Medical Marijuana Lawyers: Outlaws or Crusaders?

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I. INTRODUCTION

In 17 states and the District of Columbia, voters have passed measures permitting the use of marijuana for medical purposes. At the same time, marijuana remains a Schedule 1 narcotic, a drug whose manufacture, possession, and distribution remains prohibited by federal law. This article focuses on the ethical (and sometimes criminal) quandary that the tension between state and federal marijuana laws in this area creates. As marijuana moves from the shadows to the storefronts in medical marijuana (“MMJ”) states, it becomes a business. Businesses have employees, shareholders and leases. They must comply with state and local zoning ordinances and pay their taxes. In most businesses, proprietors turn to lawyers for help with these and other legal issues. Lawyers incorporate businesses, they write leases and employment agreements, they help navigate the labyrinth of regulatory compliance and ensure that taxes are being paid promptly and accurately.

This usual relationship is obviously and necessarily complicated by the fact that the manufacture and sale of marijuana remains a federal offense punishable by up to twenty-five years in prison. While a state may choose to de-criminalize, medicalize, or even legalize marijuana, it does not have the power to undo the federal, criminal prohibition of the drug. Even in a “medical marijuana state” 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, attorneys who take on marijuana clients face the possibility of both significant ethical and criminal consequences for their actions.

In this article, we discuss the ethical and criminal provisions that impact a lawyer’s representation of those working in the medical marijuana

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2 See part IV, infra.
industry. We show that under traditional readings of both criminal law and the Model Rules of Professional Conduct, an attorney is prohibited from providing most kinds of legal assistance to a medical marijuana client. We argue, however, that a literal reading of the rules would have serious negative repercussions in those states that have enacted MMJ regulations. Without the participation of attorneys, important state policies regarding access to medicine will be frustrated; where a state has chosen to regulate marijuana as medicine, lawyers are a necessary part of the implementation of that policy decision.

There are important limits to this representation, however. Some of these limits are easy to define, while others are far more amorphous. We borrow from the law of accomplice and co-conspirator liability to give shape to the line between permitted and forbidden legal help. We argue that so long as lawyers merely provide the same services on the same terms to their MMJ clients that they do to their other clients, they violate neither their ethical obligations nor the prohibitions of the criminal law.

Using specific examples, we give much-needed guidance to attorneys engaged in this emerging and fraught area of practice. Our proposed reading of Rule 1.2(d), the pertinent legal ethics rule prohibiting assisting a client in the commission of a crime, establishes that lawyers may generally help MMJ clients address the majority of their legal needs; attorneys may defend MMJ clients charged with violations of the Controlled Substances Act, may serve as lobbyists in challenging federal law and can advise clients about the state of the law. Lawyers may also generally help clients with compliance work, such as filing for a license to own and operate a medical marijuana dispensary, and may negotiate leases for commercial real estate space out of which clients will operate a dispensary, draft contracts for the sale of marijuana and advise clients about employment matters pertaining to MMJ business. In most instances, we argue, such conduct will not violate Rule 1.2(d) at all because lawyers lack the intent necessary for assistance of criminal activity. Even when a lawyer’s conduct will arguably violate Rule 1.2(d), we believe that an attorney may have a moral reason to nonetheless help a MMJ client if the lawyer finds the federal law in question strongly unjust, as long as the lawyer accepts the disciplinary consequences of her conduct.
II. A History of Marijuana in the United States

A. Federal Law

1. The Birth of Marijuana Prohibition

Even those who continue to believe that marijuana is a pernicious drug\(^3\) must acknowledge that the history of its regulation in the United States is a sorry one.\(^4\) Marijuana was initially criminalized in the U.S. for explicitly racialized reasons. 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 movement to criminalize it. In large part because of these negative associations, Congress passed the Marijuana Tax Act in 1937, removing the drug from the list of approved pharmaceutical substances.\(^5\)

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

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\(^1\) 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.

\(^2\) See, Sam Kamin, Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States, 43 McGeorge L. Rev. 147 (2012)


\(^5\) See, 21 USC § 811, et. seq.

\(^6\) Among the drugs in Schedule II are: opium, PCP, cocaine, and amphetamines. Other serious drugs are subject to the less restrictive regulation of Schedule III: ketamine, anabolic steroids and barbiturates.

\(^7\) In response to recent raids by agents of the DEA on medical marijuana providers in California, funding bills have been introduced in Congress that would forbid the use of federal funds to prosecute those complying with state medical marijuana provisions; these bills have consistently been defeated. A typical provision stated “None of the funds made available in this Act to the Department of Justice maybe used [in certain states] to prevent such States from implementing their own State laws that authorize the use, distribution, possession or cultivation of medical marijuana.” See, “Amendment Offered by Mr. Hinchey,” Congressional Record, daily edition, vol. 153 (July 2007), p. H8484 (“the Hinchey-Rohrabacher Amendment”).
2. DEA Regulation Today

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 on the states is not in question. In Gonzales v. Raich the United States Supreme Court rejected a commerce clause challenge to the power of Congress to regulate the intrastate cultivation and consumption of marijuana. Because even intrastate marijuana production affects interstate commerce, the Court held, it was properly the subject of Congressional regulation under the Interstate Commerce Clause.

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 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. 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. Furthermore, as discussed more fully below, the CSA and its forerunners have been influential on the passage of state laws prohibiting marijuana. Notwithstanding the blanket federal prohibition of marijuana, the legislatures of every state have made the drug’s manufacture and sale a criminal offense as well.

As a result of this web of state and federal laws, an enormous number of people have been and continue to be arrested and subsequently incarcerated for marijuana crimes in the United States. One study calculated the number of marijuana prisoners nationwide at nearly 45,000 and the annual costs of this incarceration at more than $1 billion. In 2010 more than 45% of those arrested for drug possession in the United States were arrested for marijuana

10 545 U.S. 1 (2005).
12 Citations.
13 Citations.
with the vast majority of these arrests occurring at the state and local level.\textsuperscript{15}

The second major consequence of marijuana’s categorization as a Schedule I narcotic is the inability of DEA-certified physicians to prescribe the drug. 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 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.\textsuperscript{16}

\subsection*{B. State Regulation}

In part because of concerns about the efficacy and fairness of federal marijuana laws, the past several years have seen significant pressure to change marijuana’s continued categorization as an illicit substance. 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 regulated and taxed.\textsuperscript{17} Others have praised it as a powerful medicine, effective at treating pain, nausea and other ailments.\textsuperscript{18} Still others see the underground marijuana trade as a potential source of state revenue. Arguing that the combination of taxing and regulating marijuana combined with an end to the arrest and prosecution of non-violent 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


\textsuperscript{16} Citations. The term “recommendation” is carefully chosen; while Congress and the DEA may, through regulation, determine what drugs may and may not be prescribed by licensed physicians, its power to limit what is discussed between doctors and patients is limited by the First Amendment. In \textit{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. 309 F.3d 629 (9th Cir. 2002). The court relied in part on Supreme Court decisions dealing with the right of publicly funded doctors to discuss abortion with their clients despite a federal ban on the public funding of abortion.

\textsuperscript{17} See, e.g., NORML, About Marijuana, at norml.org/index.cfm?Group_ID=7305 (last visited November 18, 2010) (“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.”)

\textsuperscript{18} See, e.g., Drug Policy Alliance, Medical Marijuana, at \url{www.drugpolicy.org/-marijuana/medical} (“Numerous published studies suggest that marijuana has medical value in treating patients with serious illnesses such as AIDS, glaucoma, cancer, multiple sclerosis, epilepsy, and chronic pain. In 1999, the Institute of Medicine, in the most comprehensive study of medical marijuana’s efficacy to date, concluded, ‘Nausea, appetite loss, pain and anxiety . . . all can be mitigated by marijuana.’”\textsuperscript{\textdagger}}
economic times. Finally, the racial disparity in the enforcement of marijuana laws has become difficult for many to ignore.\(^\text{19}\)

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.\(^\text{20}\) In addition, many municipalities have told their law enforcement units to treat the possession of marijuana as their lowest priority.\(^\text{21}\) 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. And this drive has proven increasingly effective: Seventeen states and the District of Columbia have recently legalized marijuana for medicinal purposes, making the drug available to those with a doctor’s recommendation.\(^\text{22}\) In the Fall of 2012, the issue will be on the ballot again in a number of states, possibly raising the number of medical marijuana states.

Provision for medical marijuana use is thus inherently something of a middle ground. It does not do away with the prohibition entirely; it merely provides a criminal defense to some users. Furthermore, in a number of states, there has been criticism that medical marijuana provisions are nothing more than a wink and a nod at full legalization. The combination of easy access to medical recommendations and “medical” marijuana dispensaries with names like Dr. Reefer and Rocky Mountain High along with aggressive advertising and marketing campaigns has led in some places to a backlash against the medical marijuana industry. While this has taken the form of retrenchment in some states, in others it has led to calls to do away with the charade and simply permit marijuana to be sold to any adult regardless of whether they’ve received a doctor’s recommendation or not.


No state has yet made this leap, however. Although more than a third of all state governments have now made medical marijuana available to their citizens, so far no state has gone the next step and removed its own prohibitions on the drug. The federal government has made clear that it would look with extreme disapproval on any such move. As discussed more fully below, the federal government can neither require the states to pass state analogs to the CSA nor prevent them from repealing such laws if they are already on the books. However, the federal government is by no means impotent with regard to state marijuana policy. This was demonstrated in 2010 when California considered Proposition 19, which would have legalized possession and manufacture of relatively large amounts of marijuana. The measure was polling strongly throughout the state headed into the final weeks before the election when Attorney General Eric Holder weighed in expressing the federal government’s staunch opposition to the initiative; Proposition 19 lost by seven percentage points.23

C. Uneasy Federalism – The Impact of State Marijuana Laws

Although Congress clearly has the power both to regulate marijuana and to preempt state regulation of that substance,24 it has so far chosen not to preempt the increasing number of state laws that have repealed or weakened state marijuana prohibitions. However, the power of the federal government to affect the behavior of the states in this regard is inherently limited. Even if state laws are preempted, Congress cannot force the states to enact legislation consistent with the CSA nor to repeal already passed laws that are inconsistent with it. Furthermore, it cannot enlist unwilling state or local officials in the enforcement of federal laws.25

This is not to say, of course, that there are no consequences to the

23 Notwithstanding such federal saber-rattling, however, it appears to be only a matter of time before some state makes that leap. Support for legalization appears to be growing. nationally; the gap between support for and opposition to the legalization of marijuana has dropped from 66% in 1991 to just 5% today. Proposition 19 was just the first major push for legalization, however, and legalization advocates in Colorado and other states have pledged to put the issue on their ballots in the near future.

24 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.”).

federal government prohibiting conduct that a third of state governments have endorsed. Obviously, the most serious of these consequences is the ever-present risk of federal prosecution. Although there have been only a handful of federal prosecutions of dispensary owners who are clearly abiding by state MMJ regulations, recent actions by United States Attorneys’ Offices throughout the country indicate that the risk to MMJ practitioners remains non-negligible. These enforcement actions demonstrate the difficulty of trying to determine exactly how the CSA will be enforced against the marijuana industry.

This is particularly true when trying to determine the views of the current administration in Washington. Marijuana activists and others seized on Obama’s pro-marijuana sound-bites (emboldened, no doubt by images on the web purporting to show Obama smoking a joint during his youth)26 as a harbinger of a potential change in federal policy with regard to federal enforcement of marijuana laws. These supporters found further encouragement in statements Obama’s 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.”27

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.28 The memo, written by Deputy AG 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.”29 This memo was seized upon by many pro-marijuana advocates as an opportunity. In states that had adopted medical marijuana provisions, the memo was seen as a green light to the open sale of marijuana. In Colorado, California, and elsewhere 2009 saw an explosion in the number of store-front marijuana dispensaries openly doing business in a product prohibited under federal law.

A close reading of the Ogden memo shows that this interpretation was either careless or delusional on the part of those who rushed into the marijuana business in 2009. Although it was read by many as a pledge not

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26 A web search for the image in early 2011 revealed that it had appeared on more than 250 different websites.
28 Available at http://blogs.usdoj.gov/blog/archives/192
29 Id.
to enforce marijuana laws in those states that have adopted medical marijuana 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.”

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 medical marijuana. 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.

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 – 8 months after the issuance of the Ogden memo – a second memo, written by James Cole, was released by the Justice Department on essentially the same topic. That memo states that while the Justice Department’s policy has not changed, facts on the ground certainly had:

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

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 medical marijuana to be used and sold. What is more, the Cole memo went on to make clear just how serious a misreading this was of federal policy.

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

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.31 In addition, the US Attorneys sent cease and desist letters to both dispensary owners and their landlords, giving them 45 days to move their operations or else face arrest.32 In addition to the clear threat of criminal prosecution this action made clear that the threat of civil enforcement – explicit in the Cole memo – was not an empty one. For a federal government with limited resources, the specter of civil forfeiture is an incredibly powerful tool.33 Similar crackdowns have since taken place in Washington State, Colorado, and Montana.34

Just as the Justice Department’s enforcement of the CSA has not been strictly limited to the enforcement of criminal provisions, so the federal government’s response to medical marijuana has not been limited to the Department of Justice. The Internal Revenue Service invoked a Reagan-era provision for the principle that those in the business of dispensing medical marijuana may not deduct their business expenses as other business do.35

32 Id.
33 Id.
Using this provision, the IRS has sought to collect back taxes from those it believes wrongfully claimed deductions in violation of this policy.\textsuperscript{36} Obviously, this provision could decimate the industry; no business can afford to pay income tax on its gross receipts.\textsuperscript{37} When this is combined with the increasing unwillingness of banks and credit card companies to do business with the industry – it is becoming harder and harder for marijuana businesses to continue to do business at all.

These recent actions by the federal government make clear that even if the federal government does not seek to prosecute all of those in the states actively violating the controlled substances act – and realistically, it cannot do anything close to achieving full enforcement of the CSA. In particular, so many benefits in American life carry with them a promise not to violate any criminal prohibitions. So, 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 substance during their release; leases often condition continued occupancy on the lessor’s agreement not to use the premises for criminal purposes. In a world where marijuana is permitted under state law but prohibited under federal law, the legal status of a large number of individuals’ conduct will be very difficult for them to ascertain.


\textsuperscript{37} In addition, the Bureau of Alcohol, Tobacco, and Firearms sent a letter in September of this to all licensed firearms dealers, instructing them that all licensed marijuana patients were prohibited under federal law from obtaining firearms. Open Letter from Arthur Herbert, Ass’t Dir., Enforcement Programs & Servs., ATF, to All Federal Firearms Licensees (Sep. 21, 2011), available at http://www.nssf.org/share/PDF/ATFOpenLetter092111.pdf (“[A]ny person who uses or is addicted to marijuana, regardless of whether his or her state has passed legislation authorizing marijuana use for medical purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.”). The ban has been criticized by at least one State Attorney General, see Matt Volz, \textit{Montana Objects to Gun Ban for Medical Pot Users}, ASSOCIATED PRESS, Oct. 3, 2011 (on file with the McGeorge Law Review), available at http://www.chron.com/news/article/Montana-objects-to-gun-ban-for-medical-pot-users-2200714.php and has been challenged in federal court by a Nevada woman who was denied a handgun she sought for self-protection because the seller was aware that she was a medical marijuana patient. Steve Green, \textit{Nevada Woman Fighting Federal Ban on Medical Pot Users Owning Firearms}, VEGAS INC, Oct. 18, 2011, http://www.vegassign.com/news/2011/oct/18/nevada-woman/).
III. REPRESENTATION OF MEDICAL MARIJUANA CLIENTS: CRIMINAL CONCERNS

The recent increased willingness of the federal government to prosecute those involved in medical marijuana transactions in the states reminds us that there are significant criminal risks faced by those participating in the industry. And, importantly, the risks are borne not just by those actively participating in the industry – those who do business with the marijuana industry are also at risk. For criminal law punishes not just those who actively commit crimes but also those who aid and abet or conspire with those who commit those crimes. In particular, the federal law criminally regulating controlled substances makes explicit provision for the punishment of accomplices and co-conspirators of those actively violating the CSA. As we shall see, these doctrines have significant implications for those – landlords, wholesale suppliers, employees, and particularly lawyers – who represent those running marijuana businesses.

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, etc. – with varying degrees of culpability, the law of accomplice liability today is generally much more streamlined. Today, one is generally liable for a crime if one commits it oneself (the principal) or if one aids or encourages another to commit it (the accomplice). While this much is now relatively clear, there remains great debate regarding what mental state a purported accomplice must have in order to be liable for the principal’s conduct. 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.

38 See, e.g., 18 U.S.C. § 2(a)
39 Citation
40 See, e.g., Robert Weisberg, Reappraising Complicity, 4 BUFF. CRIM. L. REV. 232, 236 (2000-20001) (“For decades, the American courts and legislatures have debated whether knowledge or ‘true purpose’ should be the required mens rea for accomplice liability.”)
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Following the lead of the Model Penal Code,\textsuperscript{42} most states today require that an accomplice not merely encourage the principal to commit the offense, but that he have an actual intent to encourage the commission that offense.\textsuperscript{43} 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 was the accomplice’s intent to do so. Adopting an intent standard rather than the more lenient knowledge requirement,\textsuperscript{44} the MPC drafters drew on Judge Learned Hand’s famous statement in \textit{United States v. Peoni} that liability as an accomplice requires the defendant to intentionally associate himself with a criminal venture. Reading a statute that criminalized a party who “aids, abets, counsels, commands, induces, or procures” Hand noted the ancient origin of this string of verbs, noting that:

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

That is, under Judge Hand’s principle, the defendant must provide aid to a principal because of – and not in spite of – the fact that the conduct of the principal is criminal. Although there is great controversy regarding this conclusion, it has come to be the majority rule in the United States.\textsuperscript{45}

\textsuperscript{42} Written by the American Law Institute in the 1960s, the Model Penal Code’s provisions have had an enormous impact on law reform in the United States over the last 50 years.

\textsuperscript{43} See, MPC §2.06:

\begin{itemize}
  \item 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.
  \item A person is legally accountable for the conduct of another person when:
    \begin{itemize}
      \item (c) he is an accomplice of such other person in the commission of the offense.
    \end{itemize}
  \item A person is an accomplice of another person in the commission of an offense if:
    \begin{itemize}
      \item (a) with the purpose of promoting or facilitating the commission of the offense, he
        \begin{itemize}
          \item (i) solicits such other person to commit it; or
          \item (ii) aids or agrees or attempts to aid such other person in planning or committing it; or
          \item (iii) having a legal duty to prevent the commission of an offense, fails to make proper effort so to do . . .
        \end{itemize}
    \end{itemize}
\end{itemize}

\textsuperscript{44} While an early draft of the MPC accomplice liability provision set forth knowledge as a sufficient mens rea, that draft was eventually rejected in favor of what the MPC refers to as purpose. Tent Draft No. 1, 1953: “A person is an accomplice of another person in the commission of a crime if . . . acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission.”

\textsuperscript{45} See, e.g., \textit{U.S. v. Fountain}, 768 F.2d 790 (7\textsuperscript{th} Cir. 1985) (Posner, J.):

Under the older cases, illustrated by \textit{Backun v. United States}, 112 F.2d 635, 636-37 (4th Cir.1940), and \textit{Bacon v. United States}, 127 F.2d 985, 987 (10th Cir.1942), it was enough that the aider and abettor
And this distinction between knowledge and intent is no idle, semantic one. Holding criminally liable those who, while indifferent to the criminal goals of others, knowingly facilitate those offenses 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. So, the gas station owner who sells gas to the arsonist and the driver alike or the newspaper that accepts advertisements from prostitutes and gardeners alike is not liable when the services are misused. This is true even when the provider of services knows that the person purchasing theirs services is using them for nefarious purposes. The rationale for the intent requirement is grounded in American individualism. The concern is that a knowledge standard would turn every merchant into his brother’s keeper, requiring every shop owners 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 comers regardless of their plans for her services.

In this sense we see an example of a broader phenomenon. The criminal law, particularly in the United States, has long been loath to use criminal sanction to enforce ethics. For example, misprision of felony – the non-reporting of a crime of which an individual is aware – has been rejected in nearly all American jurisdictions.46 Similarly, American law has been unwilling to impose a Good Samaritan requirement on the general public.47 While other Western nations have passed legislation requiring those capable of giving aid to others in peril when it can be done without risk, the United States has consistently refused to do so.48 In the United States, one is criminally liable for failing to act only when the law has otherwise imposed a duty to do so; while parents are obligated to act to protect children and sea captains are obligated to act to protect their passengers, there is no general obligation to act to protect others. In a similar way a merchant is not liable

knew the principal’s purpose. Although this is still the test in some states (see, e.g., Sanders/Miller v. Logan, 710 F.2d 645, 652 (10th Cir. 1983)), after the Supreme Court in Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949), adopted Judge Learned Hand’s test—that the aider and abettor “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed,” United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)—it came to be generally accepted that the aider and abettor must share the principal’s purpose in order to be guilty of violating 18 U.S.C. § 2, the federal aider and abettor statute. See, e.g., United States v. Paone, 758 F.2d 774, 775 (2d Cir. 1985).

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


for failing to take steps to keep her lawful goods or services from being misused by her clientele.

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

**B. Co-conspirator liability**

A conspiracy is an agreement for criminal purposes. As defined by the United States Code, a conspiracy is present: “If 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.”\(^{49}\) 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 both be charged with the substantive crime of conspiracy and can be held liable for the substantive crimes committed by each of the others in the conspiracy. In this way, conspiracy law is a far more effective, far-reaching tool for prosecutors than is accomplice liability. A conspiracy may 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 co-conspirators are admissible against one and other, co-conspirators may be tried together in a single proceeding, and so on.\(^{50}\)

As with accomplice liability, a serious question exists with regard to the mental state necessary to bring a particular party to an agreement into a conspiracy. Clearly it is not enough that the defendant agreed with others who had nefarious goals; for example, the car owner who agrees to lend his car to a friend does not become his friend’s co-conspirator 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 with regard to accomplice liability, many courts hold that a

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\(^{50}\) *State v. Overton*, 298 S.E.2d 695, 716 (1982) (holding jurisdiction existed over those involved in a “criminal conspiracy if any one of the conspirators commits an overt act in furtherance of the conspiracy within the State”); *U.S. v. Gooding*, 25 U.S. 460, 461 (1827); *see also U.S. v. Nixon*, 418 U.S. 683, 701 (1974) (holding statements by co-conspirators admissible, and not barred as hearsay); *U.S. v. Villiard*, 186 F.3d 893, 895 (8th Cir. 1999) (holding that the general rule is that co-conspirators may be tried together).
true intent is required with regard to conspiracy as well. 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 – in the days before cell phones and pagers Lauria provided live message takers for those who could not be reached by telephone. He quickly became aware that many of those who used his services were prostitutes; in fact when the police came to ask him if he was aware of any prostitutes using his service he showed them the separate list that he kept of prostitute clients. Much to his surprise, Lauria was subsequently charged with conspiring with his clients to commit prostitution. However, the California appellate court upheld the trial court’s quashing of the indictment on the ground that Lauria’s awareness that he was agreeing with prostitutes to facilitate their crimes was insufficient to bring him within a conspiracy with them. 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). The MPC approach is consistent in requiring a true intent as are the approaches of a majority of states.

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. 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

51 59 Cal. Rptr 628 (1967).
52 See, e.g., MPC § 5.03(1) (“Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.”) (emphasis added)
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 take place.

C. Implications for Lawyers

Obviously, these doctrines raise serious concerns for attorneys working in the medical marijuana field. Lawyers are obviously not immune from the dictates of the criminal law and – like any other provider of lawful services – are liable under theories of aiding and abetting or conspiracy when the provision of services satisfies the elements of those doctrines.53 What is more, charging lawyers as accomplices or co-conspirators in violations of the CSA is a tool available to federal – as opposed to state – prosecutors. In other words, an attorney in a medical marijuana state might be fairly confident that she will not be prosecuted under state law or brought up on ethics charges by the state board of legal ethics 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 – will be quite so unwilling to charge those they believe to be enmeshed in violations of the CSA.

Nonetheless, it is unusual, though not unheard of, for lawyers to be criminally charged for assisting the criminal activity of their clients.54 Many cases of lawyer prosecution involve securities fraud or other white collar crime where attorneys are charged with aiding and abetting the commission of the crimes by preparing, filing, and vouching for fraudulent documents.55 Other criminal cases against attorneys have focused on lawyers whose close connection with organized crime has brought them within the scope of ongoing criminal enterprises.56 While there is not yet a reported case of an attorney being prosecuted for her involvement in a dispensary’s violation of the CSA, there is no logical reason why vicarious liability should be limited to these few contexts.

53 See, e.g., The Torture Lawyers, at 209 (“Lawyers also assume that the advice of counsel defense will preclude their own liability. This is completely false.”)
54 See, e.g., Jens David Ohlin, The Torture Lawyers, 51 Harv. Int’l L.J. 193 (2010) (“Although many lawyers have been prosecuted and convicted as accomplices, these cases all involved a level of participation in the criminality that went beyond simple advice-giving.”). Fred C. Zacharias, Lawyers As Gatekeepers, 41 SANDIEGO L. REV. 1387, 1389 (2004).
55 U. S. v. Nesser, 939 F. Supp. 417, 422 (W.D. Pa. 1996) (holding an attorney liable for drug distribution and money laundering conspiracies through knowledge/willful blindness of the illegal activities which he was found to be furthering by providing his legal services).
56 Citations.
A cynical explanation for the relative dearth of cases involving the criminal prosecution of lawyers for assisting their criminal clients is simply lawyers protecting their own. That is, it is too easy to attribute the unwillingness of prosecutors to pursue colleagues to a dark form of professional courtesy. We believe a more likely explanation, however, is a well-grounded concern on the part of prosecutors that prosecutions of attorneys will interfere with healthy, law-abiding attorney-client relationships, or that such prosecutions will be perceived as a constitutional intrusion on the power of the courts to regulate attorneys. If lawyers fear that even ethical representation of criminals will open them up to investigation and possible prosecution themselves, they are likely to be over-deterred – shying away from lawful, ethical conduct in order to remain above suspicion. Similarly, clients are more likely to withhold – or be asked to withhold – information about their cases if their lawyers believe that full disclosure will subject them to criminal liability or suspicion.

Moreover, while prosecutors may be loath to indict attorneys for misconduct that is part and parcel of the practice of law, many defense attorneys believe that criminal prosecution of lawyers acting *qua* lawyers is an increasingly common tactic, particularly for lawyers representing unpopular defendants. Perhaps the most famous example of an attorney 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. 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. Yet the few, high profile cases like Stewart’s do little more

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

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

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

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

61 Tamar R. Birckhead, The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend, 43 AM. CRIM. L. REV. 1, 12 (“[T]he prosecution strategy utilized by the government could have reverberations that are felt for decades to come”); Heidi Boghosian, Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege, 1 CARDOZO PUB. L. POLY & ETHICS J. 15, 16 (2003) (stating that the message that the indictment of Lynne Stewart sent to lawyers was “direct and unambiguous: represent accused terrorists and you too may be arrested.”).
than highlight the fact that lawyers are rarely prosecuted for providing legal assistance to their clients.

Below we analyze attorney representation of MMJ enterprises in light of the relevant criminal prohibitions on aiding and abetting and conspiracy. What we show is that while some conduct is clearly legal – advising clients regarding the state of the law, providing criminal defense, etc. – other conduct – incorporating MMJ business, writing contracts for employment, etc. – is much more problematic.

IV. REPRESENTATION OF MEDICAL 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, the regulation of lawyers continues to be, for the most part, a state-based affair. In the vast majority of jurisdictions the state’s highest court regulates lawyers’ conduct within the jurisdiction, both through the promulgation of applicable rules of professional conduct and through the subsequent enforcement of those rules. Practically speaking, both tasks are routinely delegated to the organized bar in each state. Rule promulgation, while nominally done by state supreme courts tends to be delegated at two different levels. First, state supreme courts generally defer to the American Bar Association Model Rules of Professional Conduct (Rules) as a starting point. Second, state high courts then traditionally rely on revisions suggested at the state level by the organized bar acting through appointed state supreme courts’ advisory committees. Rule enforcement is also usually delegated to a state or court-sanctioned disciplinary authority.

The principal limit on a lawyer’s capacity to assist a client in the conducting of her criminal actions is Rule 1.2(d), which states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith

effort to determine the validity, scope, meaning or application of the law.\(^{64}\)

Similarly, section 94(2) of the Restatement of the Law Governing Lawyers (Third) (2000) states that:

For purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct, but the lawyer may counsel or assist a client in conduct when the lawyer reasonably believes:

(a) That the client’s conduct constitutes a good-faith effort to determine the validity, scope, meaning or application of the law or court order; or

(b) That the client can assert a nonfrivolous argument that the client’s conduct will not constitute a crime or fraud or violate a court order.

In addition, Rule 8.4(b) states that:

It is professional misconduct for a lawyer to:

commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

46 states have adopted these Rules in one form or another.\(^{65}\)

Rule 1.2(d) and its many state analogs clearly distinguish between counseling or assisting a client in the commission of a crime on the one hand from providing truthful information about the current state of the law on the other. Furthermore, a lawyer is free to counsel a client or assist her in her affairs so long as the lawyer does not know that such conduct is criminal or fraudulent. Otherwise, the application of the Rule is usually straightforward. The primary two-step inquiry is whether the client’s conduct in question is criminal (or fraudulent), and whether the lawyer has

\(^{64}\) Although the Model rules are not themselves binding, they have been very 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 many states.

\(^{65}\) See, http://www.americanbar.org/content/dam/aba/migrated/cpr/nic/ethics_2000_status_chart.authcheckdam.pdf. For example, Colorado has adopted Rule 1.2(d) which is virtually identical in language.
actual knowledge the conduct is criminal as opposed to, for example, mere suspicion. Normally, if the client’s conduct is criminal and the lawyer has actual knowledge to that effect, then a lawyer may not assist in the conduct, and the outcome does not trigger any legal or moral qualms. That is because in the usual case, the client’s underlying conduct will be not only criminal but also morally undesirable. Accordingly, if the black letter application of Rule 1.2(d) is straightforward (that is, the client’s conduct is criminal and the lawyer has knowledge to that effect and therefore the lawyer may not assist the client in its commission); the outcome is uncontroversial (that is, because the client’s conduct is undesirable, the lawyer should not assist the client in its commission).

At first glance, the application of Rule 1.2(d) in the medical marijuana case appears to be straightforward. Because the sale and manufacture of marijuana is a violation of the CSA, a client selling or manufacturing marijuana would be committing a crime, and a lawyer called upon to assist a client in this conduct, for example, to draft the sales agreement, would have actual knowledge that the client’s conduct constitutes a crime. It would seem, therefore, that 1.2(d) forbids lawyers from assisting clients in the commission of this (federal) crime.

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 Ethics Board warned against such representation. Directly referencing the Ogden memorandum, the Professional Ethics Commission described the question before it as: “[W]hether and how an attorney might act in regards to a client whose intention is to engage in conduct which is permitted by state law and which might not, currently, be prosecuted under federal law, but which nonetheless is a federal crime.”

Although the Maine Commission did not explicitly state that an attorney may not ethically represent a marijuana business, it described such representation as ethically fraught. 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 is prohibited.

The MMJ scenario is not, however, the usual case. In the context of the marijuana industry, the attorney is presented, as we have seen, with conduct that is both condemned (at the national level) and either condoned or
encouraged (at the state level). What is more, voters in the seventeen states and District of Columbia that have passed medical marijuana provisions have done so because they believe that marijuana is a beneficial substance with significant medical benefits for some patients. Thus, those engaged in this industry are not merely engaged in conduct deemed by their state to be lawful; they are helping to facilitate the provision of something that has been deemed beneficial by the state’s lawmakers.

The state of Arizona’s ethics board came to almost exactly the opposite conclusion than the one reached in Maine in a report issued in 2011. There, the board 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.

A few things are notable about this opinion. First, it is explicitly premised on the language of the Ogden memo that conduct in “clear and unambiguous compliance” with state law is not an appropriate target of federal law enforcement. Given the change in federal enforcement following the issuance of the Cole memo, it is not 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 justice and a lawyer’s role (and obligation) to provide services and help clarify the law:

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

Finally, the Arizona opinion does not carefully 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, “The 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].” While we generally agree with the approach taken by the Arizona ethics board, several examples illuminate what we believe to be the over-breadth of that opinion. 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 asked to provide. Below we present a number of hypotheticals, illuminating both the wide range of lawyer conduct implicated by the split between state and federal law in this area and the importance of treating that conduct in a nuanced way.

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

The inconsistency between the Maine and Arizona ethics opinions can be resolved by relying on the criminal law distinction between knowledge and intent with regard to accomplice liability. Rather than the traditional reading of Rule 1.2(d), which looks to the client’s criminal (or fraudulent) conduct and the lawyer’s knowledge, 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, (3) a lawyer’s assistance to the criminal conduct, which, following the requirements of aiding and abetting and co-conspirator liability, necessarily includes the lawyer’s intent to aid the client’s criminal conduct. We argue that the first two “traditional” elements establish a rebuttable presumption against providing legal services. Under our reading, however, a lawyer may nonetheless help a client pursue the criminal activity if the lawyer does not intend to aid that conduct.

In the sections that follow we apply this principle in a number of the contexts in which lawyers face the ethical and legal quandary of when and how they may assist clients in the MMJ area.
1. Lawyers’ “Personal” Conduct

a. Lawyers’ Personal Participation in MMJ program

   An initial question has nothing to do with the lawyer’s role as advisor or advocate: it asks merely whether a lawyer violates her ethical obligations if she participates in a state’s medical marijuana program as a patient. Here the relevant provision is not Rule 1.2(d) but 8.4(b) which governs attorney misconduct. In addition to prohibiting violation of the ethical rules, the rule also governs attorney “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.” Note that the rule does not state that it is misconduct for the attorney to engage in criminal conduct. Only that conduct that 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 some crimes such as embezzlement but not by others.

   Further bolstering this reading of Rule 8.4(b), the Colorado Bar Association Ethics Committee, in discussing medical marijuana, 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 respect.”

   It should be noted that registering as a medical marijuana patient is not itself illegal conduct, even under federal law. What is prohibited under the CSA is the manufacture or sale of marijuana. Thus, an attorney’s presence on a list of marijuana patients is, without more, neither tantamount to an admission of nor itself the commission of criminal conduct. It is only when the attorney takes the additional step of purchasing (or growing) marijuana that she first becomes subject to Rule 8.4. At this point, it is necessary to determine whether her violation of federal law constitutes misconduct.

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67 In and Around the Bar CBA Ethics Committee – A Lawyer’s Medical Use of Marijuana, Adopted, 41 THE COLO. LAWYER 28 (July, 2012).
68 State lists of patients are confidential. Thus, a lawyer will only be publicly associated with the marijuana registry if she announces herself as such.
There are very good reasons to conclude that it does not. First, possessory crimes, unless they indicate a dependence problem, are generally not deemed to invoke Rule 8.4. Second, while conduct involving alcohol and drugs has often been ground for misconduct, the typical fact pattern involves either additional wrongdoing, such as DUI, or display of disregard to the law. Participants in medical marijuana programs who are in compliance with state law, however, are not engaged in additional wrongdoing and their conduct does not display any public disregard to the law or any disregard to state law. Finally, Rule 8.4 is usually invoked in instances where lawyers conduct themselves in a manner that displays dishonesty or lack of trustworthiness, for example violation of clients’ trust, not with regard to private conduct such as the consumption of medical marijuana. Therefore, we conclude that as a general matter, participation in a medical marijuana program as a patient does not violate Rule 8.4.

b. Lawyers’ Financial Participation in the MMJ Industry

Related to the question of whether a lawyer may participate in a state’s medical marijuana industry is whether she may do so as an investor or owner of a marijuana business. This would seem to present a much closer case which likely constitutes misconduct under Rule 8.4(b). An attorney who believes that marijuana is a useful medicine for her condition is very differently situated from a lawyer-investor in a marijuana dispensary. Ample case law establishes that Rule 8.4(b) covers a lawyer’s private conduct outside of the practice of law. Therefore, that fact that ownership of a dispensary has nothing to do with an attorney’s law practice does not negate liability under the rule. The question then becomes whether ownership of a dispensary amounts to criminal conduct which reflects adversely on one’s honesty, trustworthiness or fitness as a lawyer. Because, have we have seen, fitness as a lawyer includes fidelity to the law and disrespect to the law has been acknowledged as grounds for discipline, it seems apparent that a lawyer may not own or invest in a medical marijuana business in violation of federal law. Furthermore, in contrast to membership on a list of approved MMJ patients – which is inherently private conduct – ownership of a MMJ 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

69 Although some jurisdictions have imposed discipline for mere possession. See,
70 Further bolstering this, the CBA Ethics Committee in discussing medical marijuana has determined that the violation of federal law by a lawyer/patient in compliance with state law is not in itself a violation of Colorado’s ethical rules. The committee reads Colorado ethical rules as requiring a “nexus between the violation of law and the lawyer’s honesty, trustworthiness, or the fitness as a lawyer in other respect.” In and Around the Bar CBA Ethics Committee – A Lawyer’s Medical Use of Marijuana, Adopted, 41 THE COLO. LAWYER 28 (July, 2012).
breaking of a very different kind, and we believe it could subject her to discipline under Rule 8.4(b) and possible criminal prosecution under the CSA.\textsuperscript{71}

2. Permissible Legal Services

When we turn from a lawyer’s conduct as an individual to her conduct as an attorney, we see that any general statement regarding the ethics of representing those in the MMJ industry is insufficient. Rather, a careful analysis of what services a lawyer is asked to provide and why she chooses to provide (or not provide) those services.

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 state and federal marijuana laws. Clearly, this is permissible behavior. More than that, an attorney has an obligation to provide legal services to those in need of them. Accordingly, a lawyer can always defend a client charged with the crime of violating medical marijuana laws. Notice that this is true even in those situations where a literal reading of 1.2(d) might seem to be otherwise. Imagine, for example, the conscientious dispensary owner who, believing that her product is a necessary medicine for her clients, pledges to continue to distribute marijuana to those in need regardless of the consequences to herself. She solicits a lawyer to secure bail so that she can return to distributing marijuana. Even if the lawyer would clearly be entitled to defend the client in the subsequent criminal proceedings, a literal reading of Rule 1.2(d) would seem to prohibit the attorney from providing this particular legal service – her assistance will facilitate conduct that she knows to be criminal. Yet we know that that is nonsense. One of the hallmarks of ethical legal service is the provision of a zealous defense to a criminal defendant, regardless of her guilt.

Political Advocacy and Lobbying

Relatedly, lawyers often make an argument for legal change on behalf of their clients. This argument can occur in the courtroom, the court of public opinion, or the legislature; lawyers are often asked to argue that current law, either as written or as interpreted, is unjust, nonsensical, or...

\textsuperscript{71} Note that here, the lawyer’s liability is direct rather than relying on application of the accomplice or co-conspirator doctrines described above.
otherwise ill-considered. Rule 1.2(d) makes clear that such advocacy, when undertaken in good faith, is ethical conduct. Thus, a lawyer may provide to a client lobbying and related legal services aimed at convincing state and federal legislators to amend its statutes to legalize medical marijuana.

b. Advising Clients Regarding the State of the Law

Advising the client about the consequences of acting in a certain way is never a violation of Rule 1.2(d). 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.

Next, a lawyer may advise a client that: “owning and operating a medical marijuana dispensary is a violation of federal law,” “if you violate federal law you may face federal criminal charges and a conviction,” “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 “If you are charged with a federal crime I will represent you in both the trial and the appeal stages.” Of course, an attorney would also have to advise the client about the possibly severe consequences of a criminal conviction, the cost of defending the charges and of an appeal, the possibility of losing the legal battle. The lawyer might also have to reveal that while she might be qualified and competent to represent the client at the trial level, a new appellate attorney might have to be retained.

Some commentators believe that a lawyer can advise a client not only about the law in the books, but also about the law in action, and, specifically about the likely enforcement of the law. Obviously, this point has particular salience in the MMJ context. For example, a lawyer can advise a client that while federal law prohibits medical marijuana dispensaries, it appears that enforcement of the law, at least vis-à-vis dispensaries operating within the confines of the state’s regulatory apparatus, is a low priority. Indeed, a lawyer may advise a client accordingly even though providing this information manifests the Holmesian Bad Man approach in the sense that it allows bad clients to do what they want and lets lawyers off the moral hook.72

72 See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 458-60 (1897) (address at the dedication of the New Hall of the Boston University School of Law on January 8, 1897). For analysis of the “bad man” approach to law practice, see William H Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics 1978 WISC. L. REV. 29; Murray L Schwartz, The Professionalism and Accountability of
3. Questionable Legal Services

May an attorney assist a client in filling out application forms for a MMJ dispensary license pursuant to the state regulatory scheme? May an attorney assist a client by negotiating a lease for a commercial space out of which the client will operate a medical marijuana dispensary? Draft the lease agreement? Draft purchase and sales agreement to be use in the course of doing business at the dispensary? Advise, negotiate and draft employment contracts for dispensary employees?

Recall that Rule 1.2(d) reads in relevant part:

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

We believe that a close reading of the Rule, paying sufficient attention to the elements assist and conduct leads to the conclusion a lawyer may ethically provide these legal services without violating Rule 1.2(d).

a. Compliance Work

May an attorney assist a client in filling out application forms for a 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 likely federal crime. 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. Yet we believe that there are compelling reasons to permit a lawyer to assist a client with such compliance work.

To begin with, since 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 MMJ practitioners access to legal services has the effect of counteracting the policy goals represented by state MMJ laws.

More importantly, borrowing from criminal law’s treatment of accomplices and co-conspirators, we argue that a lawyer only assists in the commission of a crime when he or she has an actual intent to encourage the commission of the crime. Accordingly, a lawyer who represents an MMJ client seeking to obtain a license to own and operate a dispensary does not violate Rule 1.2(d) because her lack on intent means that he or she does not assist the client within the meaning of the Rule.

The language of Section 94(2) of the Restatement reinforces this reading of Rule 1.2(d). Recall that it states that “[f]or purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct…”). The Restatement, then, envisions attorney discipline only when it is the attorney’s goal to facilitate the criminal conduct of her client. Like the criminal law doctrines of accomplice and co-conspirator liability, the Restatement draws an important distinction between activity that has the effect of facilitating criminal conduct and conduct that is intended to do so. Under both the criminal law and the rules of ethics, then, a true intent to assist is required before negative sanctions can apply.

Furthermore, in the usual law practice 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. Assuming that the attorney merely provides the same services to her marijuana clients that she does to her other business clients – and charges no more for doing so than she does her other clients – she has not acquired a stake in the illegality of the venture and there is no cause to equate her knowledge with intent. Thus, a business attorney who merely provides the same services to MMJ practitioners that she does to the rest of her clients and who does so at the same rates she charges her other clients, does not in our minds run afoul of Rule 1.2(d).

A more complicated case is presented by firms that cater exclusively or primarily to a marijuana clientele. In such a case, the health of the firm is

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74 Emphasis added.
75 See, e.g., Lauria, supra note XXX.
76 At least one such firm briefly existed in Colorado. Perhaps for the reasons discussed in this paragraph, however, it has since re-organized as a general-purpose law firm.
inextricably tied to the health of clients who are engaged in a violation 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 legal use. Like the publisher of an advertising flier consisting entirely of prostitute listings or the tout who provides nothing but information on illegal gambling, the provider of services to marijuana businesses – and only to 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.

An important caveat is necessary here. Our reasoning does not generalize to all crimes; that is, we do not conclude that an attorney may always provide legal services for a client so long as she does not intend to facilitate that client’s criminal behavior. There are many instances in which a mere awareness that her conduct will facilitate the commission of a crime will suffice. Again, our lodestar is the California Supreme Court’s opinion in Lauria. There, 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. But the court noted that a different situation might arise if the defendant were charged with conspiring to commit a more serious offense: “The duty to take positive action to dissociate oneself from activates helpful to violations of the criminal law is far stronger and more compelling for felonies than it is for misdemeanors or petty offenses.” In other words, where the offense is more serious, it is less of an imposition to ask the provider of lawful services to avoid entangling herself in the misdeeds of her clientele. Courts have taken a similar approach with regard to accomplice liability; while a true intent is generally required before a defendant may be made another’s accomplice, this requirement is sometimes relaxed for more serious offenses. For example, in United States v. Fountain, Judge Posner wrote that a prisoner could be an accomplice to another prisoner’s killing of a guard even if the aid he provided could be described only as knowing:

Compare the following hypothetical cases. In the first, a shopkeeper sells dresses to a woman whom he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish her intent to aid. Indeed, little would be gained by imposing criminal liability in such a case.

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77 Id. at XXX.
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.  

Exactly where, however, is the line to be drawn between those crimes for which the defendant’s knowledge makes her culpable and those for which a true intent will suffice. While the Lauria court drew the line at the misdemeanor/felony distinction, we would draw it slightly differently. For us, the important distinction is between those crimes that are mala prohibita – bad because prohibited – and those crimes that are mala in se – bad in themselves. This is a distinction well known in the criminal law between more serious offenses – rape, robbery, murder, etc. – whose uniform prohibition across societies indicates their inherent blameworthiness and those offenses – possession offenses and the regulation of vice more generally – about which reasonable minds can differ. Because possession of marijuana, particularly for medical purposes, is a thing bad merely because it is prohibited, we believe that an intent to facilitate is necessary in order for an attorney to be deemed to have engaged in unethical conduct.

b. Contract Work

May an attorney assist a client by negotiating a lease for a commercial space out of which the client will operate a medical marijuana dispensary? Draft the lease agreement? Draft purchase and sales agreement to be use in the course of doing business at the dispensary? Advise, negotiate and draft employment contracts for dispensary employees? None of these activities, we believe, meets the assist element and therefore none violates Rule

78 768 F.2d 790 (7th Cir. 1985).
79 See, e.g., Mistake of Law in Mala Prohibita Crimes:

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.
1.2(d). As long as a lawyer charges MMJ clients rates similar to those charged of non-MMJ clients for negotiating leases, drafting agreements and advising re employment issues, the lawyer does not possess the requisite state of mind – intent – to satisfy the assist requirement per Rule 1.2(d).

Next, nothing in our analysis suggests that a person who happens to be a lawyer may assist another in the commission of a crime without being subject to criminal liability or discipline. Rule 1.2(d) regulates the conduct of lawyers, stating in relevant part that “A lawyer shall not . . .” (emphasis added). Accordingly, our proposed Rule 1.2(d) analysis only applies to lawyers acting qua lawyers within the four corners of traditional law practice. Lawyers who act outside of the scope of their professional identity, such as by physically assisting the client in growing or selling marijuana, or even helping the client transport the marijuana to the dispensary or to patients may be liable in criminal law as accomplices and co-conspirators and are also in violation of the Rules of Professional Conduct, Rule 8.4(b).80

4. Prohibited Legal Services

May an attorney introduce a client A, who is a medical marijuana dispensary owner to client B who is a medical marijuana grower for the purpose of having the client A purchase marijuana from client B? What if the sale would take place pursuant to state rules that allow licensed dispensary owners to buy from another source a certain percentage of the marijuana they sell to patients?81

Attorneys often introduce business clients to create synergies for the clients and 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.82 It seems to us, however, that such attorney conduct violates Rule 1.2(d) when conducted in the context of the MMJ industry. By taking an active role in the transaction – by making it happen – the attorney has done more than merely assist in the sale. She has, in the words of Learned Hand’s famous requirement that the aider and abettor “in some sort associate himself with the venture, that he

80 Of course, the arguments regarding intent versus knowledge apply here as well. So long as the attorney is merely knowingly facilitating – as opposed to intentionally aiding – criminal conduct, she generally cannot be held liable for that conduct as either an accomplice or a co-conspirator.
81 Supra note XXX.
participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” Unlike the lawyer who merely helps a client draw up a lease or an employment agreement, now the attorney is actively involved in trying to grow the business for two of her clients. Whether she is paid a percentage on the transaction or is doing the work on an hourly basis, the attorney is no longer sufficiently detached from the sale. She no longer merely knows that her conduct will facilitate the sale of marijuana; she actively hopes that it does. Her clients’ happiness – and thus her own – hinges on her ability to make the violation of federal law happen. While the lawyer writing the lease is largely indifferent whether drugs are sold on the premises, the lawyer arranging the sale needs the sale of drugs to occur. Her mens rea is thus one of intent and she violates her ethical obligations – and opens herself to criminal prosecution – when she assists her clients in this way.

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 MMJ clients without running afoul of her ethical obligations or the constraints of the criminal law. But what about instances in which an attorney would be violating Rule 1.2(d) because she has the intent to assist her client in the commission of a crime? In this section, we inquire whether it is ever permissible for an attorney to intentionally aid in the commission of a criminal offense. That is, we ask whether there are situations in which an attorney may violate Rule 1.2(d). Scholars of legal ethics agree that as officers of the legal systems lawyers are under a prima facie duty to obey the law, including the rules of professional conduct adopted in the jurisdiction, which are, after all, binding state law. Some scholars even argue that while all citizens are under a prima facie duty to obey the law, as officers of the legal system lawyers are under a heightened duty to obey the law. Yet the presumption in favor of obeying the law is a rebuttable one. In order to demand attorneys’ obedience, the law in question must be just, or at least not unjust.

In a just society most, if not all, criminalized conduct reflects a moral judgment that the conduct in question is undesirable. Therefore, in the usual situation giving rise to Rule 1.2(d), that is, a scenario in which the

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

client’s conduct in question is both criminal and undesirable, lawyers should clearly follow the plain application of 1.2(d) and refuse to counsel or assist the client in the commission of the crime. In rare occasions, however, lawyers face situations in which the criminality of the underlying client conduct notwithstanding, the morality of the behavior and the law that governs it can legitimately be questioned. In such unusual scenarios, while lawyers are under a prima facie duty to obey Rule 1.2(d), they ought to at least inquire further into whether they ought to follow the Rule or violate it.

For example, some lawyers advising interracial couples considering marriage at a time in which some states prohibited and criminalized the conduct likely found the discriminatory state law morally wrong and offensive. Similarly, attorneys representing same-sex couples engaged in consensual relations in the privacy of their own homes likely found state sodomy laws criminalizing the behavior unjust. Finally, lawyers representing victims of domestic violence abuse (for example, rape) charged with murder because the law failed to recognize self-defense within the home (or to recognize rape within a family as such) likely found the laws governing the circumstances to be unjust.

All of these examples share an important feature. In all of them the lawyers could dispute the constitutionality of the governing state law in question in the spirit of Section 94(2)(b) of the Restatement, which allows a good-faith challenge meant to determine the validity of the law. Put differently, in all of these examples the lawyer in question does not know that the client’s conduct constitutes a crime (and therefore would not be violating Rule 1.2(d)) because a good faith constitutional challenge may successfully establish that the conduct was not in fact criminal. In such rare instances, in which the client’s conduct is criminal but the law

85 W. BRAD WENDEL, FIDELITY TO THE LAW (Princeton, 2011).
86 In all of these scenarios the lawyers’ conduct did not amount to “counsel” or “assistance” in violation of Rule 1.2(d) but merely constituted discussion of the legal consequences of a proposed course of conduct. A lawyer who advised inter-racial couples about getting married in violation of governing (and criminalizing) state law operated with the permissible framework of Rule 1.2(d). The lawyer merely advised the clients about the state of the law (“seeking or obtaining a marriage license would be a violation of the law”) but did not assist the clients in engaging in the underlying conduct. The lawyer’s conduct was completely passive via-a-vis the clients’ criminal conduct, consisting only of advising the clients about the state of the law. Similarly, a lawyer advising clients that engaging in same-sex relations constituted a violation of applicable state law merely advised the clients re the state of the law. The advice was completely passive in the sense that the actual underlying criminal client conduct, for example, engaging in acts considered by the relevant state law as sodomy, did not involve any lawyer’s conduct. Finally, a lawyer advising a client that killing her husband-abuser would constitute murder under state law provided only advice about the law, but did not entail assistance in the underlying conduct of killing the husband. Rather, the lawyer’s conduct consisted of advising the clients about the state of the law and perhaps agreeing the represent them subsequently should they be charged with a crime.
criminalizing the conduct appears unjust, lawyers should not blindly follow
the plain application of 1.2(d). Rather, assessing such lawyer’s conduct in
these situations requires a closer examination of the relevant legal and
moral circumstances related to the client’s underlying conduct.

Of course, a lawyer violating Rule 1.2(d) on the ground that criminalizing
the client’s underlying conduct is unjust, will be subject to discipline. Our
point, to be clear, is not that lawyers violating Rule 1.2(d) should be exempt
from disciplinary action. Rather, we believe that in rare circumstances,
when the law criminalizing the client conduct appears to the lawyer to be
unjust, lawyers may morally justified in violating Rule 1.2(d), even though
the violation will subject them to discipline.

1. Unjust Laws

In the MMJ context, federal law criminalizing the conduct of MMJ
practitioners might be considered unjust for two different reasons. First,
some MMJ patients do suffer from ailments for which marijuana
purportedly proves to be a useful medicine. Client conduct that is meant to
provide access to medical marijuana for those suffering pain, and, in
particular, when such conduct is sanctioned by state law, can thus be seen as
both legitimate and just. Federal law, if only 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, can similarly be seen as
unjust. Accordingly, lawyers assisting such clients would be assisting in the
commission of a crime pursuant to an unjust law, and may be morally
justified in doing so, the technical violation of Rule 1.2(d) and subsequent
discipline notwithstanding.

Admittedly, this line of reasoning is somewhat 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, there is some basis to believe that a substantial number of
these users are primarily recreational, not medical. Second, many clients
enter the MMJ market for profit, rather than for ideological reasons. If the
clients’ primary rational is profit making, not providing access to medical
patients in pain, the “unjust law” rationale for questioning federal law is
compromised. Put differently, if a lawyer’s assistance is based on helping
alleviate the pain of medical patients and on the desire of some clients to
address the need of these patients, she will be better positioned in justifying
violating Rule 1.2(d) and invoking the law’s unjust characteristic as a moral
reason. But since the motivation of many clients appears to be profit
maximization, they (and subsequently their lawyers) cannot in good-faith assert violating the law (and Rule 1.2(d)) because it unjust.

Moreover, not only do many clients wish to enter the MMJ arena with the intent to make money rather than to provide access to patients in need of pain relief; so do many lawyers wish to represent these clients not because of an ideological commitment to helping clients, but rather because representing MMJ clients is a mean of making a living in a highly competitive legal services market. The distinction is a relevant one in assessing the lawyer’s conduct: Rule 7.3, for example, draws a similar distinction in assessing a lawyer’s in-person solicitation of clients. If the solicitation is primarily driven 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. One could argue analogously that if a lawyer’s primary motivation for serving a 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.

2. Access to Justice

A second line of reasoning questioning the moral force of the MMJ federal law stance is grounded not in the motivation of clients and lawyers for engaging in and assisting in the MMJ practice, but rather in the tension between state and federal law. In one-third of American jurisdictions, state law provides a lawful MMJ scheme. Construing Rule 1.2(d) as prohibiting lawyers from assisting clients from pursuing lawful legal conduct amounts to depriving clients from access to their legal rights and entitlements, and, more broadly, to depriving clients of access to lawyers and the law. Providing access to the law, however, is a fundamental aspect of what lawyers do and is at the core of what it means to be a lawyer. Indeed, some believe that in a highly regulated society that is the subject of increasingly complex body of law, access to the law is impossible without access to lawyers and that without access to lawyers one is deprived of first-class citizenship. Indeed, the fundamental commitment to increasing client

87 Model Rules of Professional Conduct, Rule 7.3(a) (2012).
access to the law and lawyers is a cornerstone of the Rules themselves and is codified in several of its provisions.\textsuperscript{90}

The “access to law and lawyers” justification for violating Rule 1.2(d) may be criticized in the context of MMJ, because access to lawyers is not a necessary condition, either de jure or de facto, to obtaining a license and owning and operating a dispensary. That is, one can file an application for and obtain a license to operate a dispensary, as well as negotiate a lease for commercial real estate, hire employees, pay taxes, etc. without the assistance of an attorney. To be sure, having an attorney assist in these activities may very well be useful, but one is not literally denied access to the MMJ industry if one cannot retain a lawyer to assist in the conduct.

Consider, by contrast, a private company wishing to engage in an initial public offering. The company would be required under federal securities laws to file a disclosure statement with the Securities and Exchange Commission, and as part of the statement submit a statement by an attorney attesting to certain pertinent facts relating to the company’s legal affairs. If an attorney would not be able to assist a company and attest to the necessary legal details, the company-client would be denied access to the law because access to a lawyer is a necessary condition for taking a company public. In contrast, a MMJ client can engage in the underlying conduct without the assistance of an attorney.

Traditionally, however, proponents of access to the law and lawyers as a condition of first-class citizenship do not invoke an argument of necessity. That is, they do not rely on the argument that access to lawyers is a condition precedent for allowing a client to act in a certain way subject and that denying the client access to a lawyer would mean that the client will have to forego the activity. While in theory individuals may apply for a license and attempt to operate and own dispensaries without the assistance of lawyers, in practice many will not. This is exactly why people who are unable to access lawyers and understand the complexities of the law are rendered second-class citizens – they lose opportunities to those able to retain representation. Consider, for example, the ability of potential marijuana entrepreneurs to obtain lines of credit with a commercial bank in conjunction with owning and operating a dispensary. While in theory one need not be represented by an attorney as condition of securing credit, in practice such an entrepreneur stands a better chance of securing credit and doing business with a bank if represented by a lawyer. If providing such

\textsuperscript{90} Model Rules of Professional Conduct, Rules 6.1-6.5 (2012).
assistance is deemed professional misconduct, client access to lawyers will be limited and there will be significant, adverse consequences for clients.

Moreover, the MMJ scenario provides an illuminating example of the possible discriminatory and unjust consequences of denying clients access to the law and lawyers. Construing Rule 1.2(d) to prohibit lawyers from assisting clients from pursuing MMJ endeavors practically means that relatively unsophisticated clients with little knowledge of the law, and, in particular, of how to navigate the complex MMJ regulatory permitting scheme, will not be able to pursue their MMJ objectives.91 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 MMJ clients triggers 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 be able to fare better than the more disadvantaged.

Similarly, some MMJ clients may be powerful enough to get lawyers to assume the risk of violating Rule 1.2(d) and assisting them, resulting in further inequalities of access. Consider a well-to-do real estate entrepreneur who owns several commercial properties and who has a stable relationship with a mid-size or large law firm which would like to keep his or her business. The entrepreneur approaches the law firm seeking advice about renting commercial real estate space to a 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 decides to advise the client and assume the risk of disciplinary enforcement for violation of 1.2(d); or it refers the case to another lawyer, perhaps one still developing her client base who is not likely to reject 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 real estate owner is more likely to end up with the better end of the deal.

If lawyers reasonably believe in good-faith that federal law is unjust because of its unequal impact on different types of clients, they may believe that they have an affirmative moral duty to assist clients even if the conduct violates the law in question, or at least that violating Rule 1.2(d) is morally justified. At the same time, the contours of plausible good-faith objections

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91 Citation to Barkowicz case.
to the relevant federal law should not be exaggerated and is subject to several caveats. The “access to law and lawyers” critique, while colorable, especially in the context of its distributive impact on the under-privileged and less sophisticated clients, is ultimately constrained by the fact the clients have and should have access to lawyers to act lawfully, not illegally. To the extent, for example, that disciplining attorneys for Rule 1.2(d) violations has inequality of access consequences, the playing field could be leveled by simply criminalizing marijuana at both the state and federal levels and thus eliminating the ability of the more savvy and privileged clients to get ahead. Next, laws may be morally unjust to varying degrees and thus provide a range of justifications for overcoming the presumption of compliance with 1.2(d). For example, a lawyer may believe that a law criminalizing inter-racial marriages is so unjust as to warrant assisting a client in violation of Rule 1.2(d), whereas a federal law criminalizing the sale of marijuana while unjust is not so morally offensive as to justify a violation of Rule 1.2(d) and the prima facie duty to obey the law. Finally, the “access to the law and lawyers” justification to violating Rule 1.2(d) must be made by lawyers in good-faith, that is, a lawyer can only make it when representing clients who are, in fact, under-privileged and have only limited access to law and lawyers. This is a particularly noteworthy caveat given that even a morally-justified violation of Rule 1.2(d) will be subject to discipline. An attorney who believes in good-faith that her client will be unfairly denied access to the law and lawyers if she does not offer legal assistance might offer evidence to that effect to mitigate the sanctions imposed by disciplinary action. Her mere assertion that she was concerned about access to justice, however, is unlikely to be of much avail.

3. Erroneous Laws

Next, there may be situations where the criminalizing of the client’s conduct is not unjust but merely wrong. As we have seen, some commentators believe that marijuana should not have been designated a Schedule I narcotic and that medical evidence strongly suggests that the marijuana should be downgraded to at least a Schedule II drug. If these advocates are correct, then federal law, while clear and unambiguous can be considered simply erroneous. This suggests, in turn, an argument that lawyers could be justified in helping clients challenge the mistaken/wrong law, in the spirit of Section 94(2)(a) of the Restatement and Rule 6.1. Section 94(2)(a) permits lawyers to counsel clients when they reasonably believe that the clients’ conduct constitutes an attempt to determine the validity of the law, in this case, the validity of characterizing marijuana as a Schedule I narcotic. Similarly, Rule 6.1(b)(3) states in relevant part that
“[e]very lawyer has a professional responsibility to provide legal services to those unable to pay… In fulfilling this responsibility, the lawyer should… provide any additional services through… participation in activates for improving the law…”92 such as helping correct erroneous laws. Moreover, if marijuana were not a Schedule I narcotic, the drug would be easier to access legally, clients would have the right to engage in for-profit activities selling it, and lawyers will be free to advise and assist clients accordingly.

Should lawyers ever violate Rule 1.2(d) and assist clients in pursuing criminal conduct on the ground that the underlying law in question is not unjust but merely erroneous? We think not. We believe that, as officers of the legal system, lawyers owe a prima facie duty to obey the law, including applicable rules of professional conduct. If lawyers encounter law that, while erroneous, is not unjust, then lawyers may only work within the bounds of the law to correct the error. In any event, even those who might find merely erroneous law a sufficient ground to justify violating Rule 1.2(d) would surely concede that a lawyer must be certain that the law in question is in fact erroneous. While many advocates present compelling evidence suggesting that marijuana should not have been designated a Schedule I narcotic, the evidence arguably does not meet the standard of certainty needed to justify violating Rule 1.2(d).

To be sure, some may reasonably disagree with us and assert that when the law is clearly erroneous, lawyers may violate Rule 1.2(d) and assist clients pursue conduct that has been erroneously deemed criminal. Lawyers who take this view are nonetheless violating Rule 1.2(d) and should expect to be exposed to the disciplinary consequences of their action. Much as conscientious objector clients can expect punishment for violating unjust laws, so lawyers should expect sanction for helping them to do so.

4. Conclusion: Should Lawyers Representing MMJ Clients Ever Violate Rule 1.2(d)?

Helping MMJ clients to establish, own and operate marijuana dispensaries in states that have adopted medical marijuana laws, may not strike many as a compelling example of a rare instance in which lawyers are called upon to assist clients challenge an unjust or erroneous law. But the MMJ context does present complex issues of access to law and legal

services in the face of an inherent conflict between federal and state law. Our analysis yields several conclusions.

First, the tension between federal and state law does not simply render the former unjust. Therefore in instances in which representing MMJ clients violates Rule 1.2(d), lawyers cannot avoid discipline simply invoking the unjustness of the CSA as a reason for failing to adhere to Rule 1.2(d). Only in the narrow circumstances where an MMJ client is primarily motivated to own and operate a dispensary for the purpose of reliving the pain of patients, as opposed to maximizing self-interest and profits, may a lawyer invoke the unjustness of the CSA as a justification for violating Rule 1.2(d), and even then, the lawyer must be prepared to take the disciplinary consequences of violating the rule.

Second, the “access to law and lawyers” justification for violating Rule 1.2(d) may only be asserted in good-faith by lawyers who in fact represent clients who experience the inequities of access created by inherent tension between federal and state law. And even in such circumstances, lawyers who violate Rule 1.2(d), especially attorneys who represent MMJ clients primarily for pecuniary gain as opposed to ideological commitment to providing access to law and lawyers, must also be prepared to face the disciplinary consequences of their conduct.

Finally, lawyers who choose to violate the Rule 1.2(d) because they believe the law is mistaken in designating marijuana a Schedule I narcotic must be willing to accept to consequences of disciplinary action.

D. Enforcement of Criminal Law and Discipline

We have not yet considered whether state regulatory agencies should seek to discipline attorneys who help MMJ clients. If regulation counsel believes that lawyers are assisting clients in the commission of a crime in violation of Rule 1.2(d), surely disciplinary action is called for: a federal crime is a crime in every jurisdiction, why would not a state regulatory agency enforce its own rules of professional conduct?

As should be clear by now, we believe that regulation counsel generally ought not seek to discipline attorneys for helping MMJ clients. First, as we argue above, in a majority of cases, Rule 1.2(d) is simply not going to be violated by attorney conduct in this area. Second, even if Rule 1.2(d) is violated, we believe that having established a legal apparatus legalizing medical marijuana, the state, acting through its regulation counsel, should
be estopped from then seeking to discipline lawyers who help MMJ clients operate within the confines of the very apparatus set up by the state. Finally, if regulation counsel were to attempt to discipline MMJ lawyers, those lawyers’ good faith assertions that they find the federal law in question erroneous and unjust should be taken into account as a mitigating factor at least in the sanctions stage of the disciplinary process.\textsuperscript{93}

It should be noted that our proposed analysis may open the door to attempts by the federal government to regulate and discipline MMJ attorneys. If state regulatory counsel fail to discipline lawyers who brazenly assist clients engaged in the flouting of federal law, federal officials may feel compelled to intercede. Outside of the medical marijuana context, the federalization of legal ethics has been an ongoing growing phenomenon. An ever-increasing number of federal agencies have acted in recent years to regulate lawyers appearing and practicing before them, and it is not inconceivable that the DEA, for example, may join the trend and purport to regulate MMJ lawyers. On the other hand, many of the federal agencies that have recently moved to regulate lawyers’ conduct have a more convenient and obvious arena in which to regulate lawyers: securities attorneys, for example, regularly appear and practice before the SEC, and tax attorneys routinely appear and practice before the IRS. MMJ attorneys, in contrast, would not be in anyway appearing or practicing before the DEA and so an attempt by the federal government to regulate MMJ attorneys would have to entail some creative maneuvering to establish jurisdiction over MMJ lawyers. Yet in the new world of the federalization of legal ethics one should not be too quick to rule out the possibility of a federal regulation of MMJ lawyers, especially in the absence of state regulation.

Without regulatory disciplinary action against MMJ lawyers at the state and federal level, should federal prosecutors seek to charge MMJ attorneys criminally as accomplices or co-conspirators of the CSA? We believe not, for two reasons. First, as we establish above, lawyers would in most circumstances lack the intent necessary to be liable of these charges. Regardless of the ultimate outcome, though, the mere prosecution of MMJ attorneys may have a significant deterrent effect on lawyers.

Second, even if federal prosecutors did believe that they had a colorable claim against MMJ attorneys as accomplices or co-conspirators, there are

\textsuperscript{93} To be clear, regulation counsel should only refrain from disciplining MMJ lawyers for helping MMJ clients. Of course, if MMJ lawyers otherwise engage in professional misconduct and violate the rules of professional conduct, for example, by charging MMJ clients unreasonable fees, regulation counsel should discipline such misbehaving just as it would any other lawyers.
constitutional law constraints on the ability of the government, federal and state, to prosecute lawyers for professional conduct that falls within the traditional four corners of law practice. Such prosecution will necessarily amount to regulation of lawyers’ conduct and will certainly chill the provision of legal services. In doing so, prosecution of MMJ lawyers will run afoul of the courts’ inherent and exclusive power to regulate the legal profession.94

V. CONCLUSION

Like all people, lawyers have a prime facie duty to obey the law. Indeed, as lawyers, attorneys have a heightened duty to obey the law, including the applicable rules of professional conduct, particularly Rule 1.2(d). Our proposed reading of Rule 1.2(d) establishes that lawyers may generally help MMJ clients address the majority of their legal needs. Without a doubt, attorneys may defend MMJ clients charged by the federal government with violations of the CSA, may serve as lobbyists in challenging federal law and can advise clients about the state of the law. Lawyers may also generally help clients with compliance work, such as filing for a license to own and operate a medical marijuana dispensary, and may negotiate leases for commercial real estate space out of which clients will operate a dispensary, draft contracts for the sale of marijuana and advise clients about employment matters pertaining to MMJ business. 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.

And what about the unusual circumstances in which assisting MMJ clients will violate Rule 1.2(d)? When the law is either morally unjust or clearly erroneous, lawyers may have a moral duty to help clients to challenge the law, and face the consequences of disciplinary action that follows. Generally speaking, however, the tension between state law and the CSA does not render the former unjust and the designation of marijuana as a Schedule I narcotic, while controversial, is not so clearly erroneous to justify a violation of Rule 1.2(d). Only in rare instances, such as when a sincere MMJ client is otherwise unable to find representation, may a lawyer legitimately contemplate violating Rule 1.2(d). Even in such a circumstance, however, the lawyer must be willing to accept the disciplinary consequences of violating the rule.