

**WEEDING OUT ETHICAL ISSUES: THE BUDDING CANNABIS INDUSTRY AND
YOUR LICENSE TO PRACTICE LAW**

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I. INTRODUCTION

Since 1996, twenty- three states and the District of Columbia have legalized medical marijuana.¹ Fifteen states have passed laws permitting the use of cannabidiol (CBD), the oil derived from the non-psychoactive ingredients found in marijuana, used to treat numerous conditions, including patients with epilepsy.² Recreational marijuana is now legal in Alaska, Colorado, Oregon, Washington, and the District of Columbia.³ Various moral and practical arguments have helped boost the growing trend of legalization. The potential to raise substantial tax revenue while reducing the number of non-violent offenders in the state prison system has motivated the international trend toward legalizing cannabis.⁴ This November, voters in at least half a dozen states, including Arizona, California, Maine, Massachusetts, and Nevada, are expected to make a decision on marijuana policy.⁵

¹ See *State Laws & Penalties*, NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS

² Scientific research has shown cannabidiol (CBD) may be therapeutic for many conditions including AIDS, Alzheimer's Disease, anxiety, arthritis, autism, bipolar, cancer, depression, epilepsy and seizures, fibromyalgia, glaucoma, heart disease, Huntington's Disease, metabolic syndrome, multiple sclerosis, nausea, obesity, Parkinson's Disease, PTSD, and sleep disorders. See Medical Conditions, PROJECT CBD, available at <https://www.projectcbd.org/conditions> (last visited Jan. 26, 2016).

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³ NORML, *supra* note 1.

⁴ In December 2013, Uruguay became the first country in the world to legalize and regulate marijuana. In Canada, the newly elected Prime Minister Justin Trudeau promised to legalize all aspects of the marijuana market. Further, the Mexico Supreme Court ruled in November 2015 that the prohibition of marijuana for personal use is unconstitutional, violating the human right to freely development one's personality. In Latin America alone, initiatives to reform marijuana laws are being debated in Brazil, Chile, Colombia, Costa Rica, and Mexico. See Edward Delman, *Is Smoking Weed a Human Right*, THE ATLANTIC (Nov. 9, 2015) available at <http://www.theatlantic.com/international/archive/2015/11/mexico-marijuana-legal-human-right/415017/>.

⁵ Paul Armentano, THE CITIZEN'S GUIDE TO STATE-BY-STATE MARIJUANA LAWS 29 (Reset.Me 2015); see also Sam Stebbins, et al., *The Next 11 States to Legalize Marijuana*, USA TODAY (August 19, 2015) available at <http://www.usatoday.com/story/money/business/2015/08/18/24-7-wall-st-marijuana/31834875/>.

As states continue to replace archaic prohibition policies with taxation and regulation, attorneys will be forced to apply conflicting federal, state, and local laws, while keeping in mind ethical obligations both to their clients and society. Suppose, for example, that Olivia is a lawyer in Washington who has practiced for several years and has a stellar reputation. She is a solo practitioner who relies heavily on word of mouth from her clients. Mark is a potential client who has been referred to Olivia. In their initial meeting, Mark informs Olivia that he would like her help setting up a legal marijuana distribution business. He needs legal advice on banking and tax issues, insurance, employment, zoning, regulatory compliance, and corporate structure. While marijuana is legal in Washington, it is illegal under federal law to possess or distribute in any state. If Olivia advises and assists Mark, is she subject to disciplinary action under the rules of professional conduct?

Imagine that Emily is an attorney at a large law firm in Colorado. Lately, Emily has been working long hours on a highly stressful and time sensitive matter. She is having a hard time relaxing enough to sleep at night and decides to see a doctor who offers her sleeping pills. After reading about the side effects of the pills, Emily is wary of taking them. One of her friends suggests she try cannabis as an alternative to sleeping pills. Because she is also worried about the health risks associated with smoking, she decides to try a smokeless alternative in the privacy of her home to help her relax. Since cannabis is legal for adults in Colorado but illegal under federal law, is Emily subject to disciplinary action under the rules of professional conduct?

This paper argues that attorneys can and should strike a balance between their duties to their clients and as ethical officers to the legal system in states with legal marijuana. Section II presents a brief history surrounding cannabis use and the legal history of marijuana prohibition in the United States. Section III describes the current tension between state and federal law.

Section IV discusses the ethical dilemmas attorneys face during the current state of legalization and advising the quickly emerging cannabis industry. Section V focuses on the current state of legalization from an economic, tax, and social justice perspective. Section VI concludes with a discussion of cannabis as a mainstream and bipartisan political issue, drawing on parallels with alcohol prohibition.

II. A BRIEF HISTORY OF CANNABIS USE IN AMERICA

For most of American history, cannabis was legal to grow and consume.⁶ As early as the 1600s, European settlers used the stalk of the cannabis plant to produce hemp, a versatile material used to make products such as twine, paper, and clothing.⁷ Physicians and pharmacists commonly used the cannabis flower to treat a variety of ailments.⁸ Listed in the United States pharmacopoeia based on medicinal value in 1850, cannabis use, for medicinal, recreational, and spiritual purposes has been recognized for providing a multitude of medical benefits.⁹

Early cannabis prohibition in this country was based on xenophobia and racism.¹⁰ After the Mexican Revolution in 1910, Mexican immigrants introduced American culture to the recreational use of “marihuana.”¹¹ In 1930, Harry Anslinger became the first director of the

⁶ Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81(2015).

⁷ See D. Mark Anderson, Benjamin Hansen & Daniel I. Rees, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & ECON. 333, 335 (2013); see also *Industrial Hemp Production*, U. KY. C. AGRIC., FOOD & ENV'T (May 2014), available at <http://www.uky.edu/Ag/CCD/introsheets//hempproduction.pdf>.

⁸ See Anderson, Hansen & Rees, *supra* note 6, at 335.

⁹ See *id.*

¹⁰ Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry Into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1011 (1970) (“From a survey of contemporary newspaper and periodical commentary we have concluded that there were three major influences [on states’ decisions to criminalize marijuana]. The most prominent was racial prejudice.”).

¹¹ See MARTIN A. LEE, *SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA - MEDICAL, RECREATIONAL AND SCIENTIFIC* 48 (Simon & Schuster 2013).

newly formed Federal Bureau of Narcotics (FBN), in Washington, D.C. He ran the FBN for over three decades, yet his influence on public policy is still felt long after his death in 1975.¹²

During alcohol prohibition, Anslinger called for extreme measures to arrest and punish liquor drinkers. He believed that harsh penalties were the only way to force compliance with the law. Although alcohol prohibition, which ended in 1933, was widely recognized as a public policy disaster, Anslinger refused to see it that way.¹³ When unemployment rates increased and tax revenue plummeted during the Great Depression, his entire department was on the chopping block.¹⁴ As a result, he convinced Congress and the public that a new drug was threatening the country, which needed immediate action by the Federal Bureau of Narcotics.¹⁵

To gain public support, Anslinger depicted marijuana as a sinister substance that made Mexican and African American men lust after white women.¹⁶ He used the non-English term “marihuana” to associate cannabis with crime and African American and Latino migrant workers.¹⁷ According to the FBN chief, one of the worst things about marijuana was that it promoted sexual contact across color lines, and that “[r]eefers makes darkies think they’re as good as white men.”¹⁸ Nonetheless, states quickly followed the federal government’s lead. By the end of 1937, forty-six out of forty-eight states had officially classified cannabis as narcotic, similar to

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 52.

¹⁷ *See id.*; *see also* THE OFFICIAL REPORT OF THE NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 16 (1972) available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015015647558;view=1up;seq=36> (“As the Mexicans spread throughout the West and immigrated to the major cities, some of them carried the marihuana habit with them. The practice also became common among the same urban populations with whom opiate use was identified.”).

¹⁸ Lee, *supra*, note 12 at 52.

morphine, heroin, and cocaine.¹⁹ At the time, few Americans knew that marijuana was merely a weaker version of the concentrated cannabis medicines that everyone had taken since childhood.²⁰

This led Congress to enact the Marihuana Tax Act of 1937 (“the Act”).²¹ Since the Tenth Amendment prevents the federal government from directing states to enact specific legislation or require state officials to enforce federal law, Congress utilized taxation as an indirect method to prohibit cultivation.²² The Act required anyone who possessed the plant to purchase a stamp for such activity to be legal.²³ Congress set taxes prohibitively high, which discouraged compliance and created a de facto prohibition.²⁴ Anyone found in violation was subject to extreme fines and up to five years of imprisonment.²⁵ The risk of criminal prosecution led to a rapid decline in open use and created the black market industry still in existence today. These reforms fell into place despite strong opposition from the medical community, who argued that cannabis does not cause addiction and provides important therapeutic benefits.²⁶

¹⁹ Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PENN STATE LAW REV. 333, 338 (2014).

²⁰ *Supra*, note 12 at 52.

²¹ Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970).

²² U.S. CONST. amend. X.; *see also* Marihuana Tax Act § 2.

²³ Marihuana Tax Act § 2.

²⁴ Marihuana Tax Act § 7; *see also* *Taxation of Marijuana: Hearing Before the Comm. on Ways & Means*, House of Representatives on H.R. 6385, 75th Cong. 7 (1937), http://www.lib.berkeley.edu/doemoff/govinfo/federal/fdlpexhibit/Tax_of_Marijuana.pdf (noting that the purpose of the tax was to make it *virtually impossible* for some to acquire marijuana) (emphasis added).

²⁵ Marijuana Tax Act § 12.

²⁶ *American Medical Association Opposes the Marijuana Tax Act of 1937*, Marijuana Library.org, http://www.marijuanalibrary.org/AMA_opposes_1937.html (last visited Jan. 2, 2016) (publishing a letter from William C. Woodward, Legislative Counsel, Am. Med. Ass’n, to Pat Harrison, Chairman, Comm. on Fin., U.S. Senate (July 10, 1937)).

In 1966, former Harvard Professor Timothy Leary was arrested in Texas for trying to cross the border with less than one ounce of marijuana.²⁷ After being convicted and sentenced to 30 years in federal prison, Leary fought his case up to the Supreme Court. He argued that the Marihuana Tax Act of 1937 violated his Fifth Amendment right against self-incrimination, because in order to abide by the law, one must register the marijuana with a tax stamp, thereby announcing the intention to commit a crime.²⁸ As a result, the Court unanimously declared the law unconstitutional in 1969.²⁹

Following what many saw the self-indulgent excesses of the 1960s, when President Nixon took office in 1969 he pushed Congress to “get tough” on drugs.³⁰ Under the Reagan administration, First Lady Nancy Reagan’s “Just Say No” campaign was backed by the power of the presidency, drawing a clear line that with the War on Drugs there was no moral middle ground.³¹ Simply being indifferent was not an option.³² The Pentagon’s anti-drug spending went from \$1 million to \$196 million.³³ Drug testing became mandatory for all federal employees.³⁴ Federal funding moved away from drug treatment programs and toward surveillance and punishment operations.³⁵ In 1988, DEA Judge Francis Young pronounced that marijuana was

²⁷ See *Leary v. United States*, 395 U.S. 6, 16 (1969) (overturning Leary’s conviction for possession of marijuana without a tax stamp and holding that a federal tax stamp requirement violated Leary’s Fifth Amendment right against self incrimination).

²⁸ See *id.*

²⁹ See *id.*

³⁰ 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.”).

³¹ Bruce Barcott, *Marijuana Goes Main Street Smoke Trails- and Trials*, TIME, Nov. 20, 2015, at 17 (an adaptation of the book *Weed the People: The Future of Legal Marijuana in America*).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

“one of the safest therapeutically active substances known to man” and that the Schedule I classification was “unreasonable, arbitrary and capricious.”³⁶

III. TENSION BETWEEN STATE AND FEDERAL POLICY

The Controlled Substances Act (CSA) is the key federal policy under which marijuana is regulated.³⁷ The CSA categorizes all controlled substances into one of five classifications based on medicinal value, harmfulness, and potential for abuse or addiction.³⁸ Schedule I is reserved for drugs, with a high potential for abuse and no recognized medical use.³⁹ In 1970, marijuana was classified as a Schedule I substance and was no longer being prescribed for medicinal purposes because some believed that it posed an unreasonable risk of harm.⁴⁰ Thus, under federal law, cultivation and possession of marijuana is prohibited, with an exception for limited federally approved research.⁴¹

The U.S. Supreme Court has made it clear that Congress has the authority to regulate cannabis.⁴² In 2001, the Court held that even though permitted by state law, medical necessity was not a defense to the federal prohibition of marijuana use since the CSA unambiguously classified marijuana as having no medical benefits warranting exception.⁴³ In 2005, the Supreme Court rejected a challenge to the CSA under the Commerce Clause, finding that even marijuana grown on a patient’s own property for personal use had an effect on the interstate market for

³⁶ The Bush administration sat on Young’s ruling for nearly a year before quietly rejecting Young’s decision on Christmas Eve in 1989, when newsrooms were empty. *See supra* note 31; *see infra* note 40.

³⁷ Controlled Substances Act of 1970, PUB. L. NO. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012)).

³⁸ *Id.*

³⁹ *Id.*; *see also* Chemerinsky *supra* note 6 at 82.

⁴⁰ Rosalie Liccardo Pacula et.al, *State Medical Marijuana Laws: Understanding the Laws and Their Limitations*, 23 J. PUB. HEALTH & SAFETY 413, 416 (2002); *see also* 21 U.S.C. §812(c)(10).

⁴¹ 21 U.S.C. § 872 (e).

⁴² *See* Sam Kamin, *The Battle of the Bulge: The Surprising Last Stand Against State Marijuana Legalization*, 45 (3) J. FEDERALISM 427 (2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659353.

⁴³ *See* United States v. Oakland Cannabis Buyers’ Collective, 532, U.S. 483 (2001).

marijuana and was thus within Congress' reach.⁴⁴ These cases solidify the power of the federal government to criminalize and enforce all cannabis related conduct even in states that have reached different conclusions.⁴⁵ In terms of congressional action, various bills to amend the CSA have attracted bipartisan support in both the House of Representatives and Senate, generating significantly more attention to the issue than in prior years.⁴⁶

The preemption doctrine, based on the Constitution's Supremacy Clause, is what many believe to be "the supreme law of the land" trumping conflicting state laws.⁴⁷ However, the Tenth Amendment's anti-commandeering doctrine poses a significant counterweight to the Supremacy Clause.⁴⁸ Cooperative federalism is described as "a partnership between the States and the Federal Government, animated by a shared objective."⁴⁹ In the context of marijuana policy, such agreements would provide that only state law governs marijuana enforcement within opt-out states, so long as such states comply with federal guidelines. In all other states, the CSA

⁴⁴ See *Gonzales v. Raich*, 545, U.S. 1 (2005).

⁴⁵ Kamin, *supra* note 44.

⁴⁶ *Id.*; See also Clean Slate for Marijuana Offenses Act of 2015, H.R. 3124, 114th Cong. (2015); The Compassionate Access, Research Expansion, and Respect Act of 2015, H.R. 1538 & S.683, 114th Cong. (2015); Ending Federal Marijuana Prohibition Act of 2015, S. 2237, 114th Cong. (2015); Marijuana Business Access to Banking Act, H.R. 2076 & S. 1726, 114th Cong. (2015); Marijuana Tax Revenue Act of 2015, H.R. 1014, 114th Cong. (2015); Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. (2015); Respect State Marijuana Laws Act, H.R. 1940, 114th Cong. (2015); Small Business Tax Equity Act, H.R. 1855 & S. 987; 114th Cong. (2015); States' Medical Marijuana Property Rights Protection Act, H.R. 262, 114th Cong. (2015); Stop Civil Asset Forfeiture Funding for Marijuana Suppression Act, H.R. 3124 & H.R. 3518, 114th Cong. (2015); Veterans Equal Access Act, H.R. 667, 114th Cong. (2015).

⁴⁷ U.S. CONST., art. VI, cl.2.

⁴⁸ See Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the State's Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009) ("Though expansive, Congress's preemption power is not, in fact, coextensive with its substantive powers, such as its authority to regulate interstate commerce. The preemption power is constrained by the Supreme Court's anti-commandeering rule.").

⁴⁹ See *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

would continue to control.⁵⁰ The federal government performs a vanishingly small amount of the drug enforcement that occurs in the United States each year. Nearly everyone arrested on marijuana charges is arrested under state rather than federal authority. Under the Tenth Amendment, the federal government cannot simply outsource the enforcement of federal law to unwilling state governments.⁵¹

In response to evolving state policies, the Department of Justice under the Obama Administration issued a series memoranda outlining federal enforcement policies.⁵² In 2009, the Department of Justice released the Ogden Memorandum, stating that prosecuting medical marijuana patients and their caregivers who were in “clear and unambiguous compliance” with state law was not a priority for federal government resources.⁵³ However, this did not withdraw enforcement from commercial enterprises, especially those engaged in for-profit activity.⁵⁴

In 2012, Colorado and Washington legalized the responsible use of recreational marijuana.⁵⁵ The Obama Administration responded with the Cole Memorandum, which articulated a hands-off approach for medical and recreational enterprises in full compliance with state law.⁵⁶ The Department of Justice announced that federal prosecutors would not attempt to

⁵⁰ See Chemerinsky *supra* note 6 at 116.

⁵¹ See *Printz v. United States*, 521 U.S. 898 (1997) (holding that although states are free to cooperate in the enforcement of federal law if they wish to do so, state apparatuses cannot be conscripted into the service of federal policy as such commands are fundamentally incapable with our constitutional system of dual sovereignty).

⁵² Memorandum from James M. Cole, Deputy Att’y Gen. (Aug. 29, 2013) *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁵³ Memorandum from David W. Ogden, Deputy Att’y Gen. to All United States Attorneys (October 19, 2009) *available at* <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

⁵⁴ *Id.*

⁵⁵ COLO. CONST. amend. XVIII § 16; WASH. REV. CODE § 69.50.4013; Ballot Initiative 30 (Colo. 2011) (proposing Amendment 64, legalizing the possession and sale of marijuana, to the Colorado Constitution); Ballot Initiative 502 (Wash. 2011) (proposing amendments to the Washington Revised Code, legalizing the possession and sale of marijuana).

⁵⁶ Memorandum from James M. Cole, Deputy Att’y Gen. (Aug. 29, 2013) *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

challenge state laws that allow for the medical and recreational marijuana, as long as sales do not conflict with the following federal enforcement priorities:

- 1) Preventing the distribution of marijuana to minors;
- 2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- 3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- 4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or illegal activity;
- 5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- 6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- 7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- 8) Preventing marijuana possession or use on federal property.⁵⁷

While the Cole Memorandum articulated a hands-off approach, it is not a black letter change to the law, leaving many with questions about the conflicting laws and the landscape of regulation, which are currently unclear.

IV. ETHICAL DILEMMAS REPRESENTING AND ADVISING THE CANNABIS CLIENT

A. The Rule 1.2(d) Dilemma

The regulation of lawyers is a state-based matter, since the principal means of regulation are the individual state's rules of professional conduct.⁵⁸ Rule 1.2(d) of the American Bar

Association Model Rules of Professional Conduct provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of an 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.⁵⁹

⁵⁷ *Id.*

⁵⁸ See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799,802-803 (1992).

⁵⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2 (d) (2015).

The Maine Bar of Overseers Professional Ethics Commission (the “Maine Commission”) issued the first ethics opinion to address this issue in 2010. While the Maine Commission believed that Maine could be on the vanguard regarding the medicinal use and effectiveness of cannabis, the Maine Commission warned that the Rule governing attorney conduct, does not make a distinction between crimes that are enforced and those that are nonetheless a federal crime.⁶⁰ The Maine Commission also stated that the attorney, keeping in mind the degree of risk, should evaluate where the line is drawn between permissible and forbidden activities on a case-by-case basis.⁶¹

In 2011, the State Bar of Arizona’s Ethics Committee (the “Arizona Ethics Committee”) came to almost exactly the opposite conclusion than the one reached by the Maine Commission.⁶² 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 interest 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.⁶³

⁶⁰ Opinion #199. Advising Clients Concerning Maine’s Medical Marijuana Act (July 7, 2010) *available at* http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134.

⁶¹ *See id.*

⁶² *See* Sam Kamin & Eli Wood, *Marijuana Lawyers: Outlaws or Crusaders*, 91 OR. L. REV. 869, 904 (2013).

⁶³ State Bar of Arizona Ethics Opinion 11-01 (February 2011) *available at* <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

Two years later, Connecticut released official commentary on Rule 1.2(d) stating that, “[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed.”⁶⁴ In the context of medical marijuana, the opinion stated, “that lawyers may advise clients of the requirement of the Connecticut Palliative Use of Marijuana Act,” but urged lawyers to “carefully assess” where to draw the line between consultation and explanation, and participating in criminal enterprises.⁶⁵ In short, Connecticut mimicked the Maine approach.

The Colorado Bar Association Ethics Committee (the “Colorado Committee”) addressed this issue in October 2013 after Amendment 64 passed in November 2012.⁶⁶ The opinion concluded that because of Rule 1.2(d) lawyers who advise clients under the state’s medical and recreational statutes are acting unethically if they assist clients in structuring or implementing transactions which on their own violate federal law.⁶⁷ Examples of forbidden conduct included: drafting or negotiating contracts to facilitate the purchase or sale of marijuana, drafting leases for facilities, and drafting contracts for supplies used in the cultivation, distribution, or the sale of marijuana, even if they comply with Colorado law.⁶⁸ At that time, the Colorado Committee viewed such legal work as aiding and abetting as part of a conspiracy to violate federal law.⁶⁹ While the opinion recognized the difference between explaining the law versus urging a client to

⁶⁴ Informal Opinion 2013-02: Providing Legal Services to Clients Seeking Licenses Under the Connecticut Medical Marijuana Law (January 16, 2013) *available at* [http://c.ymcdn.com/sites/ctbar.siteym.com/resource/resmgr/Ethics Opinions/Informal Opinion 2013-02.pdf](http://c.ymcdn.com/sites/ctbar.siteym.com/resource/resmgr/Ethics%20Opinions/Informal%20Opinion%202013-02.pdf).

⁶⁵ *Id.*

⁶⁶ Colo. Bar Ass’n Ethics Comm., Formal Opinion 125- The Extent to Which Lawyers May Represent Clients Regarding Marijuana- Related Activities, 42 COLO. LAW. NO. 12,19 (adopted October 21, 2013).

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *Id.*

violate the law, the Colorado Committee also had unanswered questions about tax preparation and planning, if the intent is to assist the client in violating federal law.⁷⁰ After attorneys urged the Colorado Committee to amend Rule 1.2(d), on March 24, 2014, the Colorado Supreme Court responded with the following commentary:

A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by those constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.⁷¹

The court's decision is interesting for two reasons. First, it is simply commentary intended as a guide for interpretation, as it does not change the black letter law. Second, it manages to avoid using the words "marijuana" or "cannabis." Nonetheless, it provides a level of protection for attorneys in Colorado.⁷²

When Washington legalized recreational cannabis use in 2012, lawyers looked to their state bar association for guidance. Regulators responded by adding a new comment to Rule 1.2:

At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 and may assist a client in conduct that lawyer reasonably believes is permitted by this statute

⁷⁰ *Id.*

⁷¹ COLO. RULES OF PROF'L CONDUCT, RULE 1.2 OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER, Amended and Adopted by the Court, En Banc (March 24, 2014) available at https://www.courts.state.co.us/userfiles/file/court_Probation/Supreme_Court/Rule_Changes/2014/2014%2805%29%20redlined.pdf.

⁷² *Id.*; see also Phil Cherner, *Marijuana and Your License to Practice Law: A Trip Through the Ethical Rules, Halfway to Decriminalization* (August 2015) available at <http://www.philcherner.com/Articles/2014%20Ethics%20of%20pot%20lecture.pdf>; see also NEV. RULES OF PROF'L CONDUCT, Order Adopting Comment [1] To Nevada Rule or Prof'l Conduct 1.2 (adopted March 11, 2014) available at http://nvcourts.gov/Supreme/Rules/Amendments/Proposed/ADKT_0495_In_re_Amendments_to_Rule_of_Professional_Conduct_1_2/ (adopting a nearly identical comment to Colorado).

and other statutes, regulations, orders, and other state and local provisions implementing them.⁷³

Washington's Office of Disciplinary Counsel adopted a similar position by announcing that the state "does not intend to discipline lawyers who in good faith advise or assist clients or personally engage in conduct that is in strict compliance with the state and its implementing regulations."⁷⁴

B. A New Approach to Rule 1.2(d)

As more states continue replacing prohibition with taxation and regulation, attorneys will continue to seek guidance from the state bar associations. The state will have two options: either to mimic the questionable Maine and Connecticut approach or to follow a more reasonable Colorado and Washington approach.

A suggested remedy for the inconsistencies between state ethics opinions can be resolved by relying on the criminal law distinctions between knowledge and intent, for those concerned about accomplice and coconspirator liability.⁷⁵ The Rule 1.2(d) should be read 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.⁷⁶ Without guidance from lawyers, clients would often be left unable to ascertain the meaning and

⁷³ WASH. RULES OF PROF'L CONDUCT COMM. 18 TO RULE 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer (effective Dec. 9, 2014) available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garp1.02.

⁷⁴ Letter from Douglas J. Ende, Chief Disciplinary Counsel, Wash. State Bar Ass'n, to Charles W. Johnson, Assoc. Chief Justice & Rules Comm. Charman, Wash. Supreme Court (October 24, 2013), available at http://www.kcbar.org/judicial/legislative/pdf/ende_102413.pdf; see also OREGON RULES OF PROF'L CONDUCT 1.2(D) ("Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.") (Amended Feb. 19, 2015) available at <https://www.osbar.org/docs/rulesregs/orpc.pdf>.

⁷⁵ Kamin, *supra* note 64 at 906.

⁷⁶ *Id.*

application of the law. Clients would effectively be denied the ability to decide how to conduct themselves under the law in an informed manner.⁷⁷ If lawyers face disciplinary charges for “assisting” clients whenever one merely knows of the clients’ criminal conduct, defense attorneys would be inhibited from representing their clients.⁷⁸

Consider the earlier example where Mark seeks legal advice from Olivia because he would like to apply for a license to own and operate a dispensary. The application process is complex and detailed. If a lawyer is only allowed to discuss the process and associated risks, but prohibited from “assisting” clients in filling out an application, the practical reality would deny Mark the ability to apply for a license.⁷⁹ Access to an attorney is a crucial element to implementing such policy decisions; especially in instances when the law is in flux, clients need legal assistance more than ever.⁸⁰

Access to counsel is fundamental to ensuring that clients make decisions considering the current state of the law and the potential consequences.⁸¹ Under Model Rule of Professional Conduct Rule 1.2(b), “[a] lawyer’s representation of a client... does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”⁸² Prohibiting the assistance of counsel is justified in serious *mala in se* crimes (i.e. murder, rape, robbery and assault), but not in the case of *mala prohibita*, in which actions are deemed “criminal” merely because they are prohibited.⁸³ The “access to law and lawyers” justification requiring intent as a

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.* at 907.

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² MODEL RULE OF PROF’L CONDUCT R. 1.2(b) (2015).

⁸³ Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301,1322 (1995).

condition to finding attorney misconduct is different than the one advanced in criminal law.⁸⁴ In the ordinary course of business, lawyers inquire into the clients' plans and sometimes motives. Since the assistance of counsel is fundamental to the exercise of client autonomy, it is important that lawyers do not become their clients' gatekeepers or act as moral police officers.⁸⁵

Pursuant to the Model Rules of Professional Conduct, the client alone determines the objectives of the attorney-client relationship.⁸⁶ An attorney in the position to act as the client's gatekeeper should refrain when doing so would usurp the clients' autonomy.⁸⁷ Although lawyers are retained to represent clients, they do not, by virtue of representation, "endorse" or form the intent to help clients pursue their goals.⁸⁸ Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent itself make a lawyer a party to the course of action by inferring intent from sheer knowledge of the client's goals.⁸⁹ Assuming that the attorney provides the same services to her cannabis clients that she does to all other business clients, she has not acquired a stake in the illegality of the venture, and there is no cause to equate such knowledge with intent.⁹⁰

The practice of law often tolerates instances when a lawyer knows of clients' criminal conduct, but is not required to abstain from offering legal services as a result. For example, if a criminal defense attorney learns while representing the accused that the client is guilty of the crime, instead of informing the prosecutor or the court, the defense counsel is expected to

⁸⁴ See Chemerinsky *supra* note 6 at 907.

⁸⁵ See *id.* at 909.

⁸⁶ MODEL RULES OF PROF'L CONDUCT R.1.4 (2015).

⁸⁷ See Chemerinsky *supra* note 6 at 911.

⁸⁸ See *id.*

⁸⁹ Lisa G. Lerman et. al, *Ethical Problems in the Practice of Law*, 15 (Erwin Chemerinksy et al. eds., 2015-2016 ed.).

⁹⁰ Kamin, *supra* note 64 at 908.

continue to represent the client.⁹¹ This expectation is grounded in the idea that the government has the burden of persuasion to prove guilt beyond a reasonable doubt.⁹² Similarly, a defense attorney may come to know of her client's ongoing or future criminal plans; however, the Model Rules do not mandate disclosure of such information to the police or victim.⁹³ The point is not to either ignore or endorse the client's conduct, but rather to respect a competing value, the sanctity of the attorney-client relationship.⁹⁴

In the same way a defense attorney exercises professional discretion, prosecutors also utilize discretion in deciding whether to charge a suspect with the accused crime or with a lesser offense.⁹⁵ This exercise of prosecutorial discretion does not violate the prosecutor's duty as an officer of the legal system. Instead, society acknowledges that competing policy considerations warrant the exercise of discretion and professional judgment.⁹⁶ Prosecutors exercise discretion

⁹¹ See Monroe H. Freedman, *The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469-72 (1966).

⁹² See *id.*

⁹³ The only mandatory exceptions to confidentiality are disclosures 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) (2015). 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).

⁹⁴ "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 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 (2015) (emphasis added).

⁹⁵ See generally Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J 607 (1999); see also Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutor's Ethics*, 55 VAND. L. REV. 381 (2002).

⁹⁶ *Id.*

when deciding not to charge state compliant cannabis businesses, knowing that the owners are guilty of a federal crime.⁹⁷

C. Attorneys' Personal Conduct

1. Personal Participation in Legal Cannabis

When analyzing whether a lawyer violates one's professional responsibilities by participating in legal conduct under state law, we look to Model Rule of Professional Conduct Rule 8.4(b), governing attorney misconduct.⁹⁸ Rule 8.4(b) also extends to an attorneys "personal conduct" outside of her professional duties, stating that 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," constitutes misconduct.⁹⁹ It is important to note that Rule 8.4(b) does not consider violations of criminal law misconduct; *only* activity that reflects negatively on her trustworthiness or fitness as a lawyer is deemed misconduct.¹⁰⁰ In the past, this provision has been violated by crimes such as embezzlement.¹⁰¹

Violating federal law by becoming a patient in a state-sponsored medical marijuana program does not constitute professional misconduct for several reasons. Possessory crimes, unless the behavior is indicative of a dependence problem, generally does not invoke Rule 8.4(b).¹⁰² Second, while conduct involving alcohol and drugs has often been deemed misconduct, the typical fact pattern for attorney misconduct involves driving under the influence,

⁹⁷ Kamin, *supra* note 64 at 913.

⁹⁸ MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2015).

⁹⁹ *Id.*

¹⁰⁰ Kamin, *supra* note 64 at 913.

¹⁰¹ Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 705 (2003).

¹⁰² *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2015) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority.").

providing incompetent representation, or otherwise complete disregard for the law.¹⁰³ Registered medical patients, however, are not engaged in any additional wrongdoing for such to constitute professional misconduct, and their conduct does not harm others.¹⁰⁴

To bolster this reading of Rule 8.4(b), the Colorado Bar Association Ethics Committee (“the Committee”) determined that consumption by a lawyer-patient, compliant with state law, is not in itself professional misconduct. The Committee refused to find the required “nexus between the violation of law and the lawyer’s honesty, trustworthiness, or the fitness as a lawyer in other respects.”¹⁰⁵ Relying on state constitutional and statutory enactments, the Committee was hard-pressed to find that such behavior adversely reflected on the attorney’s fitness.¹⁰⁶ Thus, patient participation in a medical program does not violate Rule 8.4(b).¹⁰⁷ For the same reasons, it is difficult to see how attorney participation in recreational cannabis in legal states would violate Rule 8.4(b).¹⁰⁸

2. Financial Participation in the Marijuana Industry

Attorney participation in a state’s marijuana industry as an investor or owner presents a tighter dilemma, which would likely constitute professional misconduct under Rule 8.4(b).¹⁰⁹ An lawyer-patient who uses cannabis to treat a medical condition and a lawyer-consumer of recreational cannabis is differently situated from an investor in a dispensary. Preamble 5 of the Model Rules of Professional Conduct states that “[a] lawyer’s conduct should conform to the

¹⁰³ *Id.*

¹⁰⁴ Kamin, *supra* note 64 at 913.

¹⁰⁵ Colorado Ethics Comm., Formal Opinion 124 (2012), *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=7626.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ Kamin, *supra* note 64 at 916.

¹⁰⁹ *Id.*

requirements of law, both in professional service to clients and in the *lawyer's business and personal affairs*.¹¹⁰ The fact that ownership of a dispensary has nothing to do with the attorney's professional law practice does not negate liability under the Rule 8.4(b).¹¹¹

The question then becomes whether ownership in a business, which violates federal law amounts to criminal conduct that reflects adversely on one's honesty, trustworthiness, or fitness as an attorney. Because fitness includes fidelity to the law and public disrespect for the law is acknowledged as grounds for discipline, it seems apparent that a lawyer may not own or invest in a cannabis dispensary.¹¹² Unlike being a medical patient, inherently private conduct, ownership of a dispensary is inherently public, since ownership of any business is generally a matter of public record.¹¹³ Thus, an attorney's participation in the industry as a financial stakeholder is law-breaking of a different kind and could subject the attorney to discipline under Rule 8.4(b) and criminal prosecution under federal law.¹¹⁴

V. THE CURRENT STATE OF LEGALIZATION AS A MAINSTREAM ISSUE

According to the Colorado Department of Revenue, the state has received nearly \$70 million in tax revenue from cannabis between July 1, 2014 and June 30, 2015, easily beating the nearly \$42 million in taxes on alcohol.¹¹⁵ However, there is a little known provision of the federal tax code with crippling consequences for businesses operating in clear compliance with

¹¹⁰ MODEL RULES OF PROF'L CONDUCT pmb1. 5 (2015) (emphasis added).

¹¹¹ Kamin, *supra* note 64 at 916.

¹¹² *See id.*

¹¹³ *See id.* at 917.

¹¹⁴ In this case the lawyer's criminal liability is direct, rather than relying on application of accomplice or coconspirator doctrines.

¹¹⁵ Debra Borchardt, *Colorado Now Reaping More Tax Revenue From Pot Than From Alcohol*, Forbes (September 16, 2015) available at <http://www.forbes.com/sites/debraborchardt/2015/09/16/colorados-pot-tax-revenues-are-higher-than-alcohols/#49ba0327716b>.

state law.¹¹⁶ Federal Tax Rule 280E¹¹⁷ requires any trade or business operating in violation of federal drug laws, and only federal drug laws, to pay federal income tax on unfavorable terms.¹¹⁸ Under 280E a cannabis retailer cannot deduct ordinary business expenses before calculating taxable income; other than the cost of obtaining the goods for sale, a marijuana business is required to pay taxes on gross income.¹¹⁹ All other ordinary and necessary business expenses such as retail rent, employee payroll, lights, and proper ventilation cannot be deducted like other businesses.¹²⁰ It is hard to imagine how a business could survive without deducting things that account for the bulk of ordinary business expenses.¹²¹

In 2015, Ohio overwhelmingly rejected Issue 3, which would have legalized both medical and recreational cannabis at the same time, moving too far too fast.¹²² This initiative probably did not fail on the merits related to marijuana.¹²³ The Ohio ballot measure allowed for only ten cultivation facilities to produce all of the cannabis for the entire state, creating a monopoly for the initiative's financial backers.¹²⁴ This radically contrasts both Colorado and Washington law, which allows for a free-market marijuana economy.¹²⁵

¹¹⁶ See Chemerinsky, *supra* note 6 at 94.

¹¹⁷ I.R.C. § 280E (2015).

¹¹⁸ Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523,522 (2014) (“To be clear, this over-taxation of a marijuana seller’s income is not simply the result of her engaging in an illegal business activity. If she were engaged in murder for hire, she would owe federal income tax on the profits she made from such activity, but would be allowed to deduct as ordinary and necessary business expenses the cost of her gun and bullets, the cost of overnight travel to and from the crime scene, any amounts she paid to employees or contractors who helped her carry out her crime, and other expenses associated with criminal activity.”).

¹¹⁹ *See id.*

¹²⁰ See Chemerinsky, *supra* note 6 at 94.

¹²¹ Kamin, *supra* note 44.

¹²² See Hilary Bricken, *O-High-O? Says ‘No’ to Marijuana, But Don’t Sweat It*, ABOVE THE LAW (Nov. 9, 2015) available at <http://abovethelaw.com/2015/11/o-high-o-says-no-to-marijuana-but-dont-sweat-it/>.

¹²³ *Id.*

¹²⁴ Jacob Sullum, *2 Reasons Ohio Voters Overwhelmingly Rejected Marijuana Legalization*, FORBES, (Nov. 4, 2015) available at <http://www.forbes.com/sites/jacobsullum/2015/11/04/2-reasons-ohio-voters-overwhelmingly-rejected-marijuana-legalization/2/#398f4ce75cdb>.

¹²⁵ See Kamin, *supra* note 64 at 916.

In 2013, the American Civil Liberties Union released a report, which focused on the racial disparities in marijuana arrests over the past decade.¹²⁶ The report found on average, African-Americans are 3.73 times more likely to be arrested for marijuana possession than their Caucasian counterparts, despite the fact that both races use marijuana at similar rates.¹²⁷ In an age of mass incarceration, such racial disparities exist in all regions of the country, urban and rural, wealthy and poor.¹²⁸ Like the larger War on Drugs, marijuana prohibition has been a failure that needlessly placed hundreds of thousands of people into the criminal justice system.¹²⁹

With the number of marijuana arrests at a historic low, the District of Columbia is currently leading the country with legalization from a racial justice perspective.¹³⁰ In 2010, the District of Columbia was among the worst offenders of this national trend, spending more money on marijuana enforcement than almost any other state or county in the country.¹³¹ According to data produced by the Metropolitan Police Department, law enforcement officers in the District of Columbia averaged nearly fifteen marijuana related arrests per day in 2010, spending millions of dollars on enforcement practices.¹³² In November 2015, one year after D.C. passed Initiative 71, the ballot measure which effectively legalized marijuana for personal cultivation and possession

¹²⁶ Ezekiel Edwards et. al., *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, 4, (ACLU 2013) available at www.aclu.org/marijuana.

¹²⁷ See *id.*

¹²⁸ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press, 2010).

¹²⁹ See *id.*

¹³⁰ Andrew Giambrone, *A Year After Marijuana Legalization, Arrests Are Dramatically Down*, (Nov. 10, 2015) available at <http://www.washingtoncitypaper.com/blogs/citydesk/2015/11/10/a-year-after-marijuana-legalization-arrests-are-dramatically-down/>.

¹³¹ In the District, slightly over half of the population is African American; yet in 2010, 91 percent of all marijuana arrests were of African- American people. Seema Sadanandan & Jennifer Wedekind, *Behind the D.C. Numbers: The War On Marijuana in Black and White*, 4 (2013) available at <http://aclu-nca.org/billions-of-dollars-wasted-on-racially-biased-arrests-behind-dc-numbers>.

¹³² See *id.*

in one's own home, marijuana related arrests decreased by 99.2 percent from 2014's 895 total arrests.¹³³

State regulators in Maryland recently received nearly 900 applications to grow, produce, and sell medical marijuana.¹³⁴ The Medical Marijuana Commission can authorize up to fifteen grow facilities, will allow up to two dispensaries in each senatorial district, and prohibits a single entity from operating more than one dispensary.¹³⁵ The number of applications received ensures that the commission will have a strong pool of qualified candidates to consider and that the state's medical cannabis program will be self-funded as intended by the legislative branch.¹³⁶

VI. CONCLUSION

There are many parallels that can be drawn between the end of alcohol prohibition and the movement currently underway to legalize marijuana. Both substances were banned by acts of Congress based on fear of how use would impact society.¹³⁷ By the time alcohol prohibition was repealed, fifty-eight percent of Americans admitted to consuming alcohol, suggesting that the public favored ending prohibition.¹³⁸ In 2015, fifty-eight percent of Americans support legal cannabis.¹³⁹

¹³³ *Id.*

¹³⁴ Fenit Nirappil, *Nearly 900 Apply to Grow, Produce, or Sell Medical Marijuana in Maryland*, (November 12, 2015) available at https://www.washingtonpost.com/local/md-politics/nearly-900-apply-to-grow-or-sell-medical-marijuana-in-maryland/2015/11/12/aa093d7c-8954-11e5-9a07-453018f9a0ec_story.html.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Hull, *supra* note 20 at 357; see also David J. Hanson, National Prohibition Act, ALCOHOL PROBS. & SOLUTIONS, <http://www.alcoholproblemsandsolutions.org/Controversies/National-Prohibition-Act.html> (last visited Jan. 26, 2016).

¹³⁸ *Alcohol and Drinking*, GALLUP, <http://www.gallup.com/poll/1582/alcohol-drinking.aspx> (last visited Jan. 25, 2016).

¹³⁹ Jeffery M. Jones, *In U.S., 58% Back Legal Marijuana Use*, GALLUP, <http://www.gallup.com/poll/186260/back-legal-marijuana.aspx> (last visited Jan. 25, 2016).

Many states and municipalities have decriminalized marijuana, effectively stopping arrests and issuing civil citations for personal possession.¹⁴⁰ Decriminalization, however, does not go far enough to protect consumers. As long as supplying marijuana remains illegal under federal law, the business will remain a criminal monopoly.¹⁴¹ The enormous tax revenue generated in states that have fully legalized has created increasing pressures on other state legislatures to follow.¹⁴² In Colorado, the state reserved a portion of tax revenue to fund the construction of schools and distributes a portion of revenue collected to local governments with retail stores.¹⁴³

Marijuana has already started to play a mainstream role in the upcoming presidential election.¹⁴⁴ Given the hardline partisan political environment of the last nearly forty years, it is rare for Democrats and Republicans to agree on anything. Yet this issue has implications for candidates in states that truly matter in a presidential campaign.¹⁴⁵ Recreational marijuana is a reality in swing states like Colorado and will appear this year on the ballot in Nevada.¹⁴⁶ With more federal bills pending before Congress than ever before, representatives from both political parties acknowledge the need to amend federal controlled substance law.¹⁴⁷

¹⁴⁰ See *States That Have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Jan. 26, 2016).

¹⁴¹ See *Decriminalizing Drugs Leaves the Crooks with the Cash*, THE ECONOMIST, (July 28, 2014) available at <http://www.economist.com/news/leaders/21605908-decriminalising-drugs-leaves-crooks-cash-legalise-drugs-instead-half-smoked-joint?frsc=dg%7Ca>.

¹⁴² See Hull, *supra* note 20 at 358.

¹⁴³ See Matt Ferner, *Colorado Recreational Weed Sales Top \$14 Million in First Month*, HUFFPOST BUS. (Mar. 10 2014, 6:03PM EST), http://www.huffingtonpost.com/2014/03/10/colorado-marijuana-tax-revenue_n_4936223.html.

¹⁴⁴ See John Hudak, *2016 Will Be The Marijuana Election*, NEWSWEEK (Mar. 22, 2015) available at <http://www.newsweek.com/2016-will-be-marijuana-election-315472>.

¹⁴⁵ *Id.*

¹⁴⁶ See Hudak, *supra* note 146; see also Nevada Marijuana Legalization Initiative, BALLOTPEDIA: THE ENCYCLOPEDIA OF AMERICAN POLITICS (last visited Jan. 26, 2016) available at [https://ballotpedia.org/Nevada_Marijuana_Legalization_Initiative_\(2016\)](https://ballotpedia.org/Nevada_Marijuana_Legalization_Initiative_(2016)).

¹⁴⁷ *Supra* note 48.

Cannabis prohibition is crumbling and the sky isn't falling. Like alcohol, states will experiment with different regulatory systems, in order to find the best practices for regulation and taxation while maintaining public safety.¹⁴⁸ As states continue with cannabis reform, attorneys will seek guidance from state bar associations on ethical issues. As bar associations continue to weed out the ethical dilemmas, pioneering attorneys will continue sift through the symphony of ethical obligations, to strive for a good-faith balance between duty to the client and their role as an officer of the legal system.¹⁴⁹

¹⁴⁸ *See supra* note 64 at 931.

¹⁴⁹ *See id.*