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Blazed and Confused: The Hazy Legal Ethics of the Cannabis Craze and How Oklahoma Can Clear the Air for Its Attorneys

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BLAZED AND CONFUSED: THE HAZY LEGAL ETHICS OF THE CANNABIS CRAZE AND HOW OKLAHOMA CAN CLEAR THE AIR FOR ITS ATTORNEYS

I. INTRODUCTION

Marijuana legalization has been one of the most polarizing legal issues in the country over the past two decades.[1] In 1996, California became the first state to legalize medical marijuana through State Proposition 215, or more commonly known as the Compassionate Use Act.[2] In the following twenty years, twenty-nine other states, plus Washington D.C., followed suit by passing their own marijuana legalization laws.[3] And just over a year ago, Oklahoma became the thirtieth state to join the cannabis legalization party by passing State Question 788—giving medical marijuana the green light in a traditionally red state.[4] Fast forward to 2020 and thirty-three states have legalized medical marijuana, while eleven have legalized its recreational use.[5] Changes in the general stigma attached to the drug, and political ideologies from both sides of the aisle that lend support to its intrastate legalization have mobilized the country's thoughts on the plant that was once prohibited across all fifty states.[6]

Change in marijuana policy and ideology has brought on additional issues that confront a wide range of individuals and entities. Employers that were once permitted to fire employees for cause relating to any drug related offenses prior to medical marijuana becoming legal in their states now face pressure to consider employees' newly-acquired rights when evaluating company drug use policies.[7] Financial institutions are limited by

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1. *See generally* Dennis A. Rendleman, *Ethical Issues in Representing Clients in the Cannabis Business: "One Toke Over The Line?"*, 26 PROF. LAWYER No. 1 (July 2, 2019) (discussing state-level marijuana legalization with other polarizing political issues such as sanctuary cities, gun restriction laws, and civil rights).

2. Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (last updated Apr. 19, 2017), https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws.

3. *Id.*

4. *Oklahoma State Question 788, Medical Marijuana Legislation Initiative (June 2018)*, BALLOTPEDIA (last visited Sept. 4, 2020), https://ballotpedia.org/Oklahoma_State_Question_788,_Medical_Marijuana_Legalization_Initiative_(June_2018).

5. Tom Murse, *States Where Smoking Recreational Marijuana Is Legal*, THOUGHT CO. (last updated Feb. 4, 2020), https://www.thoughtco.com/states-that-legalized-marijuana-3368391.

6. Trip Gabriel, *Legalizing Marijuana, With a Focus on Social Justice, Unites 2020 Democrats,* NY TIMES (Mar. 17, 2019), https://www.nytimes.com/2019/03/17/us/politics/marijuana-legalize-democrats.html (discussing ideologies from both the democratic and republican platforms that support state-level marijuana legalization).

7. *See* Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326 (Conn. 2017) (Holding a provision of Connecticut's Palliative Use of Marijuana Act (PUMA) that prohibits an employer from discriminating against authorized individuals using marijuana outside the workplace provides a right of private action and does not violate the Equal Protection Clause); H.B. 2612, 57th leg. (Okla. 2019); *see also* Dale L. Deitchler & Nancy N. Delogu, *In Oklahoma, Medical Use of Marijuana Is OK, But Employers Now Have Enhanced Rights to Act*, LITTLER WORKPLACE POLICY INST. (Mar. 20, 2019), https://www.littler.com (Click on the menu icon at the top right corner of the home page and a search option will come up. In the search box, type "In Oklahoma, Medical Use of Marijuana Is OK, But Employers Now Have Enhanced Rights to Act") (discussing Oklahoma's Unity

federal banking and money laundering laws when it comes to providing services to cannabis businesses due to the drug remaining federally illegal.[8] Burdensome expenses, mandatory suspicious activity reports, and a minefield of other complicated rules and regulations deter most banks and accountants from getting involved with cannabis cash.[9] The same goes for many physicians, who, despite their professional opinion of the drug's medical benefits, remain hesitant to prescribe or even recommend it to patients because of the ethical and legal risks involved.[10]

Marijuana legalization is an equally complex issue for attorneys to navigate. Acting as a set of ethical guidelines for practicing attorneys, the Model Rules of Professional Conduct expressly prohibit an attorney from counseling a client to engage in illegal activity, or assisting a client in activity that the attorney knows is illegal or fraudulent.[11] Because marijuana growth and distribution is still federally illegal under the Controlled Substances Act ("CSA"), and acting under the color of state law is not a defense to engaging in federally illegal conduct, attorneys thrust themselves into an ethical gray area when they choose to take marijuana businesses as clients.[12]

To make matters worse, legal intrastate cannabis industries are accompanied by some of the most complex and stringent regulatory schemes in existence.[13] Ambitious entrepreneurs looking to capitalize on this new market face the daunting task of navigating a minefield of legal issues in a highly regulated industry before they even think about making their first sale.[14] Combine these issues to the CSA's unconditional federal prohibition of marijuana,[15] along with lawyers who are concerned with breaching their ethical duties should they choose to represent a marijuana business,[16] and you have a perfect formula for a massive amount of unattended legal needs. Leaving these legal needs unattended could inhibit a promising industry's full bloom.

In response to the conflict between the CSA and state marijuana legalization, many states have either modified their Rules of Professional Conduct or have provided ethics opinions that answer whether attorneys are permitted to represent legal intrastate marijuana businesses, and if so, what exactly the representation may entail without breaching the attorney's ethical duties.[17] Certain states have taken a progressive "client-

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Bill, which provides a non-exhaustive list of "safety sensitive" jobs that allow employers to take an employee or job applicant's medical marijuana use into consideration when the individual holds or will hold a "safety sensitive job").

8. Kevin Murphy, *Legal Marijuana: The $9 Billion Industry That Most Banks Won't Touch*, FORBES (Sept. 6, 2018), https://www.forbes.com (click on search icon at the top right corner of home page and search "Legal Marijuana: The $9 Billion Industry That Most Banks Won't Touch").

9. *Id.*

10. Steve Hendrix, *Doctors backing out of recommending medical marijuana in response to Sessions memo*, THE CANNABIST (Feb. 2, 2018), https://www.thecannabist.co/2018/02/02/maryland-massachusetts-medical-marijuana-doctorssessions/98160/.

11. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983).

12. *See* United States v. McIntosh, 833 F.3d 1163, 1167 (9th Cir. 2016).

13. *See* Rendleman, *supra* note 1.

14. *Id.*

15. Controlled Substances Act of 1970, 21 U.S.C. § 812(1)(a) (2012).

16. *See* Rendleman, *supra* note 1.

17. *See* Wash. State Bar Ass'n, Advisory Op. 201501 (2015); ILL. RULES OF PROF'L CONDUCT (Ill. 2015).

centric" approach[18] (i.e. an approach that promotes unrestricted access to attorneys) to applying the Rules of Professional Conduct to their legalized marijuana industries. Alternatively, other states have been hesitant to deviate from a strict textual reading of the rules, which arguably restricts or inconveniently conditions marijuana businesses' access to lawyers.[19] However, some states, including Oklahoma, have left many attorneys in the dark by not officially taking a clear stance on the issue.[20]

Part II of this comment will explore the history of the federal government's regulation and criminalization of marijuana and the recent development of the drug becoming legal in some capacity under the laws of over half the states. Part III will analyze how these states have responded to marijuana legalization through ethics opinions or changes in their Rules of Professional Conduct. Additionally, Part III will analyze how these opinions and rule changes have attempted to articulate permissible degrees of representation that lawyers may provide state-legal marijuana businesses without breaching their ethical duties. After a comparative analysis of the states' responses to their legalized marijuana industries, this Comment will recommend an approach for Oklahoma to take that will provide attorneys adequate guidance through the ethical gray area associated with their choice to provide services to marijuana businesses.[21] Lastly, this Comment will explain that by implementing a "client-centric" approach[22] to interpreting the Rules of Professional Conduct, the Oklahoma Ethics Committee or Supreme Court can eliminate part of this ethical gray area for Oklahoma attorneys, further the underlying objectives of the Rules, and provide the state's medical marijuana industry an opportunity to fully blossom.

II. AN OVERVIEW OF FEDERAL REGULATION AND STATE MARIJUANA LEGALIZATION

Through the early parts of American history, growing and using marijuana was legal under federal law and laws of the individual states.[23] From the mid-nineteenth century through the early 1900's, physicians recognized the drug for its medical value and utilized it to treat a wide range of ailments.[24] During this time, marijuana was even listed in the U.S. Pharmacopeia, a pharmaceutical publication containing the formula for the

18. *See* Rendleman, *supra* note 1 (Rendleman addresses the two primary stances on the interpretation of Model Rule 1.2. One being a "strict textual" interpretation, and the other being a "client centric" interpretation based on reasonableness. This Comment concurs with Rendleman's argument for a "client-centric" approach, recommends that Oklahoma adopt this approach, and further elaborates how the approach carries out the ABA Rules' objectives.).

19. *Compare* Wash. State Bar Ass'n, Advisory Op. 201501 (2015), *with* Pa. Joint Formal Op. 2015-100 (2015).

20. Shortly after Oklahoma passed State Question 788, the Oklahoma Bar Association Rules of Professional Conduct Committee proposed an amendment to Rule 1.2. that allowed attorneys to represent marijuana businesses as long as the attorney advised the client regarding federal and tribal law. However, the amendment was not adopted. *See* Joe Balkenbush, *Ethics of Legal Marijuana in Oklahoma*, 90 OKLA. B.J. 60 (2019).

21. *See generally* OKLA. STAT. tit. 5 (2008). Oklahoma adopted the ABA Model Rules of professional conduct in 2008. Therefore, all discussions of the "ABA Model Rules" apply to Oklahoma. The crux of this Comment's argument is that the Oklahoma Ethics Committee should either issue an official opinion, or the Supreme Court should amend the rules in light of Oklahoma's legalized medical marijuana industry.

22. *See* Rendleman, *supra* note 1.

23. Mark Eddy, *Medical Marijuana: Review and Analysis of Federal and State Policies*, CONG. RESEARCH SERV. 1 (2010), http://fas.org/sgp/crs/misc/RL33211.pdf.

24. *Id*. at 1.

preparation of drugs considered to be the most fully established and best understood at the time.[25] However, in the mid 1900's, the federal government did not provide the same welcomed greeting to the drug that earlier physicians had, which in effect began the rollercoaster ride that the government's whimsical stance on the drug has resembled over time.

A. Congress Goes on the Offensive in the Crusade Against Cannabis

By the end of 1936, marijuana had lost its popularity and was viewed as an accessory associated with violent crime.[26] The drug's new image led Congress to pass the Marihuana Tax Act of 1937,[27] which was the government's first attempt to regulate marijuana.[28] The Act imposed a registration and reporting requirement and a tax on marijuana growers, buyers, and sellers.[29] Additionally, the Act caused marijuana to drop from the Federal Pharmacopeia, stripping it of its previously recognized medicinal value.[30] Though the Act did not expressly prohibit the production or use of marijuana, its effect was essentially the same due to the duty imposed on users and growers to self-report.[31] However, the Act was later ruled unconstitutional because it compelled self-incrimination, and thus violated the Fifth Amendment.[32]

Decades after the Marihuana Tax Act, President Nixon launched the "War on Drugs" campaign in response to a rise in recreational drug use in the 1960's.[33] To give the campaign legs, the government doubled down on its disapproving position on marijuana by passing the infamous Controlled Substance Act ("CSA") of 1970, which categorized marijuana as a Schedule I drug.[34] The CSA provided a five-tiered scheduling system that classified drugs based primarily on their addictive potential balanced against their medicinal value.[35] Schedule I drugs have high potential for abuse and no currently accepted medical use.[36] Other examples of Schedule I drugs include heroin, LSD, and ecstasy.[37] The most significant difference between Schedule I and II drugs is that Schedule

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25. *Id.* at 6; Nils Hagen-Frederiksen, *What is a Pharmacopeia?*, U.S. PHARMACOPEIA (Aug. 7, 2014), https://qualitymatters.usp.org/what-pharmacopeia.

26. Eddy*, supra* note 23, at 6.

27. Christopher Ingraham, *'Marijuana' or 'marihuana'? It's all weed to the DEA*, WASH. POST (Dec. 16, 2016, 6:00 AM), https://www.washingtonpost.com/news/wonk/wp/2016/12/16/marijuana-or-marihuana-its-all-weed-to-the-dea/ (One frequent question brought up about early cannabis legislation is why the Marihuana Tax Act is spelled with an "h" instead of a "j" as we are used to seeing. The word's origin is Mexican-Spanish, which spells it with an "h," while the Americanized spelling of the word is with a "j." However, some jurisdictions still regularly use the "h" version of the spelling. Both spellings are technically correct, but if ever in doubt, just use the word "cannabis.").

28. Eddy, *supra* note 23, at 2.

29. *Id.*

30. *Id.*

31. *Id.*

32. *See* Leary v. United States, 395 U.S. 6 (1968).

33. *The War on Drugs: History and Facts*, CRIMINAL JUSTICE PROGRAMS, https://www.criminaljusticeprograms.com/articles/war-on-drugs-history-and-facts/ (last visited Mar. 10, 2020).

34. Controlled Substances Act of 1970, 21 U.S.C. § 812(1)(a) (2012).

35. German Lopez, *The Federal Drug Scheduling System Explained*, VOX (last updated Aug. 11, 2016), https://www.vox.com/2014/9/25/6842187/drug-schedule-list-marijuana.

36. 21 U.S.C. § 812(1)(a).

37. *See* Lopez, *supra* note 35.

II drugs may have limited use for medical purposes with the DEA's approval, while Schedule I drugs are federally illegal for all purposes besides government research.[38] For example, many ADHD medications contain amphetamine, a Schedule II drug with a high risk of potential for abuse, which is legal in some capacities due to its recognized medical benefits.[39]

The CSA additionally established punishment guidelines for individuals prosecuted for engaging in the manufacture, distribution, and possession of Schedule I narcotics, with punishment as severe as life imprisonment for high volume sellers and traffickers.[40]

i. Lack of Firepower for Marijuana Legalization from the Federal Judiciary

The U.S. Supreme Court has consistently held that the CSA's prohibition of marijuana preempts conflicting state laws that deem the drug legal.[41] Throughout its Marijuana jurisprudence, the Court has established that no implied medical-necessity exception exists to the federal government's prohibitions on the manufacture and distribution of marijuana.[42] The Court has acknowledged that because of marijuana's Schedule I status, the only exception the CSA provides for marijuana use is for government research.[43]

In 2005, the Court provided additional ammunition for the government's crusade against marijuana in its decision in *Gonzales v. Raich.*[44] In this landmark case, the Court upheld the CSA and struck down a California citizen's argument that they had a right to use marijuana for medicinal purposes under California's Compassionate Use Act.[45] *Gonzales* affirmed the federal government's preemptive powers to regulate cannabis use, even when it is produced and used in compliance with state laws.[46]

The Ninth Circuit maintained the CSA's preemption over state medical marijuana laws in *United States v. McIntosh*, but acknowledged the limitations that congressional appropriations to spending bills inflict on the Department of Justice's ("DOJ") ability to prosecute individuals complying with state law.[47] In *McIntosh*, the court reviewed a consolidation of cases that dealt with the government prosecuting individuals in California

38. *Id.*

39. Sharon Liao, *Why Are ADHD Medicines Controlled Substances?*, WEBMD (May 10, 2017), https://www.webmd.com/add-adhd/features/adhd-medicines-controlled-substances#1.

40. 21 U.S.C. § 841(a)(1) (2012).

41. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005); United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483 (2001).

42. *Oakland Cannabis Buyers Co-op*, 532 U.S. at 484.

43. *Id.*; Paul Armentano, *The federal government must stop stifling medical marijuana research*, THE HILL (Sept. 14, 2018, 3:30 PM), https://thehill.com (In the search icon at the top right corner of the home page, type "The federal government must stop stifling medical marijuana research.") (The DEA is currently blocking 25 medical marijuana research applications. Since 1962, the only federally recognized marijuana research facility is the University of Mississippi, and experts contend that the facilities and product are inadequate to achieve legitimate research results. As they stand, the federal hurdles to clinical cannabis research are "unduly onerous", and have been called upon by law makers to be abolished. Without adequate approved government research, marijuana's legal status will remain stagnant.).

44. *Raich*, 545 U.S. at 1.

45. *Id.*

46. *Id.* at 8–10.

47. *See* 833 F.3d 1163 (9th Cir. 2016).

for marijuana offenses.[48] The defendants pointed to a rider that Congress had recently attached to an omnibus spending bill that prohibited the DOJ from using its funds to prevent states from implementing their own medical marijuana laws.[49] The court struck down the DOJ's argument that it was not preventing states from implementing their marijuana laws by using funds to prosecute individuals, as opposed to the state itself.[50] However, the *McIntosh* court noted that individuals who do not strictly comply with all state law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in unauthorized conduct and therefore are subject to prosecution by the DOJ.[51]

Despite the CSA's preemption over state marijuana laws, Congress still maintains its authority to allocate or restrict the DOJ's funds for prosecuting marijuana offenses in states where it is legal.[52] When an appropriations act prohibits the DOJ from using its funds to prevent states from implementing their own medical marijuana laws, the DOJ is barred from utilizing its funds to prosecute individuals that can demonstrate their marijuana use was in compliance with state law.[53]

B. Full Steam Ahead: The States Challenge the CSA by Passing Their Own Marijuana Laws.

Marijuana advocates who long called for the drug's legalization can largely thank the concept of federalism, and perhaps the audacity of law makers in the first few states that legalized the drug, for the impressive traction that the movement for marijuana legalization has gained over time. Whether through statute adoption, state referenda, or ballot measure, constituents in states that voted in favor of state marijuana legalization would soon put the federal government on notice that the CSA would not go unchallenged.

i. Blazing the Trail: California's Compassionate Use Act Sparked the Movement for Marijuana Legalization

In 1996, California became the first state to allow marijuana use for medical purposes through State Proposition 215, which would come to be known as the Compassionate Use Act.[54] The Act was considered a victory for medical marijuana proponents and was passed by more than an 11% margin.[55] In effect, patients and defined caregivers were permitted to possess and cultivate marijuana for doctor-recommended medical treatment and would not be subject to criminal laws which otherwise prohibit such

48. *Id.*

49. *Id.* at 1177 (referencing the rider Congress attached to the 2015 omnibus spending bill, which provides, "None of the funds made available in this Act to the [DOJ] may be used, with respect to [states with medical-marijuana laws], to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

50. *Id.*

51. *Id.*

52. 833 F.3d at 1179.

53. *Id.*

54. *California Proposition 215, The Medical Marijuana Initiative (1996)*, BALLOTPEDIA (last visited Mar. 10, 2019), https://ballotpedia.org/California_Proposition_215,_the_Medical_Marijuana_Initiative_(1996).

55. *Id.*

acts.[56] The "recommended" language was crucial, as doctors who would risk losing their license for prescribing cannabis to a patient could merely recommend the drug for medical purposes and discuss its benefits without fear of punishment.[57]

ii. One Step Forward: The Obama Administration and the Ogden Memo Ignite an Ideological Revolution at the Nation's Capital and in States with Legal Cannabis Markets

President Barack Obama's election was a huge turning point for the medical marijuana industry. The Obama Administration DOJ suggested that it would loosen the standards of the Bush administration's more stringent stance on marijuana.[58] Additionally, the administration advised U.S. Attorneys against devoting resources to prosecuting medical marijuana users and suppliers acting in compliance with their state laws.[59]

In October of 2009, Deputy Attorney General David Ogden released the infamous "Ogden Memo," which elaborated on the Obama administration's more relaxed policy on marijuana.[60] The Memorandum, which addressed attorneys and prosecutors in states where marijuana had been legalized, concerned the allocation of federal prosecution resources and set forth recommended guidelines, providing: "As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[61] The Ogden Memo was significant because some interpreted it to narrow the scope of CSA enforcement policy.[62]

The Ogden Memo's effect on the marijuana industry was profound. Although parts of the memo cautioned against an apathetic view towards federal law,[63] many people, perhaps prematurely, saw it as the government taking a laissez faire approach to marijuana regulation in states where it had been legalized.[64] The marijuana industry's growth in California and Colorado was particularly explosive. Citizens saw a handful of dispensaries multiply into thousands by 2010.[65]

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56. *Id.*

57. Edwin Chemerinsky, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 85 (2015) (citing Conant v. Walters, 309 F.3d 629, 632, 638–39 (9th Cir. 2003)).

58. Eddy, *supra* note 23, at 11 (discussing the public reaction to the FDA's 2006 statement on marijuana's lack of medical benefits).

59. *Barack Obama 'To Overturn' Bush Era Cannabis Policy*, THE TELEGRAPH (Oct. 18, 2009, 11:18 PM), https://www.telegraph.co.uk/news/worldnews/barackobama/6373683/Barack-Obama-tooverturn-Bush-era-cannabis-policy.html.

60. Memorandum from Deputy Att'y Gen. David G. Ogden to Selected U.S. Attorneys (Oct. 19, 2009) (*available at* https://www.justice.gov/archives/opa/blog/memorandum-selected-unitedstate-attorneys-investigations-and-prosecutions-states).

61. *Id.*

62. *Id.* (providing that "[p]rosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law . . . is unlikely to be an efficient use of limited federal resources.").

63. *Id.* ("Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted.").

64. Chemerinsky, *supra* note 57, at 86–87.

65. *Id.* at 87.

iii. Two Steps Back: The Cole and Sessions Memos Send the Ogden Memo Up in Smoke and Cloudy the Understanding of the Government's Stance on CSA Enforcement

In 2011, Deputy Attorney General James Cole released the first of his three follow-up memos to the Ogden Memo regarding CSA enforcement in response to the rapidly expanding marijuana industry.[66] The 2011 Memo rebutted the belief that the Ogden Memo would shield marijuana manufactures, transporters, and other users from federal prosecution, and clarified that federal law and the CSA still preempted any state law that legalized marijuana.[67] The Cole Memo explained that the Ogden Memo's purpose was to assist in allocating prosecution resources efficiently and that the DOJ was still committed to fully enforcing the CSA.[68]

In August of 2013, Cole further detailed CSA enforcement in his second memorandum. The 2013 Memo set forth eight specific enforcement priorities that were intended to prevent activities ranging from cartel and criminal enterprise involvement in the marijuana industry, to marijuana sales to minors.[69]

Less than a year later, the DOJ issued an additional memo that addressed financial institutions providing services to marijuana businesses.[70] The DOJ warned that financial institutions engaging in transactions involving proceeds deriving from marijuana businesses or marijuana related conduct would subject the institutions to liability under preexisting money laundering statutes.[71] Soon after, the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") issued a set of guidelines to financial institutions wishing to take on marijuana businesses as clients.[72] The Guidelines were intended to enhance the availability of financial services and transparency for state-legal marijuana businesses, while also outlining an approach for financial institutions to comply with the eight enforcement priorities issued in the Cole Memos.[73] The Cole Memos, the DOJ Banking Memo, and the FinCEN Guidelines provided marijuana businesses a degree

66. Memorandum from Deputy Att'y Gen. James M. Cole to U.S. Attorneys (June 29, 2011) (*available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance2011-for-medical-marijuana-use.pdf).

67. *Id.*

68. *Id.*

69. Memorandum from Deputy Att'y Gen. James M. Cole to All U.S. Attorneys (Aug. 29, 2013) (*available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf) (providing that U.S. attorneys should allocate their prosecutorial resources according to the following eight priorities: (1) preventing the distribution of marijuana to minors; (2) preventing revenue of marijuana sales from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property).

70. Memorandum from Deputy Att'y Gen. James M. Cole to All U.S. Attorneys (Feb. 14, 2014) (*available at* https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf).

71. *Id.*

72. *See generally* FIN. CRIMES ENF'T NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESS (2014).

73. *Id.* at 1.

of comfort by allowing the businesses to ascertain how the DOJ would handle state laws conflicting with the CSA.[74] However, whatever world of comfort that was believed to exist would soon be shaken to its core by the Trump administration.

In 2018, the Trump administration DOJ dropped a bombshell on the marijuana industry when Attorney General Jeff Sessions issued a memo that expressly withdrew the Ogden, Cole, and Banking Memos.[75] The Sessions Memo reiterated the DOJ's commitment to established principles that govern all federal prosecutions, and warned that marijuana offenses would be prosecuted in the same manner as other federal offenses.[76] The Memo instructed U.S. Attorneys to prosecute marijuana offenses pursuant to the principles in the U.S. Attorney's Handbook, which merely establishes the level of discretion each U.S. Attorney possesses.[77] While prosecutorial discretion has always been a power U.S. Attorneys possess, the Ogden and Cole Memos deterred federal prosecutors from taking free reign to prosecute any marijuana entity they desired.[78] In effect, the Sessions Memo expanded U.S. Attorneys' discretion to prosecute marijuana businesses, resulting in a high degree of uncertainty for the industry.[79]

The Sessions Memo sent many in the marijuana industry into panic mode, as the Ogden and Cole Memos were seen as critical governmental interjections that enabled the industry's growth.[80] In particular, marijuana business owners in California feared they were being put on notice because the Memo was released shortly after California enacted legislation that legalized recreational marijuana use.[81] Additionally, the Memo put financial institutions working with marijuana-business clients in the dark due to the FinCEN Guidelines' reliance on the Cole and Banking Memos.[82]

The Sessions Memo was greeted with extreme opposition from lawmakers of states, and the strength of marijuana's quasi-legal status seemed to be withering away.[83] However, the Memos were somewhat limited because they only provided guidance for investigating and prosecuting criminal offenses. The Memos were silent on civil and regulatory penalties, forfeitures, and other non-criminal penalties. If the Memo shielded cannabis businesses from any sort of legal liability, it was only from criminal prosecutions.

The takeaway from the government's seemingly inconsistent agenda on prosecuting marijuana offenses is that the cannabis industry is hyper-sensitive to even the smallest changes in the DOJ's CSA enforcement strategy. Indeed, statements from the government in the form of memos to federal prosecutors have a direct effect on anybody connected to

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74. Hilary Bricken, *Reading The Pot Leaves: What The Sessions Memo Means For Marijuana In The U.S.*, ABOVE THE LAW (Jan. 8, 2018, 4:20 PM), https://abovethelaw.com (In the search icon at the top right corner of the home page, type "Reading the Pot Leaves: What the Sessions Memo Means for Marijuana in the U.S.").

75. Memorandum from Att'y Gen. Jeff Sessions to All U.S. Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement.

76. *Id.*

77. *Id.*

78. *See* Bricken, *supra* note 74.

79. *Id.*

80. *Id.*

81. *Id.*; CAL. HEALTH & SAFETY CODE ANN. § 11362.1 (West 2017).

82. *See* Bricken, *supra* note 74.

83. *Id.*

state-legal marijuana markets.[84] When the government issues statements that could be interpreted as a plan to prosecute these businesses, the market is negatively affected, and at times sent into a state of hysteria due to apprehension from entrepreneurs to keep investing in and developing at-risk businesses.[85] Alternatively, signs of apathy or deference to state law can invigorate states' marijuana markets and bring a sense of optimism to business owners and investors—but some marijuana business owners remain indifferent either way.[86] In sum, uncertainty surrounding the government's prosecutorial philosophy regarding marijuana offenses has potential to bring a "make hay when the sun is shining," or perhaps, "grow herb while the government isn't watching" mentality to many marijuana business owners. The next section will discuss the concerns this has brought to attorneys considering providing legal services to marijuana businesses.

III. LAWYERING UP: SIGNIFICANT LEGAL ISSUES CONFRONTING THE MARIJUANA INDUSTRY

State-legalized marijuana industries are some of the most highly regulated industries in existence. Issues such as banking, taxing, zoning ordinances, business transactions, and other local regulations create a minefield of legal issues for start-up marijuana businesses.[87]

There are two distinct kinds of representation that marijuana businesses seek from attorneys, and each of these representations create different amounts of ethical risk for the attorney. On one hand, a lawyer does not assume much risk when their representation is limited to pure legal advice.[88] A lawyer may safely advise the client on the legal ramifications of a proposed course of action.[89] Even if the client goes on to engage in conduct that is against federal law after receiving the advice, the lawyer will not be personally liable.[90] On the other hand, the attorney could be exposed to professional misconduct liability when the representation goes beyond giving advice, and involves transactions furthering the operation of the business.[91] Providing this degree of representation arguably constitutes an act aiding and abetting a federally-illegal business, which in effect exposes the attorney to more ethical liability.[92]

Even under the presumption that representing a marijuana business does not constitute an ethical breach, attorneys must still navigate the complexities of handling payment from marijuana businesses. Because marijuana is federally illegal, federally chartered banks cannot accept marijuana businesses as customers.[93] Even most state

84. *Id.*
85. *Id.*
86. *Id.*
87. *See generally* Cloudi Mornings v. City of Broken Arrow, 454 P.3d 753 (Okla. 2019) (holding a city is authorized to implement zoning provisions so long as they do not unduly restrict or change zoning as to prevent retail marijuana businesses from opening); Chemerinsky, *supra* note 57, at 90–99; Rendleman, *supra* note 1.
88. Bruce E. Reinhart, *Up in Smoke or Down in Flames?*, 90 FLA. B.J. 20, 25 (2016).
89. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983).
90. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) cmt. 9 (AM. BAR ASS'N 1983).
91. Reinhart, *supra* note 88, at 24.
92. *Id.*
93. *See* Murphy, *supra* note 8.

reserve banks operating in a state where marijuana has been legalized are hesitant to accept money from marijuana businesses.[94] Additionally, credit card companies do not provide services for marijuana transactions.[95] As a result, marijuana businesses extensively operate with cash.[96] Federal law requires banks, lawyers, and other businesses to report cash transactions that exceed $10,000, and failure to do so could result in prosecution or monetary penalties.[97]

Furthermore, federal money laundering laws apply to many common transactions with legal marijuana businesses. Taking payment in excess of $10,000 from a known marijuana business may be a federal crime punishable by up to ten years in prison, and engaging in a transaction for the purpose of furthering a known marijuana business may be a federal crime punishable by up to twenty years in prison.[98] For example, an accountant who receives payment for providing services to a legal marijuana business could be violating federal money laundering statutes.[99] By that same logic, an attorney who is compensated over $10,000 for drafting a contract with their marijuana business client's suppliers could be personally liable for violating federal money laundering laws. Funds obtained from a marijuana business are subject to forfeiture if the recipient of the funds knows that they are from an illegal source, and the fact that the attorney provided fair-value services in exchange for the payment does not render the attorney immune from forfeiture.[100]

In sum, attorneys contemplating the decision to provide services to marijuana businesses are confronted with significant professional responsibility considerations, and once the attorney-client relationship is invoked these considerations only start to pile on more.

A. An Ethical Haze: The ABA Model Rules Create an Ethical Gray Area for Attorneys Representing Marijuana Businesses

The ABA Model Rules define the relationship between attorneys and individuals who consult them for legal advice, providing that someone who consults a lawyer about possibly forming an attorney-client relationship with respect to a matter is a prospective client.[101] However, a prospective client does not necessarily trigger the full attorney-client privilege or other implications of the relationship.[102] Both the attorney and prospective client are entitled to decide whether to proceed with forming the relationship.[103]

When an attorney does choose to represent a client, the representation is limited and

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94. *Id.*

95. *Id.*

96. *Id.*

97. 31 U.S.C. § 5321 (civil penalties for failure to file report of transactions over $10,000); 31 U.S.C. § 5322 (criminal penalties for failure to file report of cash transactions over $10,000).

98. 18 U.S.C. § 1957 (illegal to engage or attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000); 18 U.S.C. § 1956(a)(1) (illegal to engage in a transaction of more than $10,000 with intent to further or promote unlawful activity).

99. Reinhart, *supra* note 88, at 24.

100. *Id.*

101. MODEL RULES OF PROF'L CONDUCT r. 1.18(a) (AM. BAR ASS'N 1983).

102. MODEL RULES OF PROF'L CONDUCT r. 1.18 cmt. 1 (AM. BAR ASS'N 1983).

103. *Id.*

is not an endorsement of the client's political, economic, social, or moral views and activities.[104] Regardless of whether the attorney endorses their client's position, lawyers are required to exercise independent professional judgment and provide candid advice.[105] Though lawyers typically should consider legal principles in giving such advice, the Model Rules provide a list of non-legal factors for consideration in client consultation, including moral, economic, social, and political factors that could have relevance to the client's situation.[106]

Additionally, the commentary of the Model Rules provides that a lawyer should seek to improve the law and access to the legal system.[107] When read alone, these provisions could possibly be taken as support for lawyers being able to comfortably assist marijuana businesses with their legal needs. However, the existing conflict between state and federal law on the matter still creates a dilemma for lawyers wishing to represent cannabis businesses without breaching their ethical duties.

The ABA Model Rules of Professional Conduct prohibit lawyers from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.[108] Specifically, ABA Model Rule 1.2(d) reads:

> 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.[109]

Comment nine of this rule further elaborates on this prohibition, providing:

> This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action.[110]

The main substance of debates pertaining to Rule 1.2 has been whether to strictly interpret the text of the rule, thus enforcing it as it stands, or to interpret the rule more progressively, in effect creating a more "client-centric" standard based on reasonableness.[111] In the context of intrastate marijuana, a client-centric approach to interpreting and applying Rule 1.2 would primarily concern the legal needs of marijuana businesses and their access to attorneys, and less on strict adherence to a rigid, textual interpretation of the rule.

In essence, a strict reading of Rule 1.2 ethically prohibits lawyers from representing marijuana businesses. One could argue that a strict reading of the Rule would infer the only clearly permissible action the attorney is allowed to take in such a meeting is to advise the client about the legal consequences resulting from running the business. A strict

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104. MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 1983).
105. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983).
106. *Id.*
107. MODEL RULES OF PROF'L CONDUCT, Preamble and Scope (AM. BAR ASS'N 1983).
108. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983).
109. *Id*.
110. *Id*.
111. *See* Rendleman, *supra* note 1.

reading of the Rule could also lead to an inference that a lawyer is prohibited from providing assistance to a start-up marijuana business in the form of negotiating business deals and drafting contracts. Comment nine further elaborates on this point by pointing out the "critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."[112]

While bar associations and supreme courts of some states with legal cannabis industries have addressed this dilemma through their own rule modifications or ethics opinions,[113] other states, including Oklahoma, have yet to take a stance on the application and interpretation of Rule 1.2. Inconsistent opinions and rule changes have only further muddied the waters for states entertaining the idea of legalizing marijuana.

i. As "Rules of Reason," the ABA Rules of Professional Conduct Are Elastic Enough to Accommodate Modern Legal Developments

While Rule 1.2 provides that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, it also makes a crucial distinction between providing or recommending the means for a client to engage in criminal or fraudulent conduct and providing a legal analysis that addresses the legal implications of a questionable course of action; the former being prohibited by the Model Rules.[114] Additionally, Rule 1.2 applies a "good faith" provision to attorneys interpreting and applying the law in order to effectively counsel or assist a client with a particular course of conduct.[115] This provision acknowledges that sometimes an attorney's effort to determine the interpretation or validity of a law might require the disobedience of a statute or regulation or the interpretation placed on it by the government.[116] The good faith provision arguably establishes a twilight zone where attorneys can use discretion in the ethical gray area that accompanies representing marijuana business clients. Because of the conflict between state and federal law, an attorney who provides a client services relating to the state law and local regulatory dynamics of managing a state-legal marijuana business arguably falls directly in line with this provision.

The Model Rules of Professional Conduct "are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies[,]" such as state bar associations.[117] In a constantly evolving profession, the Rules are far from black and white or set in stone—as demonstrated by the ABA committee providing:

> In balancing the need to preserve the good with the need for improvement, we were mindful of Thomas Jefferson's words of nearly 185 years ago, in a letter concerning the Virginia Constitution, that "moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill

112. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) cmt. 9 (AM. BAR ASS'N 1983).
113. *See, e.g.*, Ariz. Ethics Op. 11-01 (2011); OHIO RULES OF PROF'L CONDUCT r. 1.2(d)(2) (2019).
114. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) cmt. 9 (AM. BAR ASS'N 1983).
115. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983).
116. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) cmt. 12 (AM. BAR ASS'N 1983).
117. MODEL RULES OF PROF'L CONDUCT, Preamble and Scope (AM. BAR ASS'N 1983).

effects."[118]

The ABA Model Rules are purported to be "rules of reason," and one of their primary functions is to control the image of lawyers in the public eye by maintaining the integrity of the profession.[119] The ABA committee quote lends support to this idea and the notion that the Rules are elastic enough to accommodate legal evolution. With this principle in mind, some states' bar associations have taken the liberty of amending their own rules or issuing opinions that define the scope of the rules to accommodate intrastate marijuana legalization.[120] These modern changes, along with the progressive philosophy of the ABA Ethics Committee shown in the Thomas Jefferson quote, arguably highlight the flexibility of the Model Rules and demonstrate their ability to accommodate modern issues.

ii. The "Client-Centric" Solution: Arizona, Colorado, and Washington, Among Other States, Issued Ethics Opinions That Promote Marijuana Business' Access to Lawyers

In 2011, Arizona became the first state to author an ethics opinion weighing in on Rule 1.2 in response to the enactment of its medical marijuana act.[121] The opinion provided that a lawyer does not violate Arizona's Rules of Professional Conduct when assisting or advising a client under the Medical Marijuana Act, but that they must inform the client that their conduct may be in violation of federal law under the CSA.[122] The opinion additionally provided:

> [W]e decline to interpret and apply [ABA Model Rule 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.[123]

In 2013, the Connecticut Bar Association issued a similar opinion addressing the conflict between state law, federal law, and Rule 1.2 (d).[124] Connecticut's opinion mirrored Arizona's in part, but perhaps with more reservation, providing, "[a]t a minimum, a lawyer advising a client [on state marijuana laws] must inform the client of the conflict between the state and federal statutes, and that the conflict exists regardless of whether federal authorities in Connecticut are or are not actively enforcing the federal statutes."[125] While the Connecticut Bar Association's opinion deemed it permissible for attorneys to advise clients on the State's Palliative Use of Marijuana Act's requirements, it reiterated that under Rule 1.2 (d) lawyers are still prohibited from assisting clients in criminal

118. ANN. MODEL RULES OF PROF'L CONDUCT xv (AM. BAR ASS'N 2011).
119. *Id.*
120. OHIO RULES OF PROF'L CONDUCT r. 1.2(d)(2) (2019).
121. *See* Ariz. Ethics Op. 11-01 (2011).
122. *Id.* at 1.
123. *Id.* at 5.
124. *See* Conn. Bar Ass'n, Informal Op. 2013-02 (2013).
125. *Id.*

conduct.[126] Additionally, the Connecticut opinion cautioned that it was the duty of the lawyer to draw the line where such prohibited assistance meets permissive consultation and advisement.[127]

In 2014, the Florida Bar Association issued an ethics opinion that provided it would not punish lawyers solely for advising a client regarding the validity, scope, and meaning of Florida medical marijuana laws, or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida law, as long as the lawyer also advises the client of the conflicting federal law and policy. [128]

In 2016, the Supreme Court of Illinois also made strides in dealing with the conflict between its new marijuana legislation and ABA Model Rule 1.2 by amending its professional conduct rules to encompass the same principle set forth in the Arizona Bar Association's ethics opinion.[129] Illinois' amended Rule 1.2 (d) allows lawyers to counsel and assist clients with conduct expressly permitted by Illinois law, even if the conduct might conflict with or violate federal law, as long as the lawyer advises the client about the federal law it might violate, and the potential consequences of violating it.[130]

To support its decision to apply a more "client-centric" approach to interpreting Rule 1.2, the Illinois Bar Association cited the ABA Model Code's preamble, which described the model rules as "rules of reason."[131] This decision was also in line with the primary objectives of the ABA Model Rules, which is to ensure that regulations are conceived in the public interest and to improve access to the legal system.[132]

The State of Washington implemented an even more "client-centric" interpretation and application of Rule 1.2 in its 2015 ethics opinion.[133] The Washington opinion laid out a list of hypothetical questions with answers and analysis concerning the legality of certain conduct by lawyers representing marijuana businesses.[134] These questions asked whether an attorney could remain in compliance with the Rules of Professional Conduct while: (1) advising the client regarding interpretation and compliance of Washington Marijuana laws; (2) assisting the client in starting up their marijuana business; (3) using marijuana under Washington law; and (4) starting and operating their own marijuana business under Washington law.[135] The opinion determined that the lawyer could engage in all of the aforementioned conduct without breaching their ethical duties, and provided that acting under the color of state law protects the lawyer from engaging in or assisting a client in conduct that might conflict with federal law.[136] Additionally, the opinion provided that a lawyer would not be engaging in professional misconduct or activity that compromised their fitness to practice law by choosing to participate in the legalized cannabis market as

126. *Id.*

127. *Id.*

128. Gary Blankenship, *Board Adopts Medical Marijuana Advice Policy*, THE FLORIDA BAR (June 15, 2014), https://www.floridabar.org/the-florida-bar-news/board-adopts-medical-marijuanaadvice-policy/.

129. *See* ILL. RULES OF PROF'L CONDUCT r. 1.2 (Ill. 2015).

130. *Id.*

131. Ill. State Bar Ass'n Prof'l Conduct Advisory Op. 14-07 (2014).

132. MODEL RULES OF PROF'L CONDUCT, Preamble and Scope cmt. 6 (AM. BAR ASS'N 1983).

133. *See* Wash. State Bar Ass'n, Advisory Op. 201501 (2015).

134. *Id.* at 2–8.

135. *Id.* at 3.

136. *Id.* at 3, 6–7.

either a customer or a businessperson.[137]

California, like Washington, also took an aggressive, "client-centric" approach to modifying its rules in 2018. The amended rule sets forth that it is permissible for:

> [a] lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client [in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws.] If California law conflicts with federal or tribal law, the lawyer [should also advise] the client about related federal or tribal law and policy . . . .[138]

An important distinguishing factor between the California and Illinois and Florida rules is the strength of language used for outlining how attorneys should handle preliminary meetings with marijuana business clients. Illinois Rule 1.2(d) provides that a lawyer may represent marijuana business *as long as* the lawyer informs the client of the potential consequences stemming from its conduct being a violation of federal law.[139] The correct interpretation of "as long as" is that it mandates lawyers to inform their client of the consequences of breaking federal law while acting under the color of state law. Alternatively, California's Rule uses slightly weaker language compared to the Illinois Rule, and merely provides that a lawyer *should* inform their client of the potential consequences of such conduct.[140] Though the difference in the strength of language seems minor, using optional language such as "should" gives attorneys less of an incentive to provide "candid advice," which the ABA Model Rules mandate.[141]

The question presented by this issue is whether a lawyer is truly satisfying their duty to their client if they have the option of consciously withholding such advice that the Illinois Rule makes mandatory, but the California Rule makes optional. Rule 1.1 partly addresses this inquiry by requiring an attorney to provide competent representation, and one of the necessary components of competence is adequate legal knowledge.[142] Comments One and Two of Model Rule 2.1 also help answer this question by providing:

> "[a] client is entitled to straightforward advice expressing the lawyer's honest assessment . . . . However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations . . . are predominant."[143]

Furthermore, Model Rule 1.4 requires an attorney to explain the matter to which the representation is related to the extent necessary to permit the client to make informed decisions.[144] These provisions of the Model Rules alone arguably require the attorney to advise a marijuana business client on the implications of federal and state law conflict,

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137. Wash. State Bar Ass'n, Advisory Op. 201501, at 6–7 (2015).
138. CAL. RULES OF PROF'L CONDUCT r. 1.2.1 (Cal. 2018).
139. ILL. RULES OF PROF'L CONDUCT r. 1.2 (Ill. 2015).
140. CAL. RULES OF PROF'L CONDUCT r. 1.2.1 (Cal. 2018).
141. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 1983).
142. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).
143. MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 1–2 (AM. BAR ASS'N 1983).
144. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 1983).

which in turn could support the argument that mandates similar to the one provided in the Illinois Rule are redundant and unnecessary.

Though versions of Rule 1.2 like California's arguably impose less obligations on attorneys, the majority of states that have modified their Rules or issued opinions have conditioned marijuana business representation on the lawyer informing the client of the implications of federal law conflicts.[145]

iii. Pennsylvania, Maine, and Ohio Were Among States to Restrict Marijuana Business' Access to Lawyers by Issuing Ethics Opinions Supporting a Strict Reading of Model Rule 1.2

Not all states have bought into the "client-centric" approach to addressing Model Rule 1.2 the way California and Washington have. In 2015, the Pennsylvania Bar Association released an opinion that rendered support for a strict textual approach to interpreting Rule 1.2.[146] The Pennsylvania Bar Association's opinion compared other states' provisions of Rule 1.2 and discussed the implications of broadening the rule's scope to accommodate marijuana legalization.[147] Weary of the potential ramifications stemming from giving attorneys the go-ahead to provide legal services to marijuana businesses, Pennsylvania suggested a more conservative reading of the rule, providing;

> Given that it is a federal crime to manufacture, distribute, dispense, or possess marijuana, PA RPC 1.2 (d) forbids a lawyer from counseling or assisting a client in such conduct by, for example, drafting or negotiating contracts for the purchase, distribution or sale of marijuana. The fact that the proposed client conduct is permitted by state law, and federal law enforcement may not target those operating in compliance with state law, does not change the analysis, as the rule makes no distinction between laws that are enforced and laws that are not.[148]

The word "forbids" is especially significant because it sets forth a stringent, zero tolerance policy for lawyers involving themselves in any way with marijuana businesses. The Pennsylvania opinion gives examples of prohibited attorney conduct, such as drafting contracts for sales of marijuana that are legal under state law.[149] Absolute compliance with Pennsylvania's strict enforcement of Rule 1.2 would restrict marijuana businesses' access to attorneys. A state rule prohibiting certain businesses from accessing legal services seems counterintuitive to the ABA's assertation that the Model Rules are "rules of reason," and runs afoul of the basic notion that everyone should have access to the legal system.

Ohio was also initially among the group of states electing for a stricter adherence to Model Rule 1.2.[150] The Ohio Board of Professional Conduct released an opinion in 2016 stating that a lawyer could not counsel or assist a client in operating a marijuana business that was legal under state law because the lawyer possesses knowledge that such conduct

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145. *See* ILL. RULES OF PROF'L CONDUCT r. 1.2 (Ill. 2015); *see also* Wash. State Bar Ass'n, Advisory Op. 201501 (2015); Conn. Bar Ass'n, Informal Op. 2013-02 (2013); Ariz. Ethics Op. 11-01 (2011).

146. *See* Pa. Joint Formal Op. 2015-100 (2015).

147. *Id.* at 2, 4–8.

148. *Id* at 8.

149. *Id.*

150. *See* Ohio Bd. of Prof'l Conduct Op. 2016-6 (2016).

is illegal under federal law.[151] However, shortly after the 2016 opinion was released, the Ohio Supreme Court reviewed the Ohio Rules of Professional Conduct, and made an amendment to Rule 1.2, which now provides:

> A lawyer may counsel or assist a client regarding conduct expressly permitted under [state law] authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.[152]

The Ohio Supreme Court's permissive interpretation of Rule 1.2 is beneficial to attorneys wishing to represent marijuana businesses and reflects the ABA's assertion that the Model Rules are "rules of reason."[153] Additionally, Ohio's ruling is in line with the notion that the Rules should remain flexible in response to the legal profession's evolution.

A strict interpretation of Rule 1.2, while potentially shielding lawyers from federal liability, does not provide marijuana businesses with adequate legal recourse. This leaves businesses vulnerable to mishaps in their startup and places them in a position where they are a mistake or two away from being subject to federal prosecution. These mistakes could be avoided if marijuana businesses had equal access to lawyers as other business entities do, and taking steps to avoid serious legal mishaps starts with giving lawyers the green light to represent these businesses.

iv. So Now What? How Attorneys Can Ethically Manage Representing Marijuana Businesses

What exactly should a lawyer tell a marijuana business client when its state's Rules of Professional Conduct require the attorney to warn their client of the implications of participating in a federally illegal industry? Is it sufficient that the attorney merely warn the client of the illegal nature of the business from a federal law standpoint, and that the client should be cautious of federal authorities investigating their activity? What about questions the client has that pertain to circumventing federal investigations?

An appropriate approach for attorneys to take when providing legal services to marijuana businesses would be one that adequately informs the client about the potential consequences of engaging in the marijuana industry. Law firms that provide services for marijuana businesses could utilize disclaimers in engagement letters that fully detail the services being provided to the client, explain the scope of the lawyer's representation (e.g. that the lawyer will not be assisting them outside of transactional matters that are in full compliance with state law), and that remind the client that possessing, using, distributing, and selling marijuana are all federally illegal offenses.[154] Additionally, lawyers should limit the scope of their representation to state law, and should spell out in plain meaning that they will only assist or counsel the client with matters or activities that are in

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151. *Id.* at 4.

152. OHIO RULES OF PROF'L CONDUCT r. 1.2(d)(2) (2016).

153. MODEL RULES OF PROF'L CONDUCT, Preamble and Scope (AM. BAR ASS'N 1983).

154. *See, e.g.*, Daniel Shortt, *The Ethical Marijuana Lawyer: Legal Issues, Federal Law And Policy, States*, HARRIS BRICKEN: CANNA LAW BLOG (Oct. 3, 2019), https://harrisbricken.com/cannalawblog/the-ethical-marijuana-lawyer/.

compliance with state law.[155]

v. Conflicts of Interest

Another significant issue facing lawyers who choose to represent marijuana businesses, especially at large firms, is the potential for conflicts of interest with other current clients. ABA Model Rule 1.7 addresses conflicts of interest and provides that a concurrent conflict of interest exists if the lawyer's representation of one party would be directly adverse to the other or if the dual representation would materially limit the lawyer's ability to represent one of the clients.[156] For example, suppose that a large firm in a state that just legalized marijuana represents hundreds of employers. The firm's services for an employer may include drafting and implementing the employer's workplace policies—which include the drug use policies. Right after the state legalizes marijuana, cannabis dispensaries show up in droves looking for legal services to help facilitate the businesses' start-up phase. A conflict of interest may arise if the firm represents employers that are adverse parties to the marijuana business. Precisely, the employers who have lawyer-created policies that allow them to fire employees who test positive for marijuana do not want their employees patronizing the new marijuana dispensary that seeks legal counsel from the same firm.[157]

The Model Rule's comment section elaborates further on the concept and policy behind conflicts of interest, setting forth that "[a] lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated."[158] The significance of "wholly unrelated" is manifested in the illustration above, because despite the fact that the matter in which the lawyer is representing the marijuana business is not directly related to the employer's drug policy, the representation still circumvents both parties' interests. The marijuana business has an interest in attracting customers who can legally use marijuana to buy their products, but the employer has a legitimate interest in preventing its employees from engaging in such conduct.

Rule 1.7 also provides an exception where the lawyer may represent two clients when the representation could bring about a conflict of interest if the following conditions are satisfied: (1) the lawyer reasonably believes they will be able to provide competent and diligent representation to each client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against the other client represented by the lawyer in the same proceeding; and (4) each client gives informed consent, confirmed in writing.[159]

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155. *Id.*

156. MODEL RULES OF PROF'L CONDUCT r. 1.7(a) (AM. BAR ASS'N 1983).

157. *See* H.B. 2612, 57th leg. (Okla. 2019) (The Unity Bill was Oklahoma's compromise for employers in response to medical marijuana legalization. One provision of the Bill discusses employer's rights to fire employees for drug use, and provides a lengthy, non-exhaustive list of "safety sensitive" jobs. Employees with job duties that fall in to one of these categories, or that are perhaps parallel with one, may be terminated for cause for using marijuana even if they have a state-issued medical marijuana card. Legislation like the Unity Bill can send employers scrambling for their lawyers to ensure their policies are still valid. As discussed, conflicts of interest can arise if the attorneys they consult are also representing marijuana dispensaries.).

158. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 6 (AM. BAR ASS'N 1983).

159. MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 1983).

Applying these exception qualifications to the previous hypothetical, the lawyer at a large firm could easily satisfy item (1) based on the amount of resources at large firms, and the fact that the lawyer's services would not be compromised due to the arbitrary conflict. Item (3) would not apply to this scenario because the matter would not involve a claim being brought against an employer by a marijuana business or vice versa. However, items (2) and (4) are more difficult to overcome.

Concerning item (2), operating a marijuana business is federally illegal. This element still begs the question whether state law that conflicts with federal law is sufficient to permit a lawyer to provide legal services to marijuana businesses.

With respect to item (4), a signed consent form that permits counseling and assisting a client in an illegal activity would *arguably* be a non-enforceable contract, and therefore would render the waiver invalid.[160] This would be based on the basic contract law principle that deems a contract formed with illegal activity as consideration unenforceable.[161] However, in order for such an agreement to be an illegal contract, it must clearly and definitively be illegal from one of its terms in order to be considered unenforceable.[162] A contract that *might* potentially lead to illegal action, but does not immediately involve illegal action would ultimately be considered a legal contract.[163] If the contract is merely collaterally connected with an illegal purpose or act, the general rule is that the contract is enforceable if it is only remotely connected with the illegal transaction and rests on an independent and legal consideration.[164] Additionally, the contract is enforceable as long as the plaintiff can establish their case without relying on the illegal transaction.[165]

The hypothetical at issue is squarely in line with this. The terms of the waiver on its face would not expressly provide such illegal conduct as consideration, or due to the agreement's terms, immediately trigger illegal conduct. A better example of an illegal contract would be if the marijuana business paid the lawyer with marijuana for the lawyer's services.

In sum, a waiver signed by both parties in a scenario like this hypothetical would likely be enforceable. The significance of this result is that parties with such an abstract and arguably indirect conflict could still have access to legal services of their choice upon providing informed consent to the attorney in writing.[166]

vi. Entrepreneur Attorneys: Should Attorneys Be Allowed to Participate in State-Legalized Marijuana Industries?

Another question that would likely prompt most attorneys to reflect on their ethical obligations is whether they are allowed to participate in a state-legalized marijuana

160. *But see* RICHARD A. LORD, WILLISTON ON CONTRACTS §19:11 (4th ed. 2003).
161. *See id.*
162. *See id.*
163. *See id.*
164. LORD, *supra* note 160, at 1; *see also generally* Mann v. Gullickson, No. 15-cv-03630-MEJ, WL 6473215 (N.D. Cal. Nov. 2, 2016) (holding contracts that involve consulting services and pertain to marijuana business are enforceable).
165. LORD, *supra* note 160, at 1.
166. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(4) (AM. BAR ASS'N 1983).

industry. The Washington Opinion provides that lawyers are generally free to engage in business to the same extent as other members of the general public, and because the lawyer participating in a state-legal marijuana business is separate from the lawyer's practice of law, there would be no reason to prohibit the lawyer from participating in the market as long as their operations are in compliance with state law and the Rules of Professional Conduct.[167]

The Washington Opinion arguably ignores key provisions of Rule 8.4, one of which provides that disregard for the rule of law and criminal acts reflecting adversely on honesty, trustworthiness, or fitness to practice are not in compliance with the Rules of Ethics.[168]

Additionally, the Rule provides that breaching the oath of office—swearing to abide by both state and federal law—is against the Rules of Professional Conduct, as is conduct demonstrating unfitness to practice law, and acts involving moral turpitude, or corruption.[169] Because marijuana is federally illegal, a lawyer engaging in the cannabis market could arguably be violating Rule 8.4.[170]

Nonetheless, the Washington Opinion rebutted this argument and opined that it would be inappropriate to interpret Rule 8.4 in a way that would define engaging in business permitted by state law as an act demonstrating character that is unfit to practice law.[171] The opinion emphasized that until there is a change in federal enforcement policy that would put the State's legalized marijuana industry at risk, lawyers may enjoy the same freedoms as other members of society to participate in the market.[172] The Washington Opinion demonstrates its commitment to taking a progressive approach to the Rules of Professional Conduct by interpreting matters of law in light of what is permissible under state law, even if it conflicts with federal law.

But what if an attorney wants to enter a marijuana business with one of its clients? Rule 1.8 provides that attorneys should not enter into business with a client, or knowingly acquire a pecuniary interest adverse to a client unless: (1) the transaction and terms are both fair and reasonable and are fully disclosed in writing in a way that can be reasonably understood by the client; (2) the client is advised in writing that they have the ability to seek independent legal counsel on the transaction, and that doing so might be best for the client; and (3) the client gives informed, written consent to the essential terms of the transaction and the lawyer's role in it, including whether the lawyer is representing the client in the transaction.[173]

Maintaining its progressive approach to the Rules of Professional Conduct, the Washington Opinion noted that a lawyer going in to a marijuana business with a client, while acting in compliance with state law, would not constitute either a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," or an "act involving moral turpitude, or corruption, or any unjustified act of

167. Wash. State Bar Ass'n, Advisory Op. 201501, at 8 (2015).
168. MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (AM. BAR ASS'N 1983).
169. *See* MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 1983).
170. *See* Wash. State Bar Ass'n, Advisory Op. 201501 (2015).
171. *Id.* at 7.
172. *See* Wash. State Bar Ass'n, Advisory Op. 201501 (2015).
173. MODEL RULES OF PROF'L CONDUCT r. 1.8(a) (AM. BAR ASS'N 1983).

assault or other act which reflects disregard for the rule of law."[174]

In sum, the Washington Opinion's interpretation and enforcement of the Model Rules of Professional Conduct provide attorneys substantial freedom to represent marijuana businesses as clients and participate in state-legalized cannabis markets.[175] This interpretation and enforcement of the rules is beneficial in multiple ways. First, it provides marijuana businesses the same freedom and ability to obtain legal representation as other legal business entities do in their respective states. Second, it promotes opportunity for development and growth in a new and evolving area of law by affording attorneys the opportunity to represent these businesses as clients. And lastly, allowing attorneys to represent marijuana businesses is beneficial to the CSA enforcement priorities. With adequate legal representation and sound legal advice, marijuana business owners will be more informed on the law and more cognizant of their conduct. And as a result of the benefits from obtaining legal services, marijuana businesses will be more likely to refrain from committing serious federal offenses such as: selling to minors, trafficking across state lines, and establishing ties with criminal enterprises.

Because the Rules of Professional Conduct are meant to be rules of reason with an underlying motive to provide access to the best legal representation possible, the Washington standard adequately addresses the needs of marijuana businesses that are predisposed to a wide variety of legal and regulatory issues.[176]

IV. OKLAHOMA CAN FURTHER THE OBJECTIVES OF THE MODEL RULES OF PROFESSIONAL CONDUCT BY TAKING A "CLIENT-CENTRIC" APPROACH WHEN APPLYING THE RULES TO THE MEDICAL MARIJUANA INDUSTRY

Oklahoma should take a "client-centric" approach when applying the Rules of Professional Conduct to attorneys representing medical marijuana businesses because doing so would improve access to the legal system and the quality of services that the legal profession provides to the public.[177] Interpreting and enforcing the Rules of Professional Conduct in a way that restricts access to our legal system is counter intuitive to the ABA's objective to improve access to the legal system.[178] The Rules are intended to facilitate practices that ensure the legal profession's responsibilities are catered to and discharged in the public interest.[179] Since Oklahomans voted to legalize medical marijuana, it seems improbable that the will of the public is to afford marijuana businesses a fraction of the legal access that other businesses are afforded. The ABA Committee holds the Rules of Professional Conduct out to be "rules of reason,"[180] and it is entirely unreasonable to legalize an evolving industry only to subsequently restrict industry participants' access to

174. The assertion that attorneys should be able to participate in the marijuana industry does not mean that all attorneys should be able to. For example, a prosecutor participating in the industry would probably trigger more conflicts under Rule 1.7 than a general practitioner would. *See* Wash. State Bar Ass'n, Advisory Op. 201501 (2015).

175. *Id.*

176. *See generally* MODEL RULES OF PROF'L CONDUCT, Preamble and Scope (AM. BAR ASS'N 1983).

177. *Id.*

178. *Id.*

179. *Id.*

180. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

lawyers. Because it is the duty of the Profession to create policy that furthers the public interest, it would be best for Oklahoma to take a "client-centric" stance when applying Model Rule 1.2(d) to medical marijuana businesses.

Oklahoma could achieve this end by writing an ethics opinion or implementing a series of modifications to the Oklahoma Rules of Professional Conduct. If Oklahoma issues a formal opinion, it should provide that attorneys may render legal services pertaining to the State's marijuana laws and regulations. Additionally, the opinion should deem it permissible for attorneys to assist medical marijuana businesses with transactional work, and any other conduct that the attorney reasonably believes is permitted by Oklahoma law, orders, regulations, or any other state and local provisions.

Although it would be best for Oklahoma to require attorneys to advise their marijuana business clients about the implications of state and federal law conflicts, it is not entirely necessary. Such a requirement would essentially be encapsulated by Rule 1.1, which requires a lawyer to provide competent representation to a client.[181] One of the necessary components of competent representation is adequate legal knowledge.[182] Additionally, Model Rule 1.4 requires an attorney to explain the law to clients to the extent necessary to permit the client to make informed decisions.[183] These two ABA Model Rules read together arguably require an attorney to inform a client about the implications of federal law when representing a marijuana business. An attorney would probably breach their duty owed to their client by failing to do so. On balance, any modification to the Oklahoma Rules of Professional Conduct should include language that requires attorneys representing medical marijuana businesses to advise them on the implications of federal and state law conflict.

Additionally, any rule modification or ethics opinion should support the notion that Oklahoma attorneys may enjoy the same opportunity to participate in the marijuana industry as everyday citizens are afforded, so long as their participation does not create conflicts of interest with clients and is in compliance with state law and regulations.[184] An attorney's participation in the marijuana industry, whether as a business-person or a consumer, would not constitute an act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Such participation would not be an act of moral turpitude, corruption, or any other unjustified act that reflects poorly on the legal profession or depicts the attorney's disregard for the rule of law. Oklahoma should refrain from taking any stance that would suggest otherwise.

V. CONCLUSION

The ABA committee described the Rules of Professional Conduct as "rules of reason," and established that one of the legal profession's primary objectives is to create policy conceived in the public interest.[185] Oklahoma can further these principles by taking action to eliminate the ethical gray area that dazes attorneys looking to represent medical

181. *Id.*
182. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 1983).
183. *See* Wash. State Bar Ass'n, Advisory Op. 201501 (2015).
184. MODEL RULES OF PROF'L CONDUCT, Preamble and Scope (AM. BAR ASS'N 1983).
185. *See* Shortt, *supra* note 154.

marijuana businesses, or even participate in the industry.

Although state ethics opinions merely serve as a set of guidelines that provide attorneys no shield from federal enforcement,[186] a set of guidelines is better than silence in light of the enormous ethical gray area created by opportunities for attorneys to represent marijuana businesses. And while attorneys gain no federal legal protection when their state modifies its Rules of Professional Conduct—an attorney's ability to ascertain the state's stance on and interpretation of the Rules will give them one less thing to worry about on the job. Taking a stance that clarifies attorneys' ethical duties will undoubtedly allow them to focus their efforts on increasing access to the legal system, providing the best legal services possible, and becoming better advocates for medical marijuana businesses that deserve a full menu of legal services—all of which squarely align with the underlying objectives of the Rules of Professional Conduct.[187]

The people of Oklahoma spoke loud and clear when they voted to pass State Question 788. And for all of the aforementioned reasons, the Oklahoma Ethics Committee and Oklahoma Supreme Court should allow a growing industry to fully blossom by using this opportunity to endorse the voice of the Oklahoma constituents and eliminate the inconvenient ethical haze pestering attorneys that represent medical marijuana businesses.

- Jay Kendrick[*]

186. *See* MODEL RULES OF PROF'L CONDUCT, Preamble and Scope (AM. BAR ASS'N 1983).

187. *Id.*

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