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## NOTE

# Caught in a Haze: Ethical Issues for Attorneys Advising on Marijuana

*Anna El-Zein\**

### I. INTRODUCTION

In 1920, the United States Congress amended the Constitution to outlaw the manufacture, transportation, and sale of alcohol.<sup>1</sup> Despite their aim, Prohibition Era laws were riddled with loopholes and exceptions.<sup>2</sup> Wine, for example, was allowed for religious purposes, which caused church attendance and the purported number of “rabbis” to skyrocket.<sup>3</sup> Similarly, doctors were permitted to prescribe whiskey for a variety of ailments, which caused a significant spike in registered pharmacies.<sup>4</sup> Religion and medicine were just a few of the many loopholes within the Prohibition laws.<sup>5</sup> The illegal sale of alcohol (also called “bootlegging”) became increasingly common as stores and clubs (known as “speakeasies”) developed a smuggling system to satisfy alcohol-seekers nationwide.<sup>6</sup> A black market emerged to meet the demand for alcohol, and citizens began brewing beer and distilling liquor in their

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1. The mere consumption of alcohol, however, was not illegal. U.S. CONST. amend. XVIII, § 1 (“After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”), *repealed by* U.S. CONST. amend. XXI.

2. One of the goals of prohibition was to aid in World War I efforts. *Roots of Prohibition*, KMOS, <http://www.pbs.org/kenburns/prohibition/roots-of-prohibition/> (last visited Jan. 22, 2018). Prohibition advocates argued that the production of barley would be better used to feed American soldiers instead of being used to make beer. Evan Andrews, *10 Things You Should Know About Prohibition*, HISTORY (Jan. 16, 2015), <http://www.history.com/news/10-things-you-should-know-about-prohibition>.

3. Michael Lerner, *Unintended Consequences*, KMOS, <http://www.pbs.org/kenburns/prohibition/unintended-consequences/> (last visited Jan. 22, 2018).

4. *See id.*

5. *See id.*

6. *See Prohibition*, HISTORY, <http://www.history.com/topics/prohibition> (last visited Jan. 22, 2018).

homes.<sup>7</sup> The outlawing of alcohol also exposed millions of Americans to criminal penalties.<sup>8</sup> Courts and jails filled – so much so that prosecutors began making common practice of “plea bargaining” to avoid a severe backlog of cases.<sup>9</sup> Soon, the government realized the laws were not working, and in 1933, Amendment XXI repealed Prohibition; the alcohol industry was freed.<sup>10</sup>

History has a tendency of repeating itself. Today the story of Prohibition is being relived in the marijuana industry.<sup>11</sup> The illegal sale of marijuana is rampant.<sup>12</sup> Laws prohibiting marijuana have made criminals of millions of Americans.<sup>13</sup> Yet, in some states, qualifying patients may access medicinal marijuana for a variety of ailments, including pain, migraines, and arthritis.<sup>14</sup> Other states allow recreational marijuana use.<sup>15</sup> In fact, some form of marijuana is legal in *most* states.<sup>16</sup> Yet the possession, sale, and distribution of ma-

7. *Id.*

8. *Id.*

9. *Id.*

10. U.S. CONST. amend. XXI.

11. See Garrett Peck, Opinion, *For Marijuana Legalization, Lessons from Prohibition*, N.Y. TIMES (May 22, 2013), <http://www.nytimes.com/roomfordebate/2013/05/22/how-can-marijuana-be-sold-safely-for-marijuana-legalization-lessons-from-prohibition>.

12. See *When Capitalism Meets Cannabis*, N.Y. TIMES: DEALBOOK (June 28, 2010, 6:59 AM), <https://dealbook.nytimes.com/2010/06/28/when-capitalism-meets-cannabis/>.

13. Jesse Wegman, Editorial, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), <https://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html>.

14. See Leafly Staff, *Qualifying Conditions for a Medical Marijuana Card by State*, LEAFLY, <https://www.leafly.com/news/health/qualifying-conditions-for-medical-marijuana-by-state> (last updated Oct. 30, 2017).

15. *State Marijuana Laws in 2017 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last updated Jan. 8, 2018).

16. The following states have legalized medicinal marijuana: Arizona (voter approved, 2010), Arkansas (voter approved, 2016), Connecticut (legislation, 2012), Delaware (legislation, 2011), Florida (voter approved, 2016), Hawai'i (legislation, 2000), Illinois (legislation, 2013), Louisiana (legislation, 2015), Maryland (legislation, 2014), Michigan (voter approved, 2008) (proposed recreational ballot measure failed, 2016), Minnesota (legislation, 2014), Montana (voter approved, 2004, 2016), New Hampshire (legislation, 2013), New Jersey (legislation, 2009), New Mexico (legislation, 2007), New York (legislation, 2014), North Dakota (voter approved, 2016), Ohio (legislation, 2016), Pennsylvania (legislation, 2016), Rhode Island (legislation, 2007), Vermont (legislation, 2004), West Virginia (legislation, 2018). See Leafly Staff, *supra* note 14. The following states have legalized recreational and medicinal marijuana: Alaska (recreational, 2014) (medicinal, 1998), California (recreational, 2016) (medicinal, 1996), Colorado (recreational, 2012) (medicinal, 1998), Maine (recreational, 2016) (medicinal, 1999), Massachusetts (recreational, 2016) (medicinal, 2012), Nevada (recreational, 2016) (medicinal, 2000), Oregon (recrea-

rijuana are still illegal under federal law.<sup>17</sup> It is not surprising, then, that patients, ordinary citizens, and businesses seek legal advice when confronted with these conflicting sets of laws.

This conflict between state and federal law puts attorneys in an ethical conundrum. An attorney who counsels an owner of a marijuana dispensary, for example, may face ethical penalties under Rule 1.2(d) of the ABA Model Rules of Professional Conduct.<sup>18</sup> Should attorneys be able to counsel clients on issues in strict compliance with state law without fear of punishment? Are marijuana business owners entitled to advice from legal counsel?<sup>19</sup> This Note seeks to develop and address these issues.

As a disclaimer, this Note does *not* advocate for or against the legalization of medicinal or recreational marijuana at the state or federal level. Instead, this Note outlines the history of marijuana legalization and the legal and ethical implications of conflicting federal and state laws. Part II lays the legal landscape of marijuana laws, describing how marijuana came to be criminalized at the federal level, how it has been accepted in various forms at the state level, and the ensuing issues with which the state and federal governments now grapple. Part III catalogs the various state responses to mixed signals from the federal government and Congress's recent attempt to reform the Controlled Substances Act. Lastly, Part IV contemplates implications of the Trump administration's priorities and ultimately suggests practical steps attorneys can take to ensure compliance with state and federal ethical guidelines. Part V concludes.

## II. LEGAL BACKGROUND

Marijuana has not always been illegal.<sup>20</sup> In fact, at one point, marijuana was regularly used by the public and taxed by the federal government.<sup>21</sup> This Part discusses the path marijuana has taken, from its criminalization in federal law to its acceptance under most state laws. Then, this Part examines how the conflicting federal and state law conundrum has left attorneys in an ethical limbo. Finally, it describes the federal government's enforcement (or lack thereof) of ethical violations.

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tional, 2014) (medicinal, 1998), Washington (recreational, 2012) (medicinal, 1998). *See id.*

17. 21 U.S.C. §§ 802–843 (2012).

18. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016).

19. *See* Philip Cherner & Dina Rollman, *Marijuana and Your License to Practice Law: A Trip Through the Ethical Rules, Halfway to Decriminalization*, 41 J. LEGAL PROF. 19, 21 (2016).

20. *See* Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), <http://time.com/4298038/marijuana-history-in-america/>.

21. *See, e.g.,* *Leary v. United States*, 395 U.S. 6, 14 (1969) (construing the Marijuana Tax Act).

### A. From Criminalization to Liberation

In 1970, Congress passed the Controlled Substances Act (“the CSA”).<sup>22</sup> As a comprehensive attempt to prevent drug abuse, the CSA organizes over two hundred drugs into five categories, or “Schedules.”<sup>23</sup> Schedules compare a drug’s potential for abuse with its accepted medical use.<sup>24</sup> Marijuana (along with heroin, LSD, and ecstasy) has been identified as a Schedule I drug, meaning the federal government believes the drug to have a “high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use of the drug . . . under medical supervision.”<sup>25</sup> The CSA then criminalizes the manufacture, distribution, use, and simple possession of prohibited substances based on their Schedule.<sup>26</sup> States soon followed suit, enacting legislation to criminalize the same substances.<sup>27</sup>

Since 1970, the *majority* of states – thirty – have legalized the use of marijuana for medicinal and/or recreational purposes.<sup>28</sup> States have chosen to legalize marijuana despite its categorization as a Schedule I drug.<sup>29</sup> Where medicinal marijuana is permitted, doctors tout its legalization as a necessary step to better treat seizures, multiple sclerosis, side effects of chemotherapy, and Alzheimer’s disease.<sup>30</sup> In regards to recreational marijuana, proponents claim that legalization provides a boon to states’ tax revenues,<sup>31</sup> decriminaliz-

22. Controlled Substances Act, Pub. L. No. 91-518, 84 Stat. 1242 (1970) (codified at 21 U.S.C. § 801).

23. 21 U.S.C. § 812 (2012); *The Controlled Substances Act (CSA): Overview*, FINDLAW, <http://criminal.findlaw.com/criminal-charges/controlled-substances-act-csa-overview.html> (last visited Jan. 22, 2018).

24. § 812.

25. § 812(b)(1)(A)–(C). A Schedule II drug, however, has a “high potential for abuse” but has “a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions” and “[a]buse of the drug or other substances may lead to severe psychological or physical dependence.” § 812(b)(2)(A)–(C). Schedule I includes such substances as marijuana, heroin, LSD, ecstasy, peyote, and psilocybin. § 812. Schedule II drugs may include cocaine, methamphetamine, oxycodone, opium poppy, Adderall, Ritalin, and hydrocodone. *Id.*

26. 21 U.S.C. § 841 (2012).

27. *See, e.g.*, MO. REV. STAT. § 579.055 (2016).

28. *See* Leafly Staff, *supra* note 14.

29. *Id.*

30. *See* R. Scott Rappold, *Legalize Medical Marijuana, Doctors Say in Survey*, WEBMD (Apr. 2, 2014), <https://www.webmd.com/pain-management/news/20140225/webmd-marijuana-survey-web#1>; *see also* Roxanne Khamsi, *How Safe Is Recreational Marijuana?*, SCI. AM. (June 1, 2013), <https://www.scientificamerican.com/article/how-safe-recreational-marijuana/> (discussing the potential benefits of marijuana as a medicine as well as the potential negative side effects).

31. *See* Joseph Bishop-Henchman & Morgan Scarboro, *Marijuana Legalization and Taxes: Lessons for Other States from Colorado and Washington*, TAX FOUND.

es petty crimes to reduce skyrocketing incarceration rates,<sup>32</sup> and offers an avenue for control and regulation of the most widely-used street drug.<sup>33</sup>

### B. Leftover Confusion

Notwithstanding the nationwide trend towards marijuana legalization, the federal government has continued to enforce the CSA.<sup>34</sup> The CSA authorizes countless civil and criminal penalties, ranging from petty fines to life imprisonment.<sup>35</sup> Beyond incarceration, a felony conviction may leave a person unable to vote, possess a gun, enlist in the armed forces, receive scholarships, or enjoy tax credits.<sup>36</sup> Meanwhile, eight states permit recreational marijuana use and twenty-two states allow its medicinal use.<sup>37</sup>

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(May 12, 2016), <https://taxfoundation.org/marijuana-taxes-lessons-colorado-washington/>; Tanya Basu, *Colorado Raised More Tax Revenue from Marijuana than from Alcohol*, TIME (May 18, 2016, 12:49 PM) <http://time.com/4037604/colorado-marijuana-tax-revenue/>. Such tax revenues have led some states to generously donate to different social causes. Colorado, for example, recently gave 40 million dollars to the Colorado Department of Education and another 2.5 million to a public-school fund. See *Disposition of Marijuana Tax Revenue*, COLO. DEP'T REVENUE, <https://www.colorado.gov/pacific/revenue/disposition-marijuana-tax-revenue> (last visited Jan. 22, 2018).

32. See generally *The Drug War, Mass Incarceration and Race*, DRUG POL'Y ALLIANCE (Feb. 9, 2016), <http://www.drugpolicy.org/resource/drug-war-mass-incarceration-and-race-englishspanish>. But see Marc Mauer, *Can Marijuana Reform End Mass Incarceration?*, HILL (Aug. 12, 2016, 4:20 PM), <http://thehill.com/blogs/pundits-blog/crime/291298-can-marijuana-reform-end-mass-incarceration> (asserting that there is "little evidence to indicate that [marijuana] has been a substantial contributor to mass incarceration").

33. See Lisa Rough, *Should Cannabis be Legalized? 10 Arguments in Favor of Legalization*, LEAFLY (July 7, 2015), <https://www.leafly.com/news/politics/top-ten-arguments-for-legalization>.

34. See Rick Anderson, *Sessions Says He Has 'Serious Concerns' About Legal Marijuana. Now States Wonder What's Next*, L.A. TIMES (Aug. 9, 2017, 7:50 PM), <http://www.latimes.com/nation/la-na-sessions-marijuana-20170809-story.html>.

35. 21 U.S.C. §§ 841–843 (2012).

36. See Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, NAT'L INST. JUST. (May 2013), <https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx>. These punishments vary drastically by state. See *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Sept. 29, 2016), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>. For example, Maine and Vermont do not revoke the right to vote, even while a prisoner is incarcerated. *Id.* In Virginia and Kentucky, however, felons permanently lose their right to vote. *Id.*; see also Kelly Phillips Erb, *On 4/20, It's High Time to Think About Taxes, Revenues, & Marijuana*, FORBES (Apr. 20, 2016, 8:48 AM), <https://www.forbes.com/sites/kellyphillipserb/2016/04/20/on-420-its-high-time-to-think-about-taxes-revenues-marijuana/> (arguing the adverse economic consequences of current drug laws).

37. See Leafly Staff, *supra* note 14.

Where does this leave attorneys? Understandably, the Model Rules prohibit attorneys from counseling or assisting clients in conduct the attorney knows is illegal.<sup>38</sup> Specifically, Rule 1.2(d) states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.<sup>39</sup>

Marijuana possession is illegal under federal law, so it follows that an attorney should refrain from counseling clients on marijuana use.<sup>40</sup> Less clear are the consequences an attorney might face after counseling a client in a state where marijuana is legal.<sup>41</sup> The Model Rules provide some direction, but the words “counsel” and “assist” have been interpreted inconsistently in this context.<sup>42</sup>

In the disciplinary setting, Rule 1.2(d) is considered a “close relative . . . of the criminal law of aiding and abetting . . . however, the principle of Rule 1.2(d) is much easier to state than to apply.”<sup>43</sup> Attorneys need guidance to determine whether they should counsel clients on marijuana use and if so, the scope of any assistance they should provide. Despite the need for direction, state bar organizations and the federal government have continued to skirt these issues, leaving attorneys in the dark.<sup>44</sup>

### *C. History of Enforcement*

Attorneys who violate Rule 1.2 are generally subject to two types of sanctions.<sup>45</sup> First, every state has a disciplinary body that punishes attorneys for ethical violations, which could result in probation, suspension, or disbar-

38. See MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2016).

39. *Id.*

40. *See id.*

41. See Eric Mitchell Schumann, Comment, *Clearing the Smoke: The Ethics of Multistate Legal Practice for Recreational Marijuana Dispensaries*, 6 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 332, 351 (2016).

42. See A. Claire Frezza, Current Development, *Counseling Clients on Medical Marijuana: Ethics Caught in Smoke*, 25 Geo. J. Legal Ethics 537, 545 (2012).

43. 1 GEOFFREY C. HAZARD ET AL., THE LAW OF LAWYERING § 6.22 (4th ed. 2017).

44. See David L. Hudson, Jr., *Lawyers Advising Clients on Marijuana Laws May Run Afoul of Ethics Rules*, ABA J. (Jan. 2017), [http://www.abajournal.com/magazine/article/marijuana\\_legal\\_ethics\\_rules](http://www.abajournal.com/magazine/article/marijuana_legal_ethics_rules).

45. See Neil Gordon, *Misconduct and Punishment*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment>.

ment.<sup>46</sup> Second, the federal government prosecutes attorneys for violations of criminal law, which results in a seizure of funds or, in some cases, incarceration.<sup>47</sup> This Section addresses the Department of Justice’s communication in regards to its prosecutorial “priorities” for marijuana-related crimes, specifically in states that have legalized marijuana in some form.<sup>48</sup> This Section first examines the federal government’s response to marijuana legalization, as states have often formulated their ethical guidelines in light of changes to federal policy.<sup>49</sup> This is distinct from Part III of this Note, which discusses how state courts and ethics boards have reacted to marijuana legalization.

In 2009, Deputy Attorney General David W. Ogden, responsible for establishing enforcement priorities for the federal government, issued a memorandum offering guidance to U.S. Attorneys (“the Ogden Memo”).<sup>50</sup> In it he declared, “The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States.”<sup>51</sup> But he continued, “As a general matter, pursuit of these 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.”<sup>52</sup> In short, the Ogden Memo indicated that the federal government should not, and would not, pursue prosecution of conduct authorized by state law – including marijuana legalization.<sup>53</sup>

In 2011, Deputy Attorney General James M. Cole issued the first of what would eventually become three memoranda about the discrepancy between federal and state marijuana laws.<sup>54</sup> The first reiterated the message of the Ogden Memo but limited its scope, stating, “The Department’s view of . . . the Ogden Memorandum has not changed. There has, however, been an increase in the scope of commercial cultivation, sale, distribution and use of

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46. *See id.*

47. *See id.*

48. *See* Memorandum from Deputy Attorney Gen. David W. Ogden to Selected U.S. Attorneys 1 (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [hereinafter “Ogden Memorandum”].

49. *See* Mark J. Fucile, *The Intersection of Professional Duties and Federal Law as States Decriminalize Marijuana*, 23 PROF. LAW. 34, 36–37 (2015).

50. Ogden Memorandum, *supra* note 48; *see also* *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, U.S. DEP’T JUST., <https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general> (last updated Sept. 9, 2014) (authorizing Deputy Attorney General to set enforcement priorities in consultation with Attorney General).

51. Ogden Memorandum, *supra* note 48, at 1.

52. *Id.* at 1–2.

53. *See id.*

54. Memorandum from Deputy Attorney Gen. James M. Cole to U.S. Attorneys 1–2 (June 29, 2011), [http://www.drugpolicy.org/sites/default/files/DOJ\\_Guidance\\_on\\_Medicinal\\_Marijuana\\_1.pdf](http://www.drugpolicy.org/sites/default/files/DOJ_Guidance_on_Medicinal_Marijuana_1.pdf).



marijuana for purported medical purposes.”<sup>55</sup> It continued, “The Ogden Memorandum was never intended to shield such activities from federal enforcement . . . even where those activities purport to comply with state law.”<sup>56</sup>

In 2013, Cole softened his approach.<sup>57</sup> Specifically, he said prosecutors should not consider commercial nature *alone* as an indicator of whether the trafficking implicates the government, but rather, “prosecutors should continue to review marijuana cases on a case-by-case basis . . . [including analyzing] whether the operation is demonstrably in compliance with a strong and effective state regulatory system.”<sup>58</sup> His message was clear: the federal government should not focus its limited resources on marijuana-related prosecutions where states have sufficient regulatory and enforcement systems.<sup>59</sup>

Finally, in 2014, Cole again reiterated the soft approach to federal prosecution of marijuana-related crimes in states that legalized marijuana use.<sup>60</sup> That memorandum, though, was aimed at financial institutions.<sup>61</sup> Cole noted, “[F]inancial institutions and individuals . . . operat[ing] in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the . . . federal enforcement priorities.”<sup>62</sup>

Despite these repeated attempts at guidance, the intentions of the federal government are still unclear.<sup>63</sup> Even so, the arrival of the Trump administra-

55. *Id.*

56. *Id.* at 2.

57. See Memorandum from Deputy Attorney Gen. James M. Cole to U.S. Attorneys 3 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

58. *Id.*

59. See *id.* The memorandum indicated eight priorities in enforcing the CSA, including:

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

*Id.* at 1–2.

60. See Memorandum from Deputy Attorney Gen. James M. Cole to U.S. Attorneys 2 (Feb. 14, 2014), <http://www.dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf>.

61. See *id.* at 2–3.

62. *Id.* at 3.

63. See *id.* at 3.

tion (discussed further in Part IV) leaves the lasting importance of the Ogden Memos questionable. Next, Part III examines what some states have done to clarify how attorneys should handle issues related to the conflict between state and federal law.

### III. RECENT DEVELOPMENTS

The law should be clear. Lawyers cannot assist their clients in committing crimes, and possession of marijuana is a crime; therefore, lawyers should not counsel clients regarding marijuana.<sup>64</sup> Although simple in theory, the application of the Model Rules in this area is difficult.<sup>65</sup> So far, states have generally taken one of two approaches, which this Part discusses in turn.<sup>66</sup> First, some states have decided to follow *federal law* and have either adopted the Model Rules or explicitly advised attorneys *against* counseling clients on marijuana-related issues.<sup>67</sup> Second, other states have decided to adhere to *federal policy* by following the guidance from the Department of Justice.<sup>68</sup> States following federal policy allow attorneys to advise clients on issues that are expressly permitted by state law.<sup>69</sup> Finally, this Part discusses the federal government's ambiguity and federal legislation that was recently introduced, but not passed, in an attempt to nullify the federal and state law conflict.<sup>70</sup>

#### A. State Responses to Mixed Signals from the Federal Government

##### 1. The Strict Compliance Approach – Following Federal Law

Some states have remained cautious; they encourage their attorneys to follow *federal law* rather than federal policy, which prohibits advising clients on marijuana issues.<sup>71</sup> Maine's Professional Ethics Commission, for example, announced that the "role of the attorney is limited" where the client's

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64. 21 U.S.C. § 812 (2012).

65. See MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016).

66. See Hudson, *supra* note 44.

67. See, e.g., BD. OF PROF'L CONDUCT, SUPREME COURT OF OHIO, OPINION 2016-6: ETHICAL IMPLICATIONS FOR LAWYERS UNDER OHIO'S MEDICAL MARIJUANA LAW 1 (Aug. 5, 2016), [http://www.supremecourt.ohio.gov/boards/boc/advisory\\_opinions/2016/op\\_16-006.pdf](http://www.supremecourt.ohio.gov/boards/boc/advisory_opinions/2016/op_16-006.pdf) [hereinafter "SUPREME COURT OF OHIO"].

68. See, e.g., 11-01: *Scope of Representation*, ST. B. ARIZ. (Feb. 2011), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

69. See, e.g., *id.*

70. See Compassionate Access, Research Expansion, and Respect States Act of 2015, S. 683, 114th Cong. (2015).

71. See, e.g., SUPREME COURT OF OHIO, *supra* note 67, at 1.

conduct is a known violation of federal law.<sup>72</sup> Maine reasoned that Rule 1.2(d) “does not make a distinction between crimes which are enforced and those which are not.”<sup>73</sup> Therefore, the commission warns that as long as Rule 1.2(d) does not limit its scope to crimes *enforced* by the federal government, lawyers should determine whether their service “rises to the level of assistance in violating federal law” on a “case by case basis.”<sup>74</sup> In other words, Maine told its attorneys to give marijuana-related advice at their own risk. Maine considered the Ogden Memo to be a warning, declaring that “no State can authorize violations of federal law.”<sup>75</sup> Taking this statement to heart, Maine effectively bars attorneys from advising clients on marijuana-related issues until federal law changes.<sup>76</sup>

In 2014, Colorado amended its Rule 1.2 equivalent to add Comment 14, stating that a lawyer “may counsel a client regarding . . . [marijuana-related Colorado law], and may assist a client in conduct that the lawyer reasonably believes is permitted by these [laws].”<sup>77</sup> But soon after this comment was published, the U.S. District Court for the District of Colorado held a lawyer may counsel clients regarding the “validity, scope, and meaning” of Colorado’s marijuana laws but may not “assist” clients in conduct reasonably believed to be permitted by such laws.<sup>78</sup> Consequently, Colorado’s attorneys have been left with a rule that does little more than restate Rule 1.2 of the Model Rules.<sup>79</sup> Attorneys are encouraged to limit the scope of their representation to the meaning and implications of the law in question.<sup>80</sup> In practice, such a policy prevents attorneys from advising marijuana-related business owners and others about important business decisions, financial concerns, property leasing questions, and more.<sup>81</sup> Under the Colorado rule, such advice would amount to “assisting” a client to violate federal law.<sup>82</sup> Colorado and Maine are not the only states that have chosen the strict compliance approach. A list of states that have chosen the path of strict compliance includes:

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72. Prof'l Ethics Comm'n, *Opinion #199. Advising Clients Concerning Maine's Medical Marijuana Act*, BOARD OVERSEERS B. (July 7, 2010), [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=110134](http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134).

73. *Id.*

74. *Id.*

75. *Id.* (quoting Ogden Memorandum, *supra* note 48, at 2).

76. *Id.*

77. THE COLORADO RULES OF PROFESSIONAL CONDUCT 21 (Apr. 6, 2016), [http://www.cobar.org/Portals/COBAR/repository/rules\\_of\\_prof\\_conduct.pdf](http://www.cobar.org/Portals/COBAR/repository/rules_of_prof_conduct.pdf).

78. *See Attorney Rules for the District of Colorado*, U.S. DISTRICT CT.: DISTRICT COLO., <http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/LocalRules/AttorneyRules.aspx> (last visited Jan. 25, 2018).

79. *See id.*

80. *See id.*

81. *See id.*

82. *Compare id.*, with THE COLORADO RULES OF PROFESSIONAL CONDUCT, *supra* note 77, at 21.

- Connecticut: “[L]awyers may advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act. Lawyers may not assist clients in conduct that is in violation of federal criminal law. Lawyers should carefully assess where the line is between those functions and not cross it.”<sup>83</sup>
- Louisiana: “On November 2, 2016, the Louisiana State Bar Association Rule of Professional Conduct Committee debated the issue and declined to recommend an amendment to the Louisiana rules that would have permitted lawyers to give legal advice to LSU and Southern regarding marijuana cultivation and distribution.”<sup>84</sup>
- New Hampshire: “Reading Rule 1.2(d) . . . [strictly], the Committee has concluded that New Hampshire lawyers cannot – consistent with Rule 1.2(d) in its present form – provide legal services that would assist a client in the operation of a planned or ongoing medical marijuana enterprise . . . .”<sup>85</sup>
- Nevada: “While Nevada . . . permits medical and recreational use of marijuana, because use, possession, and distribution of marijuana in any form still violates federal law, attorneys are advised that engaging in such conduct may result in federal prosecution and trigger discipline proceedings under SCR 111 under certain circumstances.”<sup>86</sup>
- New Mexico: “The Committee agrees with the Maine and Colorado opinions that assistance to these medical cannabis

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83. CONN. BAR ASS’N, INFORMAL OPINION 2013-02: PROVIDING LEGAL SERVICES TO CLIENTS SEEKING LICENSES UNDER THE CONNECTICUT MEDICAL MARIJUANA LAW 3–4 (Jan. 16, 2013), [http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics\\_Opinions/Informal\\_Opinion\\_2013-02.pdf](http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf).

84. Dane S. Ciolino, *LSBA Codes Committee Declines to Recommend Rule Regarding Marijuana-Related Legal Advice*, LA. LEGAL ETHICS (Nov. 6, 2016), <https://lalegaethics.org/lsba-codes-committee-declines-to-recommend-rule-regarding-marijuana-related-legal-advice/>.

85. Memorandum from N.H. Bar Ass’n Ethics Comm. to N.H. Supreme Court Chief Justice Linda S. Dalianis 17 (Aug. 30, 2016), <https://www.courts.state.nh.us/committees/adviscommrules/dockets/2016/2016-008/2016-008-Ethics-and-Medical-Marijuana-09-16-16-memo-from-Eileen-Fox-with-attachments.pdf>.

86. ORDER AMENDING RULE OF PROFESSIONAL RESPONSIBILITY 1.2 REGARDING MEDICAL MARIJUANA 3 (Feb. 10, 2017), <https://www.nvbar.org/wp-content/uploads/ADKT-0495.pdf>.

businesses would violate the Rules of Professional Conduct as currently written.”<sup>87</sup>

- Ohio: “[A] lawyer may advise a client as to the . . . [scope and legality of state and federal law], but a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business.”<sup>88</sup>
- Pennsylvania: “[A] lawyer may provide services to a client that are strictly advisory, that is, a lawyer may discuss and explain to the client the consequences of a proposed course of conduct and may . . . make a good faith effort to determine the validity, scope, meaning or application of the law.”<sup>89</sup>

## 2. The “Safe Harbor” Approach – Following Federal Policy

Some states have approached the ethical dilemmas inherent in counseling clients about marijuana by advising their attorneys based on federal *policy* instead of federal law.<sup>90</sup> Specifically, these states have told their attorneys that they may counsel clients on marijuana issues, in accordance with state law, even though marijuana use violates federal law.<sup>91</sup> This offers a “safe harbor” to attorneys with two conditions: that the lawyer reasonably believes the client’s conduct to be allowed under state law and that the lawyer warns the client of potential implications under federal law.<sup>92</sup>

Arizona takes this approach.<sup>93</sup> In 2011, the Arizona Bar issued an ethics opinion giving Arizona attorneys a “safe harbor” option.<sup>94</sup> The Arizona Bar based its ethics opinion on a perceived authorization from the federal government via the Ogden Memo.<sup>95</sup> In its opinion, the Arizona Bar stated that “the federal government has issued a formal ‘memorandum’ that essentially carves out a safe harbor for conduct that is in ‘clear and unambiguous com-

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87. STATE BAR OF N.M.’S ETHICS ADVISORY COMM., FORMAL OPINION: 2016-1 at 18 (Aug. 10, 2015), <http://www.nmbar.org/nmbardocs/formembers/eao/2016-01.pdf>.

88. SUPREME COURT OF OHIO, *supra* note 67, at 7.

89. PA. BAR ASS’N, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY COMMITTEE RECOMMENDATION AND REPORT 11 (Nov. 20, 2015), <http://www.pabar.org/pdf/lepr%20cmte-final.pdf>.

90. *See, e.g., 11-01: Scope of Representation, supra* note 68.

91. *See, e.g., id.*

92. *See, e.g., id.*

93. *See id.*

94. *See id.*; *see also* Frezza, *supra* note 42, at 547–48 (summarizing Arizona’s “safe harbor” option).

95. *See 11-01: Scope of Representation, supra* note 68.

pliance' with state law."<sup>96</sup> The bar noted that "[i]n these circumstances, we decline to interpret . . . [Rule 1.2] 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 clients in conduct explicitly permitted by the state.<sup>97</sup> The Arizona Bar found that to hold otherwise would "depriv[e] clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits."<sup>98</sup>

Other states have issued similar safe harbor comments. In 2014, both Florida and Massachusetts issued identical statements in which they promised "not [to] prosecute a . . . Bar member solely for advising a client regarding . . . [state] statutes regarding medical marijuana or . . . conduct the lawyer reasonably believes is permitted by . . . [state law], as long as the lawyer also advises the client regarding related federal law and policy."<sup>99</sup> Through this rule, the Florida Bar Board of Governors and the Massachusetts Board of Bar Overseers offered protection to their attorneys for counseling clients on marijuana-related issues so long as they reasonably believe the conduct is legal.<sup>100</sup>

Some states have applied, at various times, both the "strict compliance" and "safe harbor" approaches. In Hawai'i, for example, the legal disciplinary board first issued a formal opinion recommending strict compliance with federal law.<sup>101</sup> The board warned that attorneys "may [not] provide legal services to facilitate the establishment and operation of a medical marijuana business."<sup>102</sup> Yet, not even a month later, the Supreme Court of Hawai'i issued an opinion overruling the ethics committee warning and amending Rule 1.2(d) so that lawyers may now counsel clients on matters "expressly permitted by Hawai'i law."<sup>103</sup> A list of safe harbor granting states includes:

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96. *Id.*

97. *Id.*

98. *Id.*

99. Gary Blankenship, *Board Adopts Medical Marijuana Advice Policy*, FLA. B. NEWS (June 15, 2014), <http://www4.floridabar.org/divcom/jn/jnnews01.nsf/Articles/575B2BA3C91F53DD85257CF200481980>; *accord BBO/OBC Policy on Legal Marijuana*, MASS. BOARD B. OVERSEERS (Mar. 29, 2017), <https://www.massbbo.org/Announcements?id=a0P36000009Yzb3EAC>.

100. *See* Blankenship, *supra* note 99; *BBO/OBC Policy on Legal Marijuana*, *supra* note 99.

101. *See* DISCIPLINARY BD. OF THE HAW. SUPREME COURT, FORMAL OPINION NO. 49: MEDICAL MARIJUANA 1 (Aug. 27, 2015), [http://www.odchawaii.com/uploads/Formal\\_Opinion\\_49.pdf](http://www.odchawaii.com/uploads/Formal_Opinion_49.pdf).

102. *Id.*

103. *See* ORDER AMENDING RULE 1.2(D) OF THE HAWAI'I RULES OF PROF'L CONDUCT 1-2 (Oct. 20, 2015), [http://www.courts.state.hi.us/docs/court\\_rules/pdf/2015/2015\\_hrprcond1.2am\\_ada.pdf](http://www.courts.state.hi.us/docs/court_rules/pdf/2015/2015_hrprcond1.2am_ada.pdf) ("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 appli-

- Alaska: “A lawyer may counsel a client regarding Alaska’s marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.”<sup>104</sup>
- California: “A California attorney may ethically represent a California client in respect to lawfully forming and operating a medical marijuana dispensary . . . even though the attorney may thereby . . . [violate] federal law. However, the attorney should advise the client of potential liability under federal law . . . .”<sup>105</sup>
- Hawai’i: A lawyer “may counsel or assist a client regarding conduct expressly permitted by Hawai’i law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”<sup>106</sup>
- Illinois: A lawyer may “counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.”<sup>107</sup>
- Maine: “[N]otwithstanding current federal laws regarding use and sale of marijuana, Rule 1.2 is not a bar to assisting clients to engage in conduct that the attorney reasonably believes is permitted by Maine laws regarding medical and recreational marijuana . . . .”<sup>108</sup>

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cation of the law, and may counsel or assist a client regarding conduct expressly permitted by Hawai’i law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”).

104. Memorandum from N.H. Bar Ass’n Ethics Comm. to N.H. Supreme Court Chief Justice Linda S. Dalianis, *supra* note 85, at 13.

105. *Opinion 2015-1*, B. ASS’N S.F. (June 2015), [https://www.sfbar.org/ethics/opinion\\_2015-1.aspx](https://www.sfbar.org/ethics/opinion_2015-1.aspx).

106. ORDER AMENDING RULE 1.2(D) OF THE HAWAI’I RULES OF PROF’L CONDUCT, *supra* note 103, at 1–2.

107. *Article VIII. Illinois Rules of Professional Conduct*, ILL. CTS., [http://www.illinoiscourts.gov/SupremeCourt/Rules/Art\\_VIII/ArtVIII\\_NEW.htm](http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm) (last visited Jan. 26, 2018).

108. PROF’L ETHICS COMM’N, *Opinion #215. Attorneys’ Assistance to Clients Under Rule 1.2 Regarding the Use and Sale of Medical and Recreational Marijuana*,

- Minnesota: “A lawyer may advise a client about the Minnesota Medical Marijuana Law . . . without violating the Minnesota Rules of Professional Conduct, so long as the lawyer also advises his or her client that such activities may violate federal law, including the . . . [CSA].”<sup>109</sup>
- New Jersey: “A lawyer may counsel a client regarding New Jersey’s marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.”<sup>110</sup>
- New York: “In light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.”<sup>111</sup>
- Oregon: “[A] lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”<sup>112</sup>
- Rhode Island: “Accordingly, the Panel concludes that . . . attorneys may ethically advise clients about Rhode Island’s medical marijuana law, and may ethically represent, advise, and assist clients in all activities relating to and in compliance

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BOARD OVERSEERS B. (Mar. 1, 2017), [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=734620](http://www.mebaroverseers.org/attorney_services/opinion.html?id=734620).

109. SIAMA Y. CHAUDHARY, ETHICS: OPINION NO. 23 AND MEDICINAL MARIJUANA 1–2 (May 4, 2015), <http://lprb.mncourts.gov/articles/Articles/Ethics%20Opinion%20No.%2023%20and%20Medicinal%20Marijuana.pdf>.

110. ADVISORY COMM. ON PROF’L ETHICS, PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.2 TO PERMIT LAWYERS TO COUNSEL AND ASSIST CLIENTS WITH REGARD TO NEW JERSEY MEDICAL MARIJUANA LAWS 2 (May 19, 2016), <https://www.judiciary.state.nj.us/notices/2016/n160519a.pdf>.

111. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, *Ethics Opinion 1024*, N.Y. ST. B. ASS’N (Sept. 29, 2014), <http://www.nysba.org/CustomTemplates/Content.aspx?id=52179>.

112. Helen Hirschbiel, *Keeping up with a Changing World: New Rules of Professional Conduct*, OR. ST. B. (Apr. 2015), <https://www.osbar.org/publications/bulletin/15apr/barcounsel.html>.



with the law, provided that the lawyers also advise clients regarding federal law, including the . . . [CSA].”<sup>113</sup>

- Washington: “At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of [Washington’s marijuana laws] . . . and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.”<sup>114</sup>

### B. Proposed Federal Legislation

There have been few attempts by the federal government to change its current stance on marijuana.<sup>115</sup> In March 2015, Senators Cory Booker (D-NJ), Kirsten Gillibrand (D-NY), and Rand Paul (R-KY) sought to change existing marijuana laws through the Compassionate Access, Research Expansion, and Respect States Act of 2015 (“the CARERS Act” or “the Act”).<sup>116</sup> The Act proposed three changes to the existing law.<sup>117</sup> First, the Act would downgrade marijuana from a Schedule I drug to a Schedule II drug under the CSA.<sup>118</sup> Second, the Act would allow individuals and organizations that deal with marijuana to use the banking system without fear of reprisal from the federal government.<sup>119</sup> Third, and most importantly, the Act would amend the CSA so that it would not apply to *medical* marijuana where permitted by state law – effectively codifying the Department of Justice memoranda introduced during the Obama administration.<sup>120</sup>

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113. R.I. SUPREME COURT, ETHICS ADVISORY PANEL OP. 2017-01 at 3 (Feb. 13, 2017), <https://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/17-01.pdf>.

114. *RPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer*, WASH. CTS., [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=RPC&ruleid=garpcl.02](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpcl.02) (last visited Jan. 26, 2018).

115. *See, e.g.*, Compassionate Access, Research Expansion, and Respect States Act of 2015, S. 683, 114th Cong. (2015).

116. *See id.*

117. *See id.* at §§ 2, 3, 6.

118. *See id.* at § 3.

119. *See id.* at § 6.

120. *See id.* at § 2; *see also* John Hudak, *Why the CARERS Act Is So Significant for Marijuana Policy Reform*, BROOKINGS (Apr. 13, 2016), <https://www.brookings.edu/blog/fixgov/2016/04/13/why-the-carers-act-is-so-significant-for-marijuana-policy-reform/> (discussing the Act’s hypothetical impact on banking issues).

The bill was introduced but was not passed.<sup>121</sup> Nevertheless, the mere introduction of the bill is noteworthy. Perhaps the senators introduced the Act as a political move. Or, perhaps the introduction of the CARERS Act revealed a bipartisan desire for marijuana law reform.<sup>122</sup> Possibly more important, the Act may have served as a tangible signal of the growing public support for marijuana legalization.<sup>123</sup> Still, its bipartisan and public support is not enough to overcome the bill's current opponents.<sup>124</sup> But as states continue to enact medicinal and recreational marijuana laws, federal marijuana reform may soon be reconsidered.<sup>125</sup> Next, Part IV addresses how changes in the presidential administration have affected federal marijuana policy and how attorneys can practically adapt to these changes directly.

#### IV. DISCUSSION

With the current legal challenges and confusion in mind, this Part analyzes how the recent change in presidential administration is bound to impact federal marijuana law and policy. This Part further argues that regardless of how new government leaders proceed, attorneys can make sense of the otherwise hazy ethical landscape through proper use of intake procedures, limited scope of representation, and limited confidentiality.<sup>126</sup>

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121. See *S.683 - Compassionate Access, Research Expansion, and Respect States Act of 2015*, CONGRESS.GOV (Mar. 10, 2015), <https://www.congress.gov/bill/114th-congress/senate-bill/683>.

122. See *id.* The Act had nineteen cosponsors, fifteen democrats, three republicans, and one independent: Senator Booker, Senator Gillibrand, Senator Paul, Senator Dean Heller (R-NV), Senator Barbara Boxer (D-CA), Senator Michael Bennet (D-CO), Senator Ron Wyden (D-OR), Senator Jeff Merkley (D-OR), Senator Tammy Baldwin (D-WI), Senator Brian Schatz (D-HI), Senator Tom Udall (D-NM), Senator Martin Heinrich (D-NM), Senator Angus King (I-ME), Senator Mazie Hirono (D-HI), Senator Chuck Schumer (D-NY), Senator Barbara Mikulski (D-MD), Senator Lindsey Graham (R-SC), Senator Chris Murphy (D-CT), Senator Elizabeth Warren (D-MA), Senator Al Franken (D-MN). *Id.*

123. While republicans have generally been more hesitant to marijuana legalization, marijuana liberalization has growing bipartisan support. See, e.g., *supra* note 122 and accompanying text. Democrats and independents have historically embraced marijuana legalization, but recent data signals republicans are supporting marijuana legalization and use in larger numbers. See Art Swift, *Support for Legal Marijuana Use up to 60% in U.S.*, GALLUP NEWS (Oct. 19, 2016), <http://news.gallup.com/poll/196550/support-legal-marijuana.aspx>. Republican support has grown from twenty percent support in 2003 and 2005, to now forty-two percent in a 2016 poll. *Id.*

124. See *S.683 - Compassionate Access, Research Expansion, and Respect States Act of 2015*, *supra* note 121.

125. See, e.g., *Compassionate Access, Research Expansion, and Respect States Act of 2017*, S. 1374, 115th Cong. (2017).

126. See Rachel T. Nguyen, *Clearing the Smoke - An Update on the Marijuana Dilemma for Lawyers*, 2016 ALAS LOSS PREVENTION J. 20, 26-27 (2016).

*A. Unknown Effects of a New Administration*

On January 20, 2017, Donald Trump was inaugurated as President of the United States.<sup>127</sup> President Trump's administration can either continue current federal policy – following in the Obama administration's footsteps and declining to challenge state medical marijuana laws – or President Trump can adopt a new policy.<sup>128</sup> If President Trump chooses the latter, little is known about what his new policy would entail because his stance on marijuana has not been consistent.<sup>129</sup> President Trump has at times supported medical marijuana, but his view of recreational marijuana remains unclear.<sup>130</sup> In early

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127. See *Inaugural Address: Trump's Full Speech*, CNN (Jan. 21, 2017, 9:21 AM), <http://www.cnn.com/2017/01/20/politics/trump-inaugural-address/>.

128. See Melia Robinson, *Trump Has Two Paths He Can Take on Marijuana Legalization – Here's How They Could Affect You*, BUS. INSIDER (Jan. 28, 2017, 11:45 AM), <http://www.businessinsider.com/trump-on-marijuana-legalization-2017-1>.

129. See *id.* In 1990, Mr. Trump stated, “We’re losing badly the war on drugs,” and that “[y]ou have to legalize drugs to win that war. You have to take the profit away from these drug czars.” *Donald Trump: Legalize Drugs*, SARASOTA HERALD-TRIBUNE, Apr. 14, 1990, at 2A. He also indicated that the current drug enforcement efforts were “a joke,” and that tax revenues from legalization could be used to educate the public on the dangers of drugs. *Id.* Even the recently appointed Supreme Court Justice, Neil Gorsuch, has shown frustration with the federal government’s confusing signals. See *Feinberg v. Comm’r*, 808 F.3d 813, 814 (10th Cir. 2015) (Gorsuch, J.) (noting the “mixed messages the federal government is sending these days about the distribution of marijuana”).

130. In response to a question about what Mr. Trump thought about Colorado’s legalization of recreational marijuana, Mr. Trump stated that he thought it was “bad” but that “medical marijuana is another thing” and that he “feel[s] strongly about that.” See *Donald Trump on Marijuana*, C-SPAN (Feb. 27, 2015), <https://www.c-span.org/video/?c4541840/donald-trump-marijuana>. He also stated that he was “100%” behind medical marijuana. *Id.* In an interview with Bill O’Reilly in February 2016 (in response to a question about what Trump would do to combat smuggling marijuana out of Colorado into states where it is illegal):

O'REILLY: What would do you to stop it? What would you do?

TRUMP: I would really want to think about that one, Bill. Because in some ways I think it's good and in other ways it's bad. I do want to see what the medical effects are. I have to see what the medical effects are and, by the way – medical marijuana, medical? I'm in favor of it a hundred percent. But what you are talking about, perhaps not. It's causing a lot of problems out there.

O'REILLY: But you know the medical marijuana thing is a ruse that I have a headache and I need, you know, two pounds of marijuana.

TRUMP: But I know people that have serious problems and they did that they really – it really does help them.

*Donald Trump on the Trade Deficit with China*, FOX NEWS (Feb. 11, 2016), <http://www.foxnews.com/transcript/2016/02/11/donald-trump-on-trade-deficit-with-china.html>. In an interview with Sean Hannity on June 17, 2017, Mr. Trump said that

2017, former Press Secretary Sean Spicer signaled that the administration may “crack down” on states with recreational marijuana laws.<sup>131</sup> Specifically, Mr. Spicer noted that President Trump sees a “big difference” between medical and recreational marijuana and that the Department of Justice will be “further looking into” states permitting recreational marijuana.<sup>132</sup> Mr. Spicer recognized the issue was one for the Department of Justice but stated, “I do believe that you’ll see greater enforcement of [recreational marijuana].”<sup>133</sup>

The U.S. Attorney General, Jeff Sessions, will also play a critical role in determining the federal government’s stance on marijuana.<sup>134</sup> Mr. Sessions has spoken against legalization of marijuana on multiple occasions.<sup>135</sup> Notoriously, in 2016, he declared that “good people don’t smoke marijuana.”<sup>136</sup> At the same hearing, he also stated, “We need grown-ups in charge in Washington to say marijuana is not the kind of thing that ought to be legalized.”<sup>137</sup> Mr. Sessions believes marijuana is a gateway drug, and legalization is a “very real danger.”<sup>138</sup> Recently, he stated, “I think there is some pretty significant evidence that marijuana turns out to be more harmful than a lot of people anticipated and it is more difficult to regulate than I think was contemplated

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he was “all for” medical marijuana but, with respect to recreational marijuana, said that there is “[a] lot of bad information . . . coming” and that “it’s a big problem.” *Exclusive: Donald Trump on What Made Him Run for President on ‘Hannity’*, FOX NEWS (June 18, 2015), <http://www.foxnews.com/transcript/2015/06/18/exclusive-donald-trump-on-what-made-him-run-for-president-on-hannity/>.

131. See John Wagner & Matt Zapotosky, *Spicer: Feds Could Step up Enforcement Against Marijuana Use in States*, WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/02/23/spicer-feds-could-step-up-anti-pot-enforcement-in-states-where-recreational-marijuana-is-legal/?utm\\_term=.03a913ea12fe](https://www.washingtonpost.com/news/post-politics/wp/2017/02/23/spicer-feds-could-step-up-anti-pot-enforcement-in-states-where-recreational-marijuana-is-legal/?utm_term=.03a913ea12fe); see also Joshua Miller, *Will Trump Crack Down on Marijuana?*, BOS. GLOBE (Feb. 24, 2017), <https://www.bostonglobe.com/metro/2017/02/23/pot/B7tBGNSfb2FCeyL4mqcP4I/story.html> (reporting same).

132. See Wagner & Zapotosky, *supra* note 131.

133. *Press Briefing by Press Secretary Sean Spicer*, AM. PRESIDENCY PROJECT (Feb. 23, 2017, 2:58 PM), <http://www.presidency.ucsb.edu/ws/index.php?pid=123405>.

134. See Nick Wing & Matt Ferner, *Jeff Sessions Offers No Straight Answers on How He’ll Handle Legal Marijuana*, HUFFPOST (Jan. 10, 2017, 6:20 PM), [http://www.huffingtonpost.com/entry/jeff-sessions-marijuana\\_us\\_58750d2ae4b099cdb0ff9313](http://www.huffingtonpost.com/entry/jeff-sessions-marijuana_us_58750d2ae4b099cdb0ff9313).

135. See, e.g., U.S. Senate Drug Caucus, *Is the Department of Justice Adequately Protecting the Public from the Impact of State Recreational Marijuana Legalization?*, YOUTUBE (Apr. 5, 2016), <https://www.youtube.com/watch?v=gg0bZvISOK8> (Sessions’ comments begin at 34 minutes, 44 seconds).

136. *Id.* (referenced portion begins at 43 minutes, 34 seconds).

137. *Id.* (referenced portion begins at 39 minutes, 33 seconds).

138. *Id.* (referenced portion begins at 39 minutes, 45 seconds). Sessions suggests that “if [marijuana users] go on to more serious drugs, which tends to happen” people will experience a great “psychological[] impact[.]” *Id.* (referenced portion begins at 42 minutes, 20 seconds).

by some of those states.”<sup>139</sup> He continued, “We are going to take that all into consideration and then make a determination whether or not to revise that policy.”<sup>140</sup> On the other hand, Mr. Sessions has recognized that more federal involvement could strain the already limited resources of the federal government.<sup>141</sup>

Despite the attorney general’s previous mixed statements, on January 4, 2018, Mr. Sessions revoked the Obama-era policies, including the Ogden Memos and any statements made by Attorney General Cole.<sup>142</sup> In his memorandum (“the Sessions Memo”), Mr. Sessions declared that the Department of Justice had “well-established general principles,” which “require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including . . . the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.”<sup>143</sup> Because of these well-established principles, Mr. Sessions stated that nationwide marijuana enforcement policy is “unnecessary” – even though his memorandum is itself a creation of nationwide policy relating to marijuana enforcement.<sup>144</sup>

Even though the Sessions Memo rescinded previous policy, it did not go so far as to direct federal prosecutors to enforce federal laws.<sup>145</sup> Instead, the policy shift merely gives prosecutors *the option* of enforcing federal marijuana law against those who violate it, whereas previously prosecutors were directed to respect state marijuana laws.<sup>146</sup> The Sessions Memo invoked

139. Sarah N. Lynch, *Attorney General Sessions Says Marijuana Still Illegal*, REUTERS (Sept. 20, 2017, 1:43 PM), <https://www.reuters.com/article/us-usa-justice-marijuana/attorney-general-sessions-says-marijuana-still-illegal-idUSKCN1BV2OU>.

140. *Id.*

141. The Department of Justice is bound by a federal budget rider that prohibits the federal government from interfering with legitimate state medical marijuana laws. See Douglas A. Berman, *AG Sessions Indicates that Obama-Era Federal Marijuana Policies Remain in Effect*, L. PROFESSORS BLOG NETWORK: MARIJUANA L., POL’Y & REFORM (Nov. 14, 2017), [http://lawprofessors.typepad.com/marijuana\\_law/2017/11/ag-sessions-indicates-that-obama-era-marijuana-policies-remain-in-effect.html](http://lawprofessors.typepad.com/marijuana_law/2017/11/ag-sessions-indicates-that-obama-era-marijuana-policies-remain-in-effect.html). Mr. Sessions has advocated for that budget rider to be discontinued. See *id.*; Tom Huddleston, Jr., *What Jeff Sessions Said About Marijuana in His Attorney General Hearing*, FORTUNE (Jan. 10, 2017), <http://fortune.com/2017/01/10/jeff-sessions-marijuana-confirmation-hearing/>.

142. See Memorandum from Attorney Gen. Jeff Sessions to All U.S. Attorneys 1 (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [hereinafter “Sessions Memorandum”].

143. *Id.*

144. *Id.* In his memorandum, Mr. Sessions stated: “This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations.” *Id.*

145. See Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone that Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), <http://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html>.

146. See *id.*

strong responses from Democrats and Republicans alike.<sup>147</sup> But despite the negative reaction, “applications for businesses seeking to legally grow, transport, and sell marijuana[,] showed no sign of slowing after Sessions’ announcement.”<sup>148</sup>

With what little we know about the new administration, attorneys need practical guidance to avoid violating ethical rules. The next Section discusses practical steps attorneys can take to avoid ethical issues.

## B. Practical Suggestions

### 1. State Categorizations

What, if anything, can attorneys do to protect themselves from ethical violations? Some states have warned attorneys to decline advising clients on marijuana issues altogether.<sup>149</sup> Others have allowed attorneys to represent clients with marijuana-related issues in a limited capacity – some merely advising on the meaning of a particular marijuana law.<sup>150</sup>

For the sake of this analysis, states can be split into three categories: (1) those that have not legalized any form of marijuana, (2) those that have legalized some form of marijuana, and (3) those that have legalized some form of marijuana *and* have amended their rules of professional conduct or issued an ethics opinion on the topic.<sup>151</sup> Attorneys working in a state within the first category – states that have not legalized marijuana – should not advise clients on any marijuana-related issues.<sup>152</sup> The Model Rules clearly prohibit advising clients on illegal acts.<sup>153</sup>

The second category includes attorneys who work in a state that has legalized some form of marijuana but has *not* updated its rules of professional conduct or offered a related ethics opinion.<sup>154</sup> Without any type of formal or informal “safe harbor” from the state ethics boards, attorneys in such states

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147. With \$2.3 billion dollars expected in tax revenues by 2020, many state representatives are fighting to keep the marijuana industry alive and thriving. See James Higdon, *Did Jeff Sessions Just Increase the Odds Congress Will Make Marijuana Legal?*, POLITICOMAGAZINE (Jan. 6, 2018), <https://www.politico.com/magazine/story/2018/01/06/jeff-sessions-marijuana-legalization-congress-216251?cid=apn>.

148. Evan Halper et al., *Trump Administration Targets Recreational Pot, Placing Thousands of Marijuana Businesses in California at Risk*, L.A. TIMES (Jan. 4, 2018, 4:10 PM), <http://www.latimes.com/politics/la-na-pol-pot-sessions-20180104-story.html>.

149. See *supra* Section III.A.1.

150. See Nguyen, *supra* note 126, at 23–26.

151. See *id.*

152. See MODEL RULES OF PROF’L CONDUCT r. 1.2 cmt. 9 (AM. BAR ASS’N 2016).

153. See *id.*

154. See *id.*

should be wary of giving clients advice on marijuana laws.<sup>155</sup> Attorneys in this situation should limit their services to providing information on the relevant state and federal laws but should not go so far as to give advice that amounts to “assisting” a client in a marijuana-related endeavor.<sup>156</sup>

This distinction is crucial. The ABA notes in the comments to Rule 1.2 that although the rule prohibits attorneys from “knowingly counseling or assisting a client to commit a crime or fraud,” the rule does not go so far as to prevent a lawyer from “giving an honest opinion about the actual consequences . . . result[ing] from a client’s conduct.”<sup>157</sup> If a client has already begun acting and is continuing in the unlawful act, an attorney’s responsibility is “especially delicate.”<sup>158</sup> In such situations, lawyers should cease counseling clients on the illegal matters altogether.<sup>159</sup> The ABA recommends that a notice of withdrawal may be necessary “to disaffirm any opinion, document, affirmation or the like.”<sup>160</sup>

Third, and finally, some attorneys work in a state that has legalized some form of marijuana *and* has also amended its rules of professional conduct or issued a related ethics opinion.<sup>161</sup> In such states, the “safe harbor” provided should allow attorneys to be confident in counseling clients on marijuana-related issues so long as they also warn clients about potential federal violations.<sup>162</sup>

## 2. Intake Procedures and Engagement Letters

Intake procedures and engagement letters can also be useful tools in preventing ethical violations. Intake forms usually include a client’s contact information and identify a client’s purpose for visiting, whereas engagement letters establish the scope of the attorney’s services for the client, usually distributed after an attorney has agreed to work on a particular case.<sup>163</sup> To help identify potential ethical issues, law firms can add to their intake proce-

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155. *See id.*

156. *See id.* at r. 1.2.

157. *See id.* at r. 1.2 cmt. 9.

158. *See id.* at r. 1.2 cmt. 10.

159. *See id.*

160. *Id.*; *see also* MODEL RULES OF PROF’L CONDUCT r. 4.1 (AM. BAR ASS’N 2016) (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”).

161. *See, e.g., Hudson, supra* note 44.

162. *See id.*

163. *See How to Perform Solo and Small Law Firm Client Intake*, FINDLAW, <http://practice.findlaw.com/how-to-start-a-law-firm/how-to-perform-solo-and-small-law-firm-client-intake.html> (last visited Jan. 26, 2018).

dures a questionnaire asking whether a client's purpose for visiting involves marijuana; if so, the form can be flagged for review.<sup>164</sup>

The appropriate response will depend on whether an attorney is practicing in a state exercising the strict compliance approach or the safe harbor approach. Under the strict compliance approach, attorneys should not serve a client when their counsel would amount to "assisting" under the relevant ethical rules.<sup>165</sup> Their services can include no more than an explanation of the law and its potential consequences.<sup>166</sup> On the other hand, those practicing in a state using the safe harbor approach should feel comfortable offering services to their clients so long as they limit the scope of their services through a properly drafted engagement letter.<sup>167</sup>

Engagement letters convey to clients the scope of an attorney's services.<sup>168</sup> Under the safe harbor approach, a well-drafted engagement letter should inform clients of (1) the relevant state law, (2) the potential consequences of violating related federal law, and (3) the limited scope of the attorney's confidentiality and attorney-client privilege should any issues result in civil or criminal litigation.<sup>169</sup> These simple steps offer safeguards around ethical violations for firms practicing in states that have legalized some form of marijuana.

## V. CONCLUSION

Until the federal government legalizes marijuana in its entirety, attorneys will face an ethical conflict. Assuming nationwide marijuana legalization will not happen in the foreseeable future, attorneys need practical guidance on whether and to what extent they should advise clients on marijuana-related issues. Some states have offered a "safe harbor" for their attorneys, while others have vowed to follow federal law with strict compliance. In light of the various state responses, attorneys should be careful when counseling clients on marijuana by implementing limits on confidentiality and the attorney-client privilege, and through the proper use of intake questionnaires and engagement letters.

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164. See Nguyen, *supra* note 126, at 26–27.

165. See MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 10 (AM. BAR ASS'N 2016).

166. See *id.* at r. 1.2. cmt. 9.

167. See Tony Ranniger, *Step 4: Use of Engagement Letters – Identify the Scope of Engagement*, PROF. SOLUTIONS INS. COMPANY (July 7, 2015), <https://www.psicinsurance.com/posts-articles/attorneys/risk-management/step-four-use-of-engagement-letters---identify-the-scope-of-engagement.aspx>.

168. See *id.*

169. See Nguyen, *supra* note 126, at 26–27.



