.07(1) (1985) (stating that a criminal defendant can be convicted of conspiring to commit an offense or of committing the offense, but not both).

<sup>85</sup> 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. *United States v. Gooding*, 25 U.S. 460, 461 (1827); *State v. Overton*, 298 S.E.2d 695, 716 (N.C. Ct. App. 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”); see also *United States v. Nixon*, 418 U.S. 683, 701 (1974) (holding statements by coconspirators admissible, and not barred as hearsay); *United States v. Villiard*, 186 F.3d 893, 895 (8th Cir. 1999) (holding that the general rule is that coconspirators may be tried together).

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.<sup>86</sup> 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. Lauria ran an answering service and many of his customers were prostitutes.<sup>87</sup> Based solely on these facts, he was charged with conspiring with his clients to commit prostitution.<sup>88</sup> He admitted to knowing that prostitutes used his services, but argued that his knowledge was insufficient to bring him within a criminal conspiracy.<sup>89</sup> 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 (for example, charging unlawful clients a higher rate); where there is no legitimate use 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” (as where a pharmacist provides a doctor with hundreds of times more painkiller than there is a lawful demand for).<sup>90</sup> The MPC and a majority of states also require true intent.<sup>91</sup>

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<sup>86</sup> See, e.g., *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (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)); *United States 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)); *United States v. Gomez-Pabon*, 911 F.2d 847, 853 (1st Cir. 1990) (“[T]o 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.”).

<sup>87</sup> *People v. Lauria*, 59 Cal. Rptr. 628, 630 (Cal. Ct. App. 1967).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 674–75.

<sup>90</sup> *Id.* at 632–33.

<sup>91</sup> See, e.g., MODEL PENAL CODE § 5.03(1) (1985) (“Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if *with the*

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.<sup>92</sup> 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.<sup>93</sup>

Both of these doctrines—accomplice and coconspirator liability—obviously raise serious concerns for attorneys working with those in the marijuana 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.<sup>94</sup>

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.<sup>95</sup> Many cases of lawyer

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*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)).

<sup>92</sup> *Lauria*, 59 Cal. Rptr. at 634.

<sup>93</sup> This policy analysis has also led some jurisdictions to criminalize the knowing facilitation of crimes—independent of any liability as an accomplice or coconspirator.

<sup>94</sup> See, e.g., Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193, 209 (2010) (“Lawyers also assume that the advice of counsel defense will preclude their own liability. This is completely false.”).

<sup>95</sup> See *id.* at 212 (“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).



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 (GSK) for allegedly providing misleading responses to a government investigation of the firm.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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 . . . .”<sup>99</sup> 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.<sup>100</sup>

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<sup>96</sup> Duff Wilson, *Former Glaxo Lawyer Indicted*, N.Y. TIMES (Nov. 9, 2010, 2:25 PM), <http://prescriptions.blogs.nytimes.com/2010/11/09/former-glaxo-lawyer-indicted/>.

<sup>97</sup> *Id.*

<sup>98</sup> See *United States v. Stevens*, No. RWT-10-694, slip op. (D. Md. May 10, 2011). The decision to take the case from the jury on the basis of insufficiency of the evidence was non-reviewable. See Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal*, 44 AM. U. L. REV. 433, 433–34 (1994) (“In all of federal jurisprudence there is only one district court ruling that is both absolutely dispositive and entirely unappealable. Federal Rule of Criminal Procedure 29 enables the trial judge upon her own initiative or motion of the defense to direct a judgment of acquittal in a criminal trial at any time prior to the submission of the case to the jury. Once the judgment of acquittal is entered, the government’s right of appeal is effectively blocked by the Double Jeopardy Clause of the U.S. Constitution, as the only remedy available to the Court of Appeals would be to order a retrial. No matter how irrational or capricious, the district judge’s ruling terminating the prosecution cannot be appealed.” (footnote omitted)).

<sup>99</sup> *Stevens*, No. RWT-10-694, slip op. at 9.

<sup>100</sup> *Id.* at 10.

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.<sup>101</sup>

Notably, while prosecutors have traditionally been loath to indict attorneys for misconduct that is part and parcel of the practice of law,<sup>102</sup> many defense attorneys believe that criminal prosecution of lawyers acting *qua* lawyers is an increasingly common tactic against those lawyers representing unpopular defendants.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> While there is not yet a reported case of an

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<sup>101</sup> See, e.g., *United States v. Abbell*, 271 F.3d 1291–1301 (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); *United States v. Locascio*, 6 F.3d 924, 932–35 (2d 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); *United States v. Nesser*, 939 F. Supp. 417, 421 (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).

<sup>102</sup> 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.”).

<sup>103</sup> See, e.g., Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 *AM. U. L. REV.* 1331, 1374 (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.”).

<sup>104</sup> *United States v. Stewart*, 686 F.3d 93, 156, 161–64 (2d Cir. 2012).

<sup>105</sup> See, e.g., 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.”);

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.<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup>

Other prosecutors may fear interfering with or undermining attorney-client relationships.<sup>109</sup> 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.<sup>110</sup> If lawyers fear that the representation of disfavored

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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 Attorney General John Ashcroft sent to lawyers in indicting of Lynne Stewart was "direct and unambiguous: represent accused terrorists and you too may be arrested").

<sup>106</sup> 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 "the unwillingness of many lawyers to testify against one another in malpractice suits" as a "conspiracy of silence").

<sup>107</sup> 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. LITTLE ROCK L.J. 1, 6–13 (1989).

<sup>108</sup> *But see* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 877–82 (2012) (detailing the suspicion that prosecutors have historically had of professional disciplinary proceedings, believing the organized bar to be captured by criminal defense attorneys).

<sup>109</sup> *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 5.12 (3d ed. 2013) (discussing the unwillingness of prosecutors to pursue anything but the most egregious of attorney behavior).

<sup>110</sup> *See* *Rothgery v. Gillespie County*, 554 U.S. 191, 211–12 (2008) (finding that the right to counsel applies to all critical stages following the initial appearance before a

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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup>

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 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. Lawyers, unlike other providers of goods and services, are rightly seen as serving important, often constitutionally-based, societal goods. Any interpretation of criminal law that would have a deleterious effect on the ability of lawyers to serve that role should be carefully limited.<sup>114</sup> Furthermore, because effective lawyering requires a lawyer to inquire into the affairs of her client, a rule that punishes knowing facilitation

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magistrate); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (finding a right to counsel in all felony trials).

<sup>111</sup> See *Green*, *supra* note 102, at 354 (“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.”).

<sup>112</sup> *E.g.*, *Travis v. Gary Cnty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990) (“Treating involvement of a lawyer as the key unlocking § 1985 would discourage corporations from obtaining legal advice before acting, hardly a sound step to take.”).

<sup>113</sup> MODEL RULES OF PROF'L CONDUCT R. 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.”).

<sup>114</sup> See, *e.g.*, *Green*, *supra* note 102, 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 individuals are not. At least in the case of criminal defense lawyers, this professional undertaking has a constitutional dimension as well.” (footnote omitted)).

will necessarily inhibit a lawyer from effectively representing her client. Unlike, say, a gas station attendant or an advertiser who can easily provide his or her services without making personal inquiries into the affairs of their patrons, the 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 rea 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 attorney's 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 a marijuana client seems farfetched unless, following *Lauria*, the lawyer charges a marijuana client a higher rate than a non-marijuana client for similar services or has an unusually high volume of business with one marijuana client or with marijuana clients generally.

Exactly this approach has been taken by a number of courts that 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 Ninth Circuit Court of Appeals considered whether doctors could be enjoined from recommending marijuana to their patients.<sup>115</sup> The court agreed that doctors could be prohibited from engaging in criminal conduct, but it reasoned that recommending marijuana to patients who then seek to obtain it does not constitute aiding and abetting of the patients' later possession:

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

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<sup>115</sup> *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting.<sup>116</sup>

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 coconspirator 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.<sup>117</sup>

Similarly, the California Court of Appeals considered the unusual case of a city seeking to overturn a court order requiring it to return marijuana improperly seized from a criminal defendant named Kha.<sup>118</sup> 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.<sup>119</sup>

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 such knowledge was sufficient to make the city culpable for Kha's possession.<sup>120</sup>

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<sup>116</sup> *Id.* at 635–36 (citations omitted).

<sup>117</sup> *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))).

<sup>118</sup> *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007).

<sup>119</sup> *Id.* at 368 (citations omitted); *see also* *San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 825 n.13 (2008) (citing *City of 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).

<sup>120</sup> *See City of Garden Grove*, 157 Cal. App. 4th at 663 (“[H]olding 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

### 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 a marijuana 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<sup>121</sup>—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.<sup>122</sup> In order to give substance to our conclusions regarding attorneys' criminal liability, we suggest a similar reading of the relevant laws of professional responsibility.

## III

### 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,<sup>123</sup> the regulation of lawyers continues to be, for the

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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 [sic] order. The requisite intent to transgress the law is so clearly absent here that the argument is no more than a straw man.”).

<sup>121</sup> 5 U.S.C. § 3331 (2006); *see also* U.S. OFFICE OF PERS. MGMT., CONSTITUTIONAL INITIATIVE: OATH, *available at* [http://www.opm.gov/constitution\\_initiative/oath.asp](http://www.opm.gov/constitution_initiative/oath.asp) (last visited Mar. 1, 2013).

<sup>122</sup> *See Green, supra* note 102, at 391 (“[P]rosecutors 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 Green, supra* note 108, at 875 (“[P]rosecutors often express mistrust of professional regulators, their rules, and their processes.”).

<sup>123</sup> 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, 491 (2011).

most part, a state-based affair.<sup>124</sup> 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,<sup>125</sup> 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) of the American Bar Association Rules of Professional Conduct (Rules), 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.<sup>126</sup>

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 any state marijuana 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.<sup>127</sup> 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

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<sup>124</sup> *Id.* But see Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 124–28 (2011).

<sup>125</sup> David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802–03 (1992).

<sup>126</sup> MODEL RULES OF PROF'L 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*, A.B.A. (Sept. 14, 2011), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics\\_2000\\_status\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf).

<sup>127</sup> See *supra* Part I.



courts, or by enforcement efforts by the federal government. Indeed, one could even argue 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."<sup>128</sup> 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

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<sup>128</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2012).

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.”<sup>129</sup> 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 proposed course of conduct,” but on the other hand strikes many as “assisting” a client to violate the law.<sup>130</sup>

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.<sup>131</sup> If these two conditions are 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 pursue 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 marijuana (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 memoranda and the inconsistent

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<sup>129</sup> 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).

<sup>130</sup> *Id.* at 1556–58, 1565–71.

<sup>131</sup> It should be noted that the Rules state that actual knowledge may be inferred from circumstances. MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2012).

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 memo, 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.”<sup>132</sup> 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.<sup>133</sup>

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.

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<sup>132</sup> Maine Prof'l Ethics Comm., Op. 199 (2010), available at [http://www.maine.gov/tools/whatsnew/index.php?topic=mebar\\_overseers\\_ethics\\_opinions&id=110134&v=article](http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article).

<sup>133</sup> *Id.*

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 on the Rules of Professional Conduct came to almost exactly the opposite conclusion than the one reached by the Maine Commission in an opinion 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.<sup>134</sup>

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

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<sup>134</sup> State Bar of Arizona, Formal Op. 11-01 (2011), *available at* <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.<sup>135</sup>

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].”<sup>136</sup> 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.”<sup>137</sup> Accordingly, the Arizona Committee appears to allow counseling 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 hypothetical situations, 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) that 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 in which 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

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

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.<sup>138</sup>

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.<sup>139</sup> 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.

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<sup>138</sup> Section 94(2) of the *Restatement (Third) of the Law Governing Lawyers* is entirely consistent with our proposed interpretation, stating in relevant part: "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). We concede that Model 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." ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353, at \*4 (1997), available at [http://omnilearn.net/ethics/pdfs/ABA\\_opinion87\\_353.pdf](http://omnilearn.net/ethics/pdfs/ABA_opinion87_353.pdf) [hereinafter Opinion 87-353]. However, Opinion 87-353 construed Model 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, sections 3.3(a)(3) and 3.3(b) constitute the only mandatory exceptions to the doctrine of confidentiality. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2012). 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). Opinion 87-353, at \*4. 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.

<sup>139</sup> 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 (1986).

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 breaks down because, practically speaking, without the “assistance” of lawyers clients would not be able to pursue the conduct.<sup>140</sup> Consider a client who wants to apply 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 cultivation and sale—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 client 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.<sup>141</sup>

Access to law and lawyers in a highly regulated society is fundamental to the informed exercise of autonomy by clients. Yet deference to client autonomy is not the only important value lawyers serve.<sup>142</sup> We believe that limiting client access to the law and to

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<sup>140</sup> Pepper, *supra* note 129, at 1556–58.

<sup>141</sup> 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.

<sup>142</sup> David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639 (1986) (asserting that helping a client to do wrong is wrong regardless of the individual autonomy involved in the action).

lawyers is justified in the case of the more serious *mala in se* crimes—things like murder, rape, robbery and assault—but not in the case of mere *mala prohibita* crimes—crimes that are deemed bad merely because they are prohibited.<sup>143</sup> In particular, we conclude that with regard to crimes like violations of the CSA that are *mala prohibita*, 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' coconspirator.<sup>144</sup> 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."<sup>145</sup> 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:

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<sup>143</sup> See 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." (citation omitted)).

<sup>144</sup> *People v. Lauria*, 59 Cal. Rptr. 628, 635 (Cal. Ct. App. 1967).

<sup>145</sup> *Id.* at 634.



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]. 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 proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used.<sup>146</sup>

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 well-known distinction 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.<sup>147</sup> Because possession of marijuana, particularly for medical purposes, is a bad thing merely because it is prohibited, we argue that an intent to facilitate such behavior 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 the court's discomfort with asking every shop owner to inquire into her client's motives and plans.<sup>148</sup> Attorneys do, however, in the ordinary course of providing legal services, inquire into clients' plans, and sometimes into their motives as well. Yet exactly because

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<sup>146</sup> United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985).

<sup>147</sup> See Travers, *supra* note 143, at 1322.

<sup>148</sup> *Lauria*, 69 Cal. Rptr. at 635.

lawyers are so fundamental to the exercise of client 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.<sup>149</sup> As professionals, however, shouldn't 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 defined the term to refer to a group "pursuing a learned art as a common calling in the spirit of public service."<sup>150</sup> 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 responsibility for the quality of justice."<sup>151</sup> 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 an honest product at a fair 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

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<sup>149</sup> See *supra* note 114 and accompanying text.

<sup>150</sup> ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

<sup>151</sup> MODEL RULES OF PROF'L CONDUCT pmb1. (2012).

goes beyond a concern about chilling the attorney-client relationship. Shopkeepers are not required to act 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.<sup>152</sup> 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,<sup>153</sup> 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."<sup>154</sup> 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 be inferred from mere knowledge of clients' goals and conduct.

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<sup>152</sup> *Id.* at R. 1.2(a).

<sup>153</sup> *Id.* at R. 1.6 cmt 2.

<sup>154</sup> *Id.* at R. 1.2(b). On the principle of non-accountability, see Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672–75 (1978) (coining the term "Principle of Nonaccountability" to mean that lawyers are neither legally nor 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 (1978) (explaining the legal system and the attorneys' function within the system). 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* 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) [hereinafter LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*].

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 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.<sup>155</sup> 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.<sup>156</sup> Similarly, a defense attorney may, in the course of representation, come to know of her client's ongoing or future criminal plans; however, the Rules never mandate disclosure of that information to the police or victim.<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup> 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.

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<sup>155</sup> Monroe H. Freedman, *The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469–72 (1966).

<sup>156</sup> *Id.* at 1471.

<sup>157</sup> 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 PROF'L CONDUCT R. 3.3(a)(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." *Id.* at 1.6(b)(1).

<sup>158</sup> "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 PROF'L CONDUCT R. 1.6 cmt. 2 (2012) (emphasis added).

<sup>159</sup> *Id.*

What is more, a prosecutor often exercises her discretion and, notwithstanding her awareness of the extent of a defendant's misdeeds, decides either not to charge her with any crime or to charge her with a lesser offense than her conduct merits.<sup>160</sup> 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 know that the owners are guilty of a federal crime but choose nonetheless not to act on it.

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,<sup>161</sup> 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

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<sup>160</sup> See generally 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).

<sup>161</sup> See generally LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 154; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

rather than intent would suffice to preclude an attorney from helping a client pursue her criminal conduct.<sup>162</sup>

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 regarding the involvement of lawyers with the marijuana industry has nothing to do with the lawyer's role as advisor or advocate. Rather, it asks whether a lawyer violates her ethical obligations if she merely 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.<sup>163</sup> In addition to prohibiting violations of the Rules, Rule 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."<sup>164</sup> 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

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<sup>162</sup> 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 marijuana dispensary owners, they do not offer as compelling a justification for the representation of entities which own and operate marijuana dispensaries. On the other hand, in *Citizens United v. Federal Election Commission*, the Supreme Court held that corporations, like individuals, have First Amendment Rights and may make independent expenditures that advocate election or defeat of candidates. See generally *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (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.

<sup>163</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2012).

<sup>164</sup> *Id.*

crimes such as embezzlement, but not by others that do not pertain to a lawyer's trustworthiness or fitness.<sup>165</sup>

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.<sup>166</sup> 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).<sup>167</sup> 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 providing clients with incompetent representation— or otherwise displaying disregard for the law.<sup>168</sup> Participants in MMJ

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<sup>165</sup> See Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 705–06 nn.105–10 (2003) (explaining that decisions regarding an attorney's chemical dependency are "haphazard in their results—some recognizing chemical dependency as a mitigating factor, some treating it as an aggravating factor, other focusing on rehabilitation, and yet others ignoring the ramifications of the lawyer's addiction altogether" (footnotes omitted)).

<sup>166</sup> State lists of patients are confidential. Thus, a lawyer will only be publicly associated with the marijuana registry if she announces her participation. See, e.g., COLO. CONST. art. XVIII, § 14(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).").

<sup>167</sup> However, some jurisdictions have imposed discipline for mere possession. See Zacharias, *supra* note 165, at 705–06 nn.105–10.

<sup>168</sup> 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, 108–11 (2009).

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 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 respects."<sup>169</sup> 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 or MJ 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 that 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 are differently situated from a lawyer-investor in a marijuana dispensary.<sup>170</sup>

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

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<sup>169</sup> Colorado Ethics Comm., Formal Op. 124 (2012), reprinted in COLO. LAWYER, July 2012, at 28 (citations omitted), available at [http://www.cobar.org/tcl/tcl\\_articles.cfm?articleid=7626](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=7626).

<sup>170</sup> Ample case law establishes that Rule 8.4(b) covers a lawyer's private conduct outside of the practice of law. See, e.g., MODEL RULES OF PROF'L CONDUCT pmb1. 5 (2012) ("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)); see also *id.* at R. 8.4(b). 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.



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.<sup>171</sup>

## 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.<sup>172</sup> But this simply cannot be right. It is in direct conflict

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<sup>171</sup> 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.

<sup>172</sup> See, e.g., Green, *supra* note 102, at 358 (“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:

[C]ourts 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

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 acting pursuant to state marijuana laws who is charged with violating the CSA.<sup>173</sup>

*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.<sup>174</sup> 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);<sup>175</sup> 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

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exclusively on the lawyer's intentions, which a jury can determine only inferentially.

*Id.* at 388.

<sup>173</sup> In a sense, attorneys representing marijuana clients charged with violating the CSA are easiest to defend because their clients acted pursuant to state law. Accordingly, we need not opine in detail on two more problematic categories of whether it is appropriate for a criminal defense attorney to represent clients accused of crimes in circumstances in which the client did not act pursuant to the law, for example, murder or rape (we think the answer is yes); and whether it is appropriate for a lawyer to represent clients for the purpose of enabling criminal conduct, for example acting as an advisor to organized crime (we think the answer is no). See Fred Z. Zacharias, *Practice, Theory and the War on Terror*, 59 EMORY L.J. 333, 336 n.8 (2009); *People v. Morley*, 725 P.2d 510 (Colo. 1986) (disbarring an attorney acting to promote illegal client conduct); see also *infra* notes 185–90 and accompanying text.

<sup>174</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1 ("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."); *id.* at R. 5.7 cmt. 9 ("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.").

<sup>175</sup> See *supra* Part III.A.

of marijuana clients, for example negotiating a commercial real estate lease, does not likely constitute a “good faith effort to determine the validity, scope, meaning or application of the law,”<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> A lawyer may advise a client that owning and operating a marijuana 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 help a client in filling out application forms for a marijuana dispensary license pursuant to the state regulatory scheme? May an attorney help 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 agreements to be used 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

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<sup>176</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(d); *supra* notes 127–28 and accompanying text.

<sup>177</sup> *See supra* notes 129–31 and accompanying text.

<sup>178</sup> *See* Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 671 (1981); Pepper, *supra* note 129, at 1588–98.

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 an attorney's intent before precluding her 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.

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 marijuana 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.<sup>179</sup> 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 marijuana 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).

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<sup>179</sup> See *People v. Lauria* analysis, *supra* notes 87–93, 144–49, and accompanying text.

A more complicated case is presented by firms that cater exclusively or primarily to marijuana clientele.<sup>180</sup> 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.<sup>181</sup> Like the publisher of an advertising flier consisting entirely of prostitute listings or the tout who provides nothing but information on illegal gambling,<sup>182</sup> 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 marijuana dispensary? Draft the lease agreement? Draft a purchase and sales agreement to be used 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

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<sup>180</sup> 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.

<sup>181</sup> See *supra* note 171 and accompanying text.

<sup>182</sup> See, e.g., *People v. Lauria*, 59 Cal. Rptr. 628, 633 (Cal. Ct. App. 1967) (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).

client B? What if the sale would take place pursuant to state rules that allow licensed dispensary owners to buy a certain percentage of the marijuana they sell to patients from another source?

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.<sup>183</sup> However, we believe that such attorney conduct violates Rule 1.2(d) when carried out in the context of the marijuana 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. He has, in the words of Learned Hand's famous requirement, “in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed.”<sup>184</sup> 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 he is paid a percentage of 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). He no longer merely knows that her conduct will facilitate the sale of marijuana; he actively hopes that it will do so. His clients' happiness—and thus his own—hinges on his 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. His mens rea is thus one of intent and he violates his ethical obligations—and opens himself to criminal prosecution—when he assists his 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

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<sup>183</sup> John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 *IND. J. GLOBAL LEGAL STUD.* 35, 38–41 (2007); Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 *PENN ST. INT'L L. REV.* 465, 466 (2008).

<sup>184</sup> See *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The Hand formulation was subsequently referenced by the United States Supreme Court in *Nye & Nissen v. United States*, 336 United States 613, 619 (1949); see *supra* notes 75–77.

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.<sup>185</sup> Morley was charged with assisting a client pursue the criminal conduct of prostitution.<sup>186</sup> 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 the requisite intent to assist his client.<sup>187</sup> The court found that:

[Morley] 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. [But h]e 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 [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 [Morley] did mention to [the client] that . . . he would require 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 . . . that [Morley] 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]

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<sup>185</sup> *People v. Morley*, 725 P.2d 510 (Colo. 1986).

<sup>186</sup> *Id.* at 513, 519.

<sup>187</sup> 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 “counsel[] or assist[] a client in conduct that the [lawyer] knew to be illegal.” *Id.* at 513–14. Morley’s “clients” were not actual clients but in fact federal agents engaged in a sting operation. *Id.* at 513. To simplify the facts of the case, because the court found that Morley believed the agents were his clients and that he formed an attorney-client relationship with them, we refer to the agents as Morley’s clients.

on a ledger sheet titled in [the client's] name. [Morley] entered these meetings on the ledger sheet as conferences with "clients."<sup>188</sup>

The court held that:

[Morley] knowingly counseled what he believed was an illegal prostitution scheme, and he actively pursued participants for that purpose. [Morley'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.<sup>189</sup>

Morley was disbarred.<sup>190</sup> 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.

### *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.

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<sup>188</sup> *Id.* at 512–13.

<sup>189</sup> *Id.* at 518–19.

<sup>190</sup> *Id.* at 519.



As we have seen, however, the traditional approach to Rule 1.2(d) is very different, essentially prohibiting lawyers from offering legal services to marijuana clients. Under the traditional approach, may a lawyer ever help a marijuana client pursue criminal conduct in violation of the CSA? Put differently, given a reading of Rule 1.2(d) that prohibits lawyers from representing marijuana clients, may a lawyer ever intentionally choose to violate 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, lawyers have a heightened duty to do so.<sup>191</sup> However, in order to demand attorneys' obedience, the law in question must be just, or at least not unjust.<sup>192</sup> 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, notwithstanding the technical violation of Rule 1.2(d) and subsequent discipline.

This line of reasoning is contradicted by two MMJ realities. 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,<sup>193</sup> 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

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<sup>191</sup> 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, 270, 293–94 (1996).

<sup>192</sup> See William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 217–18 (1996); Wilkins, *supra* note 191, at 269–72.

<sup>193</sup> See Ogden Memo, *supra* note 49, at 9.

ideological reasons. If the client's primary rationale is making a profit, 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 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 is unjust.<sup>194</sup> In short, it seems clear that marijuana laws, while perhaps erroneous,<sup>195</sup> are not unjust. We hope that our proposed reading of Rule 1.2(d) is adopted, such that the Rule 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 follow the traditional interpretation of Rule 1.2(d),

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<sup>194</sup> Just as many clients wish to enter the MMJ arena to make money rather than to provide medical access to patients, 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 is 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. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2012). 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 id.* at 7.3(a); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 449 (1978); *In re Primus*, 436 U.S. 412, 437-39 (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.

<sup>195</sup> *See, e.g.,* *Americans for Safe Access v. Drug Enforcement Agency*, No. 11-1265 (D.C. Cir. Oct. 16, 2012) (lawsuit challenging the DEA's refusal to re-categorize marijuana from Schedule 1).

however, lawyers could use the “access to law and lawyers” rationale as a 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.<sup>196</sup> 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 approach to construing Rule 1.2(d) to prohibit lawyers from assisting clients pursue 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.<sup>197</sup> 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

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<sup>196</sup> 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 defendant’s 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, 489–95 (2001) (holding that medical necessity is not a legally cognizable defense under the CSA). 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.

<sup>197</sup> *See, e.g.,* Steve Elliott, *Colorado Medical Grower Bartkowicz Gets 5 Years In Prison*, TOKE OF THE TOWN (Jan. 28, 2011, 1:31 PM), [http://www.tokeofthetown.com/2011/01/colorado\\_medical\\_grower\\_bartkowicz\\_gets\\_5\\_years\\_in.php](http://www.tokeofthetown.com/2011/01/colorado_medical_grower_bartkowicz_gets_5_years_in.php) (as a result of a plea bargain, Chris Bartkowicz is serving five years for growing 224 marijuana plants for medical marijuana patients); *supra* note 65.

estate entrepreneur who owns several commercial properties and who has a stable relationship with a midsize or large law firm. 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. However, the lawyer 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 counsel and assistance to criminal conduct, Rule 1.2(d) does not distinguish between conduct that is criminal pursuant to 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 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 flout 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,<sup>198</sup> and it is not inconceivable that the DEA, for example, may join the trend and attempt to regulate MMJ lawyers.<sup>199</sup> But it is

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<sup>198</sup> Coquillette & McMorrow, *supra* note 124, at 124–28.

<sup>199</sup> 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 attorneys. Securities attorneys, for example, regularly appear and practice before the Securities and Exchange Commission. See Rhonda McMillion, *ABA and Other Bar Groups Work to Limit Federal Regulation of Lawyers*, A.B.A. J., Dec. 1, 2010, [http://www.abajournal.com/magazine/article/let\\_the\\_states\\_do\\_it\\_aba\\_working\\_to\\_limit\\_federal\\_regulation\\_of\\_lawyers/](http://www.abajournal.com/magazine/article/let_the_states_do_it_aba_working_to_limit_federal_regulation_of_lawyers/); George A. Riemer, *SEC v. State Bars?*, OR. ST. B. BULL., Dec. 2003, at 21, available at <http://www.osbar.org/publications/bulletin/03dec/barcounsel.html>. Tax attorneys routinely appear and practice before the IRS. See Jay Miller, *Protected Thoughts? IRS Threatens Attorney Work-Product Doctrine*, WIS. LAW., Oct. 2011, at 13, available at [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&template=/CM/ContentDisplay.cfm&contentid=107382](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=107382). MMJ

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 regulate lawyers without such authority, it should expect harsh opposition from the practicing bar.<sup>200</sup>

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.<sup>201</sup>

### 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 have generally been insulated from criminal liability for the actions that they take representing their clients. And by and large this is the right result. Compelling policy reasons such as

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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.

<sup>200</sup> See, e.g., Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 704–07 (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).

<sup>201</sup> To be clear, regulation counsel should only refrain from disciplining marijuana lawyers for helping marijuana clients. Of course, if marijuana lawyers otherwise engage in professional misconduct and violate the rules of professional conduct, for example, by charging marijuana clients unreasonable fees, regulation counsel should discipline such misbehavior just as it would any other lawyers.

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 for engaging in the practice of law.

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. 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 nor 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 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 them to help marijuana clients with the majority of their legal needs.

