

2015

PROFESSIONAL ETHICS—THE HIGH RISK OF GOING GREEN: PROBLEMS FACING TRANSACTIONAL ATTORNEYS AND THE GROWTH OF THE STATE-LEVEL LEGAL MARIJUANA INDUSTRIES

Ian Wagemaker

Follow this and additional works at: <https://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Ian Wagemaker, *PROFESSIONAL ETHICS—THE HIGH RISK OF GOING GREEN: PROBLEMS FACING TRANSACTIONAL ATTORNEYS AND THE GROWTH OF THE STATE-LEVEL LEGAL MARIJUANA INDUSTRIES*, 37 W. New Eng. L. Rev. 371 (2015), <https://digitalcommons.law.wne.edu/lawreview/vol37/iss3/7>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University.

PROFESSIONAL ETHICS—THE *HIGH RISK OF GOING GREEN*:
PROBLEMS FACING TRANSACTIONAL ATTORNEYS AND THE GROWTH OF
THE STATE-LEVEL LEGAL MARIJUANA INDUSTRIES

[F]or the professionals who can stomach the risks, the time to get in is now. They'll get in on the ground floor of a brand new industry, and help determine its shape. You don't have to be smoking something to see that as the chance of a lifetime.¹

INTRODUCTION

For the first time ever, a clear majority of Americans support the legalization of marijuana.² The idea of legalized marijuana³ in the United States has outgrown its status as a fringe issue reserved for hippies and fans of the Grateful Dead. This new strain of *reefer madness*⁴ has captivated the entire country, and “[t]he reason for the mainstream interest is simple: This is a legitimate business with many attractive opportunities, and it’s now one of the fastest-growing industries in the country.”⁵ As more states pass laws legalizing cannabis (for medicinal and/or recreational adult use)⁶ an entirely new industry is

1. Chris Walsh, *The Growing Business of Marijuana*, HARV. BUS. REV. (Dec. 13, 2013, 12:11 PM), <http://blogs.hbr.org/2013/12/the-growing-business-of-marijuana/>.

2. Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx> (fifty-eight percent of the American public supports the legalization of marijuana).

3. For the purposes of this Note, the term “marijuana” will be used interchangeably with the term “cannabis.” There is no additional emphasis when using either term. *See What is marijuana? What is cannabis?*, MED. NEWS TODAY, <http://www.medicalnewstoday.com/articles/246392.php> (last updated Sept. 9, 2014); Paul Armentano, *Marijuana: A Primer*, NORML.ORG, <http://norml.org/aboutmarijuana/marijuana-a-primer> (last visited June 28, 2015).

4. REEFER MADNESS (George A. Hirliman Productions 1936) (a 1930s anti-marijuana propaganda film portraying the drug as a monstrous substance). Although the movie and term ‘reefer madness’ have since been revived in a rather ironic fashion. *See also* JONATHAN P. CAULKINS ET. AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 19 (2012); *Reefer Madness*, THE ECONOMIST, Apr. 27, 2006, available at <http://www.economist.com/node/6849915> (illustrating the mainstream media’s tendency to use the term to refer to the revitalized support and public interest surrounding the drug).

5. *See* Walsh, *supra* note 1 (emphasis added).

6. For this Note, I will not attempt to distinguish between recreational or medicinal marijuana based on their merits. The intended use (either recreational or medicinal) is irrelevant to the broader discussion of implications for attorneys and businesses operating

being created, replete with a vast amount of business and investment opportunities.⁷

Although there is an enormous amount of economic opportunity in the state-legal marijuana markets, many legislatures are quickly adopting the approach that the industries must be tightly regulated, taxed, and controlled in order to be legitimate markets for safe products that consumers and patients can rely on.⁸ As a consequence of the implementation of strict regulatory structures and guidelines, “tax and business-transactions lawyers will become more and more in demand as state-level medical and recreation marijuana reforms create new needs for new businesses to sort through new tax laws and business-planning challenges posed by operating a state-permitted marijuana business.”⁹ Businesses will inevitably need the assistance of attorneys in navigating the legal complexities of the highly-regulated legal cannabis industry, but marijuana’s classification as an extremely addictive and dangerous illicit drug by the federal government¹⁰ presents a unique set of challenges for the industry. Even in a state like Connecticut, with a medical marijuana program that is one of the smallest, most tightly regulated program of its kind, the dichotomy between state and federal laws surrounding marijuana “presents ethical and practical challenges for lawyers who represent clients seeking to establish the marijuana growing facilities and dispensaries necessary for the new program to work.”¹¹

This Note highlights some of the most critical limitations facing the legal cannabis markets, flowing largely from the potentially severe federal criminal penalties¹² and the resulting lack of legal advice to

within their respective state-regulated legalized marijuana markets. See *State Medical Marijuana Laws*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx> (last visited June 28, 2015).

7. Solvej Schou, *America’s Marijuana Industry is Growing Like Weeds—Billions of Them*, YAHOO NEWS (Nov. 5, 2013 at 5:53P.M.), <http://news.yahoo.com/americas-marijuana-industry-growing-weeds-billions-them-225317143.html>.

8. See Melanie M. Reid, *The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana* (2013), available at http://works.bepress.com/melanie_reid/12.

9. Douglas A. Berman, *Great jobs for green lawyers in the new green ganja legal world(?)*, PRAWFSBLAWG (Nov. 8, 2013), <http://prawfsblawg.blogs.com/prawfsblawg/2013/11/great-jobs-for-green-lawyers-in-the-new-green-ganja-legal-world.html>.

10. Controlled Substances Act, 21 U.S.C. § 812 (2006).

11. Hugh McQuaid, *Medical Marijuana Poses Ethical Challenges for Lawyers*, CT NEWS JUNKIE (Oct. 25, 2013, 3:04 PM), http://www.ctnewsjunkie.com/archives/entry/medical_marijuana_poses_ethical_challenges_for_lawyers/, (stating the ethical challenges facing lawyers in Connecticut, specifically the work of Attorney Diane W. Whitney, and how the Connecticut Ethics opinion has affected her work for clients).

12. “According the Federal Bureau of Investigation, 43.3% of all ‘Arrests for Drug Abuse Violation’ are of people who are in possession of marijuana. Six percent of all drug-

facilitate legitimate business and state regulatory compliance. Part I of this Note will provide a background of the legal history of cannabis in the United States at both the state and federal levels. It will also highlight the unique status of the legal cannabis industries in the United States and how they present a wide array of problems for investors, businesses, and attorneys looking to provide transactional assistance to clients involved in these emerging state-level legal markets. Part II of this Note will examine the implications on ethical considerations and professional conduct for transactional attorneys who provide assistance to entities involved in the legal cannabis industries. Part III of the Note will then briefly discuss why attorneys are needed by businesses operating within the industry, and the potential results if they are prohibited from assisting clients operating within the legal cannabis markets.

This Note examines the issues inherent in the legal cannabis industries faced by attorneys, business owners, and investors created by the rapid expansion in state-level legalized cannabis legislation¹³ in lieu of the complete federal prohibition of marijuana.¹⁴ More specifically, this Note will address the ethical and professional conduct-related issues presented to transactional attorneys who provide assistance to clients involved in the emerging legal cannabis markets. The professional limitation on the conduct of attorneys presents a major impediment to the growth, stability, and amount of business and investment opportunity aimed at capitalizing on the uncharted territory of the legal cannabis markets that many experts are seeing as “*the next great American industry*.”¹⁵

abuse violation arrests were for the ‘Sale/Manufacturing’ of marijuana. In other words, a whopping 49.5% of all drug-violation arrests are connected to marijuana. Half of the population that is in prison for substance abuse is in prison for marijuana-related crimes.” Anthony Papastrat, *This is How Much Marijuana Prohibition Costs You, the Taxpayer*, POLICY MIC (July 18, 2013), <http://www.policymic.com/articles/54803/this-is-how-much-marijuana-prohibition-costs-you-the-taxpayer>. See also *Crime in the United States 2012, -Persons Arrested*, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (last visited June 28, 2015).

13. See generally, *State Medical Marijuana Laws*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx> (last visited June 28, 2015).

14. See generally Controlled Substances Act, §812.

15. Jane Wells, *Investors see legal marijuana as growth industry*, CNBC NEWS (Nov. 8, 2013, 2:29 P.M.), <http://www.nbcnews.com/business/investors-see-legal-marijuana-growth-industry-8C11565189> (emphasis added) (quoting Troy Dayton, CEO and co-founder of ArcView group, which handles angel investments and conducts market research on the cannabis industry).

I. *FROM SEED TO SCHEDULE I: A BACKGROUND ON CANNABIS IN THE U.S.*

For thousands of years, individuals all over the world in almost every civilization have used cannabis in various applications to treat a wide array of symptoms and ailments.¹⁶ Despite its popularity around the world as a form of medical treatment, cannabis was not recognized in the West as a legitimate form of medicine until the late nineteenth century.¹⁷ Despite marijuana's utilization as a safe and effective form of medical treatment throughout the course of human history,¹⁸ marijuana in the United States is currently listed as a "Schedule I" narcotic under the Controlled Substances Act ("CSA"),¹⁹ the most highly restrictive categorization of a drug according to the federal government.²⁰ Part I.A of this section will briefly examine the history of federal legislation of marijuana in the United States and how marijuana achieved its highly restrictive legal status as designated by the federal government. Part I.B will provide a brief history of state laws legalizing marijuana for medical purposes in the United States since the enactment of the CSA in the 1970s.

Understanding how cannabis came to be outlawed as one of the most restrictive drugs in the United States illustrates the legitimacy of state laws permitting and regulating the use, cultivation, and distribution of cannabis. It is also important to set forth the applicable state and federal laws regarding marijuana, because the relationship between the two bodies of law generates a risky situation for everyone (including business owners, investors, and attorneys) involved in their respective state-level legalized cannabis markets.²¹

16. LESTER GRINSPOON, M.D. & JAMES B. BAKALAR, *MARIJUANA: THE FORBIDDEN MEDICINE* 3 (1993) (stating that in places like India, Africa, Europe, and central Asia, for thousands of years, cannabis has been recommended for the treatment of malaria, constipation, female disorders, pain, cognitive health, to lower fevers, induce sleep, cure dysentery, induce appetite, relieve headaches, and some cultures even use it to ease the pain of childbirth.).

17. *Id.* at 4.

18. *See id.*

19. Controlled Substances Act, § 812.

20. Controlled Substances Act, § 812 ("Schedule I. (A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.").

21. *See* Janean Chun, *Medical Marijuana Businesses Face Risks, From Raids to Audits*, HUFFINGTON POST (Sept. 4, 2012, 8:47 A.M.), http://www.huffingtonpost.com/2012/09/04/medical-marijuana-business_n_1814901.html.

A. *History of Federal Legislation of Marijuana*

According to a recent report issued by Dr. Sanjay Gupta, CNN Chief medical correspondent and world-renowned neurosurgeon, “[w]e have been terribly and systematically misled for nearly 70 years in the United States . . . [n]ot because of sound science, but because of its absence.”²² The systematic misdirection and stigmatized perception of marijuana in the United States began in the early twentieth century, a time during which “[p]ublic attitude was predisposed by the identity and characteristics of persons who chose to use these substances, and the formal policy-making response tended to affirm and harden these predispositions.”²³ By 1914, the American public had been exposed to the horrors of opiate abuse as many Chinese railroad workers had shed light on the debilitating and destructive impacts of opiate addiction.²⁴ As a response to the problems stemming from narcotics usage and trade, Congress passed the Harrison Act of 1914.²⁵ The federal government’s treatment and media portrayal of these immigrant and minority groups to the public gave rise to *widespread beliefs* throughout the country that high crime rates and the decay of society was inexplicably linked with the prevalent drug use and addiction amongst minority and immigrant populations.²⁶

Many Americans (essentially unaware of any information regarding marijuana) negatively associated the drug with Mexican immigrants, other immigrant populations in urban communities, and the African American jazz culture.²⁷ A tainted public opinion toward marijuana was being influenced by the disdain for those who used it rather than by the substance itself.²⁸ For the next few years, localized governments began to echo the calls for federal anti-marijuana legislation because they were seeing use of marijuana by immigrant and minority populations in urban

22. Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN NEWS (Aug. 8, 2013), <http://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana/>.

23. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 27 (1971).

24. See MARTIN BOOTH, *CANNABIS: A HISTORY* at 127-28 (2003).

25. See 38 STAT. 785 (1914) (repealed 1970). See also BONNIE & WHITEBREAD, *supra* note 23, at 16. Strikingly similar to modern laws legalizing forms of marijuana, an important objective of the Act was to regulate the legitimate commerce in the opiates trade and to bring the traffic into channels they could observe and control. *Id.* The Act also made it “unlawful for anyone to purchase, sell, dispense, or distribute any of these ‘narcotic’ drugs” without having registered for medical use or paid the appropriate tax. *Id.*

26. BONNIE & WHITEBREAD, *supra* note 23.

27. JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 19 (2012).

28. *Id.*

areas.²⁹ In 1930, Henry J. Anslinger was appointed as the head of the Federal Bureau of Narcotics (hereinafter “FNB”), which would serve as the genesis of the federal prohibition of marijuana in the United States.³⁰

Early in his tenure, Anslinger convinced himself that cannabis use gave criminals the courage to commit their crimes, and that cannabis had no legitimate medical use.³¹ Anslinger proposed a provision in the Uniform State Narcotic Drug Act³² and asserted that allowing the use of marijuana would open up a “gigantic loophole in the law, and that, accordingly, the essential first step was for each state to enact a total ban on cultivation, sale, and possession of marihuana.”³³ Although the provision was adopted as a supplemental provision to the Uniform State Narcotic Drug Act, “any state wishing to regulate the sale and possession of marihuana was instructed to simply add cannabis to the definition of ‘narcotic drugs.’”³⁴ As a result of this modification, marijuana effectively became labeled as a “narcotic” in every state, legally indistinguishable from opiates or more dangerous narcotics, and therefore subject to all other provisions of the act.³⁵

As Anslinger advocated for the passage of the act, the FNB embarked on a campaign of propaganda that was aimed to educate the public about marijuana and its evil effects.³⁶ Anslinger’s campaign targeted an anxious, xenophobic depression-era America, willing to believe the worst about drugs as they provided an explanation (albeit

29. BONNIE & WHITEBREAD, *supra* note 23, at 67-68. In many of the port cities and urban areas, “[marihuana] was simply ‘another narcotic’ in a city with a major ‘narcotic problem.’” *Id.* Because the federal government had yet to do anything regarding marijuana, “[l]aw enforcement officials, in concert with the press, were eager to use it [marijuana] in order to explain the increases in crime within their jurisdictions.” *Id.* at 71 (1971).

30. *Id.* at 67.

31. *Id.* at 76-77. Anslinger had used evidence from one obscure criminal justice study that had essentially asserted that marihuana renders the user ‘crazy’ and thus is the reason why Mexican immigrants had committed so many crimes. *Id.*

32. *Id.* at 80 (“The lack of uniformity, and the weakness of state enforcement procedures, together with the growing hysteria about dope fiends and criminality, also converged in prompting several requests outside the medical community for a uniform state narcotic law.”).

33. *Id.* at 77. Anslinger had proposed the idea of prohibition on marijuana to the Conference of Commissioners for Uniform State Laws, but this attempt was defeated by the pharmaceutical industry, which did not want such a provision to be mandatory because they had an interest in promoting various forms of cannabis treatments for medical purposes. *Id.*

34. *Id.* at 90.

35. *Id.* (“Of equal importance was the fact that this format assured that legislators would not distinguish between marihuana and the other opiates in any subsequent effort to increase penalties for ‘narcotics’ offenses.”).

36. *See id.* at 95 (“A large part of the bureau’s activity consisted of intensive lobbying in each legislature before which the act was pending.”).

false) for violent crime and the behavior of immigrant populations.³⁷ Marijuana became a convenient scapegoat for some of the country's otherwise unexplained prevalence of crime amongst the minorities and youthful populations of the country.³⁸

As the FNB continued to demonize marijuana and its users to the American public, pressure for widespread federal legislation in response to the *reefer madness* was being felt in the nation's capitol.³⁹ Since the majority of the states adopted the marijuana provision of the Uniform Act, the federal government was interested in regulating the remaining legitimate uses of cannabis as well.⁴⁰ In 1937, The Marijuana Tax Act was passed,⁴¹ and as a result of its outrageously demanding registration and record-keeping procedures on doctors and producers, this uncontested law effectively shut down any remaining licit markets for medical cannabis in the United States, and would mark the time at which marijuana essentially became completely prohibited by federal law.⁴² Anslinger and the FNB continued to aggressively pursue violations for marijuana offenses into the 1950s, and wanted to increase the penalties for drug offenses, as drug use was once again at the forefront of public opinion after the war.⁴³

With the advent of American counterculture in the 1960s, the federal government felt the country was in need of a comprehensive reform and modernization of federal drug laws, and by the spring of 1969, several Congressional committees conducted a multitude of hearings on drug control, resulting in the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁴⁴ The overall goal of the act was to integrate all controlled substances into a uniform regulatory framework.⁴⁵

On August 14, 1970 Dr. Roger O. Egeberg wrote a letter

37. *Id.* at 70.

38. *Id.*

39. *See id.* at 115.

40. *See generally id.*

41. *See* Marihuana Tax Act of 1937, Pub. 238, 75th Congress, 50 Stat. 551 (Aug. 2, 1937), available at <http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm>.

42. LESTER GRINSPOON, MARIHUANA RECONSIDERED 14 (2d ed. 1994).

43. *See* BONNIE & WHITEBREAD, *supra* note 23, at 204. The passage of the Boggs Act provided for uniform penalties for violations of the Narcotic Drugs Import and Export Act and the Marijuana Tax Act, effectively classifying marijuana as a narcotic under federal law. The Act also called for increased penalties for all drug violators. *See also* 21 U.S.C. § 174 (1964); 26 U.S.C. §§ 4741-76 (1964); Boggs Act of 1951, Pub. L. No. 82-235, 65 Stat. 767 (repealed 1970).

44. BONNIE & WHITEBREAD, *supra* note 23, at 244 (the control part of this measure is called Controlled Substances Act).

45. *See id.* at 244.

recommending marijuana be listed as a Schedule 1 substance, because of a void in substantiated scientific data on the drug.⁴⁶ This resulted in the drug's Schedule 1 classification, and it has remained that way for the past forty-five years.⁴⁷ The enactment of the CSA sparked the *War on Drugs* in the United States, and the federal government continued to take a hardline stance against marijuana into the 1980s under the Reagan Administration and the First Lady's "Just Say No" campaign.⁴⁸

The current classification of marijuana as a "Schedule I" drug under the Controlled Substances Act (CSA) provides an explanation for the relative dearth of scientific studies conducted that aimed at discovering the positive benefits and applications for the drug.⁴⁹ For context, it is important to remember that the unique properties of the drug necessitate the need for unique classification and treatment under the law.⁵⁰ Considering the unique properties and wide variety of applications and uses for the drug, this Note will not distinguish between recreational and medicinal cannabis, as it will focus on the larger issues facing the legal cannabis markets around the country. The Note is focused on the implications for those whom are acting in accordance with their respective state laws and regulations, so it need not matter whether the particular set of state laws be for recreational or medicinal cannabis.

B. *An Overview of State Medical Marijuana Legislation*

In 1996, California passed Proposition 215 (the Compassionate Use Act), allowing the medical use of marijuana by any patient with a physician's recommendation.⁵¹ Although the California law was in

46. Gupta, *supra* note 22.

47. *Id.*

48. JONATHAN P. CAULKINS, ANGELA HAWKEN, BEAU KILMER & MARK A.R. KLEIMAN, MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 22 (2012). See also *Timeline: America's War on Drugs*, NPR.ORG (Published April 2, 2007) <http://www.npr.org/templates/story/story.php?storyId=9252490>.

49. Gupta, *supra* note 22. Dr. Gupta explains the significance of this restriction as he "calculated about 6% of the current U.S. marijuana studies investigate the benefits of medical marijuana. The rest are designed to investigate harm. That imbalance paints a highly distorted picture." As a result of marijuana's strict classification under the CSA, any studies of marijuana must gain the approval from the National Institute on Drug Abuse. "It is an organization that has a core mission of studying drug abuse, as opposed to benefit." *Id.*

50. Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, at 756-58 (2009) ("[M]arijuana doses are difficult to standardize and are dependent on plant potency and individual patient needs. . . . I believe that making marihuana fully available as a medicine is one of the reasons for general legalization.") (quoting Lester Grinspoon, M.D., *Medical Marihuana in a Time of Prohibition*, 10 INT. J. DRUG POLICY 145, 156 (1999)).

51. CAL. HEALTH & SAFETY CODE § 11362.5.

direct defiance of federal laws and the CSA,⁵² this law gave the state a way in which to completely regulate a legitimate market for medical cannabis, with many other states soon to follow.⁵³

The trend of legalizing marijuana for medicinal purposes at the state-level began in California in 1996, and now, twenty-three states and the District of Columbia have passed their own laws legalizing and regulating cannabis for recreational and medicinal purposes.⁵⁴ Although attempts to challenge the legitimacy and fairness of the “Schedule I” designation of cannabis under the CSA⁵⁵ have ultimately failed,⁵⁶ more experts have begun to acknowledge cannabis as a substance that should be regulated similar to alcohol or tobacco,⁵⁷ and have also endorsed the viability of medical cannabis as a legitimate and effective form of medical treatment.⁵⁸

52. Controlled Substances Act, § 812.

53. See generally *Milestones in U.S. Marijuana Laws*, N.Y. TIMES, Oct. 26, 2013, available at http://www.nytimes.com/interactive/2013/10/27/us/marijuana-legalization-timeline.html?ref=us/#time283_8117 (showing an interactive timeline showing the increase in state action taken toward marijuana legislation in the United States over the last century).

54. *State Medical Marijuana Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx> (last visited June 28, 2015) (providing a full list of states that have legalized marijuana for various purposes).

55. John Gettman, *Rescheduling Marijuana*, HIGH TIMES, (Oct. 17, 2012), <http://www.hightimes.com/read/rescheduling-marijuana>. When asked about the importance of rescheduling marijuana under the CSA, John Gettman, a Ph.D in public policy and regional economic development and who also consults with attorneys, advocates, and non-profits on cannabis related research and public policy issues, responded, “[r]escheduling marijuana would expedite additional research and make it easier for states that have authorized medical marijuana use to comply with federal law.” *Id.* Additionally, “rescheduling would acknowledge the scientific accomplishments that have taken place since marijuana was originally scheduled in 1970 and . . . [t]his would require the federal government to acknowledge that marijuana is not similar, scientifically, to drugs like heroin, cocaine, and methamphetamine in terms of safety, abuse potential, and dependence liability.”)

56. See *Americans for Safe Access v. Drug Enforcement Admin.*, No. 11-1265 (D.C. Cir. Jan. 22, 2013), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/12CBD2B55C34FBF585257AFB00554299/\\$file/11-1265-1416392.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/12CBD2B55C34FBF585257AFB00554299/$file/11-1265-1416392.pdf). The most recent challenge the DEA’s denial of a petition to initiate proceedings to reschedule marijuana was ultimately thrown out. *Id.*

57. *Marijuana Legalization and Regulation*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/marijuana-legalization-and-regulation> (last visited Jun. 28, 2015).

58. See generally *Center for Medicinal Cannabis Research*, UNIVERSITY OF CALIFORNIA SAN DIEGO-DEPT OF PSYCHIATRY (2014), http://www.cmcrc.ucsd.edu/index.php?option=com_content&view=frontpage&Itemid=1. The center coordinates “rigorous scientific studies to assess the safety and efficacy of cannabis and cannabis compounds for treating medical conditions.” This site contains a database of recent medical research and legislative reports outlining legitimate and safe applications for cannabis to be used as an effective form of medical treatment. See also Dr. Sanjay Gupta, *Why I Changed My Mind on Weed*, CNN NEWS (Aug. 8, 2013), <http://www.cnn.com/2013/08/08/health/gupta-changed-mind-marijuana/> (“Most frightening to me is that someone dies in the

In response to the early legalization efforts taking place in California that were in stark opposition to federal law,⁵⁹ the Office of National Drug Control Policy felt it had to address the express violation of federal drug policy taking place in California.⁶⁰ The Office of National Drug Control Policy issued a memorandum instructing the Department of Justice and Department of Health and Human Services to investigate doctors recommending or prescribing medical marijuana to patients.⁶¹ Although patients were afforded access to medical marijuana through state laws, doctors were in fact in violation of federal criminal law for enabling the possession of marijuana by prescribing medical marijuana to their patients.⁶² In a response to this tactic by the federal government, California enjoined the government from revoking licenses or investigating physicians who recommended or prescribed medical marijuana to patients until the Ninth Circuit held in *Conant v. Walters* that physicians' First Amendment rights are protected by their privileged patient-physician relationship.⁶³

After the *Conant* decision,⁶⁴ many other states saw the relative success in California as an opportunity to legalize medical marijuana on their own.⁶⁵ With more states adopting their own medical marijuana laws, the federal government again felt the need to respond to this emerging trend without altering the entire landscape of drug laws in the country.

The Supreme Court in *Gonzales v. Raich* addressed the question of whether Congress, under the Commerce Clause, has the power to regulate the intrastate activity of growing and distributing medical

United States every 19 minutes from a prescription drug overdose, mostly accidental. Every 19 minutes. It is a horrifying statistic. As much as I searched, I could not find a documented case of death from marijuana overdose.”).

59. These legislation initiatives ultimately resulted in the passage of CAL. HEALTH & SAFETY CODE §11362.765.

60. Barry R. McCaffrey, *The Administration's Response to Passage of California Proposition 215 and Arizona Proposition 200*, EXECUTIVE OFFICE OF THE PRESIDENT, (Dec. 30, 1996), at 1, available at <http://www.drugpolicy.org/docUploads/ondcp1296.pdf>.

61. *Id.*

62. *Id.*

63. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (holding that government could not justify a policy that threatened to punish a physician for recommending to a patient the medical use of marijuana, on the grounds that such a recommendation might encourage illegal conduct by the patient).

64. *Id.*

65. See 23 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>, (last visited June 28, 2015) (providing a comprehensive list of all state medical marijuana laws, some of their provisions, and the years in which they were enacted).

marijuana.⁶⁶ The Court ultimately held that Congress has the power to criminalize the production and use of homegrown cannabis even when states approve its use and cultivation for legitimate medicinal purposes.⁶⁷

Although the ruling recognized Congress's constitutional authority to regulate what appears to be a purely local, noneconomic, intrastate activity, the ruling did not invalidate the various laws legalizing marijuana in the individual states.⁶⁸ While states continue to pass their own laws, the ruling in *Raich* empowered the federal government to prosecute those who use, cultivate, distribute, or are involved in the marijuana market, even while in compliance with the respective state laws.⁶⁹

There are now twenty-three states, plus the nation's capitol, with laws legalizing medicinal or recreational forms of cannabis⁷⁰ as well as ballot initiatives in many more states.⁷¹ Although many of the state laws share a number of common characteristics with each other,⁷² each state regulates certain aspects of the industry in various ways.⁷³ Some of the

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

67. *Id.* at 29 (2005) ("Limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

68. *Id.*

69. *Id.*

70. See generally *State Marijuana Laws Map*, GOVERNING.COM, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>, (last visited June 28, 2015).

71. Rob Reuteman, *Medical Marijuana: New Age Entrepreneurs And a Hungry Market*, CNBC NEWS (April 20, 2010), <http://www.cnbc.com/id/36179402> (stating that "[s]imilar ballot measures or legislation allowing medical marijuana are pending in 14 other states this year: Alabama, Delaware, Illinois, Iowa, Kansas, Maryland, Massachusetts, Missouri, New York, North Carolina, Pennsylvania, South Dakota, Tennessee and Wisconsin.").

72. Todd Garvey, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, CRS REPORT R42398 (Nov. 9, 2012), available at <http://www.fas.org/sgp/crs/misc/R42398.pdf>.

[T]here are a number of common characteristics that appear to adhere to these laws. First, in order for an individual to legally use medical marijuana, the drug must have been recommended by a physician for use in treating a diagnosed medical condition. All states but California require that this recommendation be in writing. Most states also require potential users to register with the state. Upon registration, states will often provide the user with a registration card so that the individual can be identified as a qualified user of medical marijuana. Additionally, all states but California limit the quantity of marijuana that a patient may possess at any one time, and most states have laws limiting the manner and place in which a qualified individual can use the drug.

Id.

73. *State Medical Marijuana Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/health/state-medical-marijuana-laws.aspx>, (last visited June 28, 2015).

jurisdictions have comprehensive regulatory schemes in place that provide a legal avenue for patients to obtain access to their medicine;⁷⁴ some allow patients to grow their own cannabis,⁷⁵ while other jurisdictions simply provide that qualified individuals may legally possess and use medicinal marijuana for purposes under state law.⁷⁶

In addition to the states that have legalized marijuana for medicinal purposes, four states, Washington, Colorado, Oregon, and Alaska have gone beyond advocating for medical marijuana and have legalized adult use of marijuana, enacting state laws regulating the commercial distribution of cannabis to adults over the age of twenty-one.⁷⁷ These laws are the first of their kind in the United States, and, especially in Washington and Colorado, they have served to jumpstart public opinion and interest from the business community regarding the idea of legalized marijuana in the United States.⁷⁸ Experts have said that the legalization efforts in Washington and Colorado have created a “tidal wave” across the country, and now many experienced investors and business owners are looking to catch that wave.⁷⁹

The ‘early’ efforts in these two states have exposed the enormous

74. R.I. GEN. LAWS § 21-28.6-4. *See also* CONN. GEN. STAT. ANN. § 21a-408-429 (requiring that any entities that plan on distributing or producing medical marijuana for the state program must obtain the necessary licenses, registrations, and approvals from the state Department of Consumer Protection).

75. CAL. HEALTH & SAFETY CODE § 11362.765 (California has also authorized patients and caregivers to collectively grow marijuana in “cannabis cooperatives”).

76. Todd Garvey, *Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws*, CRS REPORT R42398, at 4 (Nov. 9, 2012), available at <http://www.fas.org/sgp/crs/misc/R42398.pdf>. *See also* ARIZ. REV. STAT. § 36-2806.02 (providing license to third party private persons or entities to cultivate and distribute the drug to qualified individuals through state-licensed and regulated dispensaries).

77. Personal Use and Regulation of Marijuana, Colo. Const. art. XVIII, § 16 (2012); *Initiative Measure-Marijuana-Legalization and Regulation*, WASH. LEGIS. SERV. Ch. 3 (I.M. 502) (2013) (codified as amended in sections of WASH. REV. CODE § 46 and 69) Washington voters passed Initiative 502, which allows the state to license and regulate marijuana production, distribution, and possession for persons over 21 and tax marijuana sales. *See also* Lester Grinspoon, *Medical Marijuana in a Time of Prohibition*, 10 INT. J. DRUG POLICY 145, at 156, 198 (1999) (after studying the medicinal uses of marijuana for over thirty years, Lester Grinspoon believes that marijuana, considering its versatility and wide variety of applications, making marijuana completely available to citizens as a medicine is one of the reasons for general legalization.).

78. Art Swift, *For First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx> (“For marijuana advocates, the last 12 months have been a period of unprecedented success as Washington and Colorado became the first states to legalize recreational use of marijuana. And now for the first time, a clear majority of Americans (58%) say the drug should be legalized.”).

79. Eric Pfeiffer, *High Times as Majority in U.S. Now Want Pot Legalized*, YAHOO NEWS (Oct. 22, 2013), <http://news.yahoo.com/for-first-time--majority-in-u-s--favor-legalizing-pot-according-to-gallup-poll-210057532.html>.

amount of investment potential in commercial marijuana markets, and will also serve as models for other states to follow as more states begin to realize the economy-stimulating, revenue-generating potential of legalized marijuana.⁸⁰ States are finding it harder to ignore the enormous, revenue-generating potential of taxing marijuana sales, as states could generate hundreds of millions of dollars in tax revenue while also supporting local legitimate businesses in their community, as opposed to the black market operators.⁸¹ Although these two states have enacted laws that are in direct violation of federal laws and drug policy,⁸² and, in effect, encourage business activity in these new markets, the federal government has chosen to look the other way when it comes to those who are acting within the boundaries set forth by their respective state laws.⁸³

Instead of expending the entirety of the federal government's law enforcement resources on enforcing violations of the CSA against actors engaging in activity that is legal under state laws, the Department of Justice released a memo in 2013 outlining its intent to focus its resources on the "most significant threats in the most effective, consistent, and rational way."⁸⁴ The federal government is unable to force the states to

80. Eliza Gray, *New Laws Chart Course for Marijuana Legalization*, TIME U.S. (Oct. 19, 2013), <http://nation.time.com/2013/10/19/new-laws-chart-course-for-marijuana-legalization/>, ("[B]oth [states] tax and tightly regulate legal markets for marijuana, require rigid security and third-party laboratory testing, limit sale to people over 21 and the amount an adult can carry, prohibit out-of-state investment, and track marijuana closely from 'seed-to-sale'.").

81. Schou, *supra* note 7.

82. See Personal Use and Regulation of Marijuana, Colo. Const. art. XVIII, § 16 (2012); *Initiative Measure—Marijuana—Legalization and Regulation*, WASH. LEGIS. SERV. Ch. 3 (I.M. 502) (2013) (codified as amended in sections of WASH. REV. CODE § 46 and 69).

83. Memorandum for All United States Attorneys from Office of Deputy Att'y Gen. Eric Cole, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The United States Department of Justice ("DOJ") recently released a memorandum for all attorneys that essentially suggested that the federal government will not seek to enforce violations of the CSA against patients, growers, and distributors of legal marijuana if such actors are in strict compliance with the state laws and regulations.

84. See *id.* See also Mark Binelli, *MarijuanaAmerica: Inside America's Last Growth Industry*, ROLLING STONE (Apr. 1, 2010), <http://www.rollingstone.com/culture/news/marijuanamerica-inside-americas-last-growth-industry-20100401?page=3>. In an interview with Robert Mikos, a Vanderbilt University law professor who has written extensively about the rights of states to defy the federal ban on marijuana, he says,

[A] state can remain very passive and look the other way while someone is violating federal law. They just can't stop the DEA or any other federal officials from enforcing that law. That's the tricky thing. Without the cooperation of the states, the DEA has to conduct raids on their own. And they just don't have that many agents. There are fewer than 5,000 nationwide, and they have to handle all kinds of drugs, not just marijuana.

adopt and enforce the provisions of the CSA,⁸⁵ but involvement or operation in state-level, legalized marijuana markets is by no means a risk-free endeavor for attorneys, business owners, and investors. Until the CSA is officially modified, the threat of criminal prosecution will continue to dominate the legal marijuana industries throughout the country that are operating within the boundaries of their respective state laws and regulations.⁸⁶

C. *The Current State of the Legal Cannabis Industries in the United States*

Over the last decade, the country has almost completely eradicated the “reefer madness” hysteria that once dominated the nation, and arguments in support of legal cannabis⁸⁷ and cannabis as a legitimate form of medical treatment have garnered support from the public and physicians alike.⁸⁸ “The reality on the ground now is, you’re seeing the birth of a whole new industry.”⁸⁹ Because the commercial cannabis industry is on the brink of providing widespread access to this effective, widely-applicable form of medical treatment and also showing promising signs of investment and business opportunity, it is inevitable that the industry will continue to grow.⁹⁰ As state-level legal cannabis laws continue to be adopted in more states around the country, politicians and business experts believe that “a highly regulated business

Id.

85. See *Printz v. United States*, 521 U.S. 898, 925 (1997) (“The Federal Government may not compel the States to implement by legislation or executive action, federal regulatory programs.”); *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

86. Roger Parloff, *Yes We Cannabis*, FORTUNE, Apr. 8, 2013, at 66.

87. Jerome P. Kassirer, *Federal Foolishness and Marijuana*, 336 NEW ENGLAND J. MED. 366 (1997). Given the overall safety of the substance, combined with its enormous amount of potential medical applications, some argue that the best course of action would be to allow individuals the right to determine the effectiveness and utilization of cannabis as a form of relief, instead of having the drug be subject to restrictive federal control similar to other pharmaceutical drugs. *Id.*

88. See generally *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.additional-resource.php?resourceID=000151> (last visited June 28, 2015) (containing consolidated information from polls taken regarding public opinion of medical marijuana. Seventy-five percent of physicians polled believe the medicinal benefits outweigh the potential harms, and more than seventy-five percent of members of the public believe marijuana should be legalized for medical use.).

89. Parloff, *supra* note 86 (quoting Steve DeAngelo, President and co-founder of ArcView Group). ArcView began its investor network in 2011, and “aims to bridge the gap between would-be financiers of this new industry—investors who sometimes know little about marijuana—and would-be entrepreneurs in it, who sometimes know little about finance or business.” *Id.*

90. Schou, *supra* note 7.

structure is required to separate the medical marijuana industry from black market operators.”⁹¹ Lawmakers in Colorado, considered by some to be the pioneers of the industry, have recognized the legitimacy of the cannabis industry and have said that they “want to make sure there is a legitimate industry to serve this population, so we’ve created a tight chain of control from seed to sale.”⁹² Although the industry is not replete with “operating talent . . . the economics are very similar to other businesses,” which makes the legal cannabis industry an attractive new investment opportunity for those with capital and experience in start-up businesses.⁹³ Nonetheless, this opportunity for growth, stability, and legitimacy for the industry is at risk as long as there remains a clash between state and federal laws regarding the use and classification of cannabis.

In spite of the glaring need for business expertise and capital and a vast amount of business opportunity in the legal cannabis industries throughout the country,⁹⁴ as long as marijuana remains illegal under the CSA, any conduct related to the sale, manufacture, transport, or procurement of marijuana remains illegal under federal law,⁹⁵ thus creating an array of fundamental problems inherent in the industry.

The high-risk nature of the industry has caused many legitimate investors to hold out on jumping into a legal cannabis market until the federal government takes action to either legitimize the state cannabis industries, or reform its stance on marijuana at large.⁹⁶ But for those to whom the opportunities speak louder than the risks involved, “[r]isk means less competition, because the weak-kneed won’t jump in. . . [t]he extra layer of risk is where the opportunity comes from.”⁹⁷ Even in a state like Massachusetts, where medical marijuana laws are on a smaller scale than Colorado or California and rather new, “[t]here is lots of

91. Reuteman, *supra* note 71 (quoting Colorado State Senator Chris Romer).

92. Dylan Scott, *Medical Marijuana: Do States Know How to Regulate It?*, GOVERNING.COM (Aug. 2012), <http://www.governing.com/topics/public-justice-safety/gov-medical-marijuana-becoming-mainstream.html> (quoting Colorado State Senator Pat Steadman in the article).

93. Tim Mullaney, *As Marijuana Goes Legit, Investors Rush In*, USA TODAY (Apr. 8, 2013) <http://www.usatoday.com/story/money/business/2013/04/07/medical-marijuana-industry-growing-billion-dollar-business/2018759> (quoting Josh Rosen, a former Credit Suisse stock analyst who runs Phoenix-based MC Advisors, which backs renewable-energy companies and is, experimenting with the cannabis industry)..

94. *Id.*

95. See 18 U.S.C. § 2(a) (2006) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

96. Reuteman, *supra* note 71.

97. Mullaney, *supra* note 93.

money to be made by the ancillary businesses — including consulting, accounting, law, and marketing — as well as in the treatment centers . . . ‘[i]t’s a brand-new industry in Massachusetts, and it’s an exciting time from a public health perspective and business perspective.’”⁹⁸

With opportunity on the horizon, many investors and business owners are apprehensive to get involved in any marijuana-related business venture because the threat of federal criminal prosecution exists for virtually every participating entity.⁹⁹ For those investors and business owners who choose to take the risk to get involved in this relatively young industry,¹⁰⁰ many of them will need the advice and assistance of attorneys to deal with the plethora of legal issues a highly-regulated business will face throughout its lifecycle.¹⁰¹

II. THE BUDDING MARIJUANA INDUSTRY: ETHICAL CONSIDERATIONS AND PRACTICAL IMPLICATIONS FOR ATTORNEYS

Experienced investors and business owners understand the idea that the implementation of regulatory measures and the utilization of capital and business expertise are vital to the growth, stability, and legitimacy of the medical cannabis industry.¹⁰² As willing investors and accomplished

98. Jenn Abelson, *Medical Marijuana Businesses See Opportunity in Mass.*, BOSTON GLOBE (Mar. 7, 2013), <http://www.bostonglobe.com/business/2013/03/06/medical-marijuana-businesses-look-massachusetts-for-growth-opportunities/zsDv1SuQXM2D3akA94wguN/story.html> (quoting Donna Rheaume, a former spokeswoman for the Massachusetts Department for Public Health. Emphasizing the positive outlook for business opportunity in Massachusetts, one of the more recent states to pass medical marijuana legislation resulting in an exponential increase in business opportunity.).

99. Parloff, *supra* note 86, at 66; *see also* Jose Pagliery, *Legal Marijuana’s All-Cash Business and Secret Banking*, CNN MONEY (Apr. 29, 2013), <http://money.cnn.com/2013/04/29/smallbusiness/marijuana-cash/> (“[F]inancial institutions still face intense pressure from federal authorities, because pot is illegal under the nation’s Controlled Substances Act.” Additionally, “[b]anks that deal with cannabis businesses open themselves up to accusations of money laundering, so they avoid it altogether.” As a result, businesses are forced “into cash-only transactions bring[ing] about all sorts of problems—it undermines the state’s efforts to tax the industry and creates security risks at stores.”).

100. When asked if the “ancillary” businesses (meaning businesses whose products and services don’t require entrepreneurs to actually touch the drug) are running afoul of federal laws, DeAngelo replied, “you don’t know until the verdict comes in.” Parloff, *supra* note 86, at 66 (quoting Steve DeAngelo, co-founder and of ArcView Angel Network and founder of Harborside dispensary, one of the nation’s largest and most lauded medical marijuana dispensaries.).

101. For a more complete description of the role of a business attorney, *see* Alan Gutterman, *Role of the Business Attorney*, WEST LEGAL EDUCATION CENTER (Sept. 17, 2012), <http://blog.legalsolutions.thomsonreuters.com/client-relations/role-of-the-business-attorney>.

102. Mullaney, *supra* note 93 (“[j]ust like Silicon Valley entrepreneurs,” experienced members of Seattle and San Francisco-based private investment firms looking to capitalize on the opportunities presented by the emerging medical cannabis industry, “talk about how big

entrepreneurs continue to flock to the immense amount of economic and business opportunities,¹⁰³ many, if not all of them, will need the advice and assistance of attorneys to navigate the intricacies and challenges of owning and operating a business in a tightly-regulated industry ripe with potential.¹⁰⁴

Despite the fact that attorneys are needed by many entities operating in the medical cannabis industry, attorneys are prohibited from providing assistance to any client who is engaged in conduct that is in violation of the law.¹⁰⁵ Part II.A of this section will explain the issues facing attorneys when they are asked to provide transactional¹⁰⁶ assistance to entities that are operating within the boundaries of their respective state legal marijuana markets. Part II.B of this section will analyze the roadblocks facing the legal cannabis industry created by the restriction on attorneys assisting entities operating in violation of federal law.

A. *Should Attorneys Fear Federal Criminal Prosecution for Joining the Green Rush?*

When approached with a request to provide transactional assistance to an entity involved in a legal, cannabis-related business, a lawyer must take into account *all* of the potential consequences. Although there may be enticing opportunities to work in an emerging, and potentially lucrative industry; as long as marijuana remains listed as a Schedule I drug pursuant to the CSA, any persons who are in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, regardless of state law, are in violation of the CSA.¹⁰⁷ Therefore, the lawyer that provides assistance to a client that is engaged in a marijuana-related business can be subject to criminal

and fragmented the market is, and how the relative handful of legal businesses out there lack the leadership and tools they need to grow the industry. That leaves the field open for people who can bring capital and experience . . .”).

103. *See id.*; Parloff, *supra* note 86, at 66.

104. Berman, *supra* note 9. *See also* Gutterman, *supra* note 101 (“[T]he attorney must be able to provide expert guidance on the selection of the appropriate form of legal entity for operation of the business and the procedures that must be followed in order to comply with the operational rules of the selected entity The attorney must be able to provide advice to the principals of the client regarding compliance issues in other substantive legal areas . . .” and “the attorney must provide guidance regarding the terms of various commercial transactions that are typically faced by any new or growing business”).

105. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2013) (“A lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent.”).

106. This Note is focusing on transactional assistance for clients, not litigation or trial representation.

107. *See* Controlled Substances Act, §§ 801-889.

prosecution for their actions.¹⁰⁸ The Justice Department memo released in August of 2013 said that federal prosecutors would not target cannabis-involved entities that are in compliance with their respective state laws,¹⁰⁹ and somewhat strengthened the notion that prosecutors *may* intend to respect the autonomy of the states in the regulation of their respective lawful cannabis markets. If states are to be the primary regulators of their cannabis industries, it is important to note that states are also traditionally responsible for the regulation of their respective legal professions as well.¹¹⁰ Consequentially, one could argue that any punitive action taken against attorneys should be dealt with at the state level, pursuant to the respective rules of professional conduct in that state.¹¹¹

Although, it is most important to consider that there is no guarantee that federal officials will refrain from prosecution in all cases, or that the policy laid out in the DOJ memo will remain in place.¹¹² Those attorneys who decide to provide services and assistance to clients involved in the burgeoning cannabis industry will be doing so at the risk of federal prosecution, professional sanctions, or disbarment.¹¹³

Realistically, any federal prosecutor that decided to uphold the oath

108. 18 U.S.C. § 2(a) (2006) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” This provision of the CSA essentially makes it illegal for an attorney to provide transactional assistance to clients involved in a medical marijuana business). *See also* United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001) (concerning two attorneys were charged and convicted of conspiracy and money laundering charges for their role in representing and assisting the head of a drug cartel). Here, although marijuana-related businesses may be legal under state law, to the federal government, they are virtually indistinguishable (according to the CSA) from the drug cartels that dominate the black markets. *See* 18 U.S.C. § 2(a) (2006).

109. Memorandum for all United States Attorneys from Office of Deputy Att’y Gen. James Cole, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

110. *See* Eli Wald, *Federalizing Legal Ethics- Nationalizing Law Practice and the Future of American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 498 (2011) (“Generally speaking, authorization to practice law in a jurisdiction is granted via a license, valid only within the issuing state’s jurisdiction. Inherently, therefore, the regulatory approach to law practice is state based”); American Bar Association, *ABA Standards for Imposing Lawyer Sanctions* (1992) available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnot es.authcheckdam.pdf.

111. *See id.*

112. *See generally* Nicole Flatow, *Feds Ramp Up Crackdowns on Medical Marijuana Dispensaries*, THINKPROGRESS.ORG (May 6, 2013, 12:00 P.M.), <http://thinkprogress.org/justice/2013/05/06/1961751/feds-ramp-up-crackdowns-on-medical-marijuana-dispensaries/> (“In several West Coast cities, federal officials are initiating a new round of crackdowns against dispensaries that are seemingly complying with state medical marijuana law.”).

113. Jonathan Martin, *Supreme Court to Decide if Lawyers can Advise Marijuana Clients*, THE SEATTLE TIMES, (Dec. 11, 2013, 6:31 A.M.), <http://blogs.seattletimes.com/opinionnw/2013/12/11/supreme-court-to-decide-if-lawyers-can-advise-marijuana-clients/>.

taken as a U.S. attorney could prosecute an attorney whose practice in a state-legal cannabis industry is found to be in violation of federal law.¹¹⁴ Alternatively, an even more realistic scenario would be a change in administration after the next Presidential election, which could result in a drastic DOJ policy change. Although the threat of federal prosecution may be intimidating for an attorney, attorneys have generally been somewhat insulated from criminal prosecutions because of their unique and important role in the legal system.¹¹⁵ But until any sweeping policy changes alter the landscape, most attorneys will likely want to err on the side of caution when it comes to risking federal prosecution, or their professional license.

Despite these laws and the obligations of U.S. attorneys to enforce federal law, an attorney has yet to be criminally prosecuted for providing assistance to a client involved in the legal cannabis industry. This prosecutorial discretion, as evidenced in the 2013 memorandum released by Attorney General Eric Cole,¹¹⁶ provides attorneys with peace of mind in knowing that someone has *yet to be prosecuted* in this respect. However, many attorneys may not be willing to roll the dice when it comes to performing work that will put them at risk of federal criminal prosecution, especially as more high-profile funding and business activity will continue to saturate the cannabis markets.

B. *Ethical Considerations for Attorneys and the Threat of Professional Discipline*

In addition to the risk of federal prosecution, lawyers who provide assistance to clients who are in violation of federal law must take into account the ethical considerations of what they are doing, and must be aware that they are also subject to the possibility of professional discipline in their respective states.¹¹⁷ As an ethical concern, it is important for an attorney in a legal marijuana state to be cognizant of the fact that she could be assisting clients in conduct that is in stark violation

114. 5 U.S.C. § 3331 (1966).

115. Geoffrey C. Hazard, Jr. & W. William Hodes, *THE LAW OF LAWYERING* § 5.12 (3d ed. 2013) (discussing the notion that attorneys generally will not prosecute other attorneys, unless their conduct is completely egregious or subversive to the professional standards inherent in the industry).

116. Memorandum for all United States Attorneys from Office of Deputy Att’y Gen. Eric Cole, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

117. Wald, *supra* note 110, at 498 (“[e]nforcement of the rules takes place at the state level and applies within a state In most states, state supreme courts are nominally charged with disciplinary enforcement but delegate investigative and disciplinary authority to regulatory agencies to report them.”).

of federal criminal law.¹¹⁸ In light of the reality that it is a highly risky proposition for an attorney to take the chance of being prosecuted for federal criminal violations, “federal prosecutors may conclude that in most instances the proper venue in which to deal with lawyers’ representation of marijuana clients is not a federal criminal courtroom but rather in an attorney disciplinary proceeding.”¹¹⁹

Although the regulation of professional conduct is a power reserved to the states, the American Bar Association (ABA) Model Rules of Professional Conduct (MRPC) have served as an influential model for the individual states to use when adopting their own versions of rules governing the professional conduct of lawyers.¹²⁰ The rule that primarily addresses the procurement of an attorney’s professional services¹²¹ for conduct that is in violation of the law is ABA MRPC Rule 1.2(d), which states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.¹²²

This rule effectively prohibits attorneys from providing transactional assistance to any business involved in a state-legal cannabis industry so long as marijuana remains illegal under federal law.¹²³ A lawyer who provides assistance to a cannabis-related client must remember, “[a] federal crime is a crime in every state jurisdiction.”¹²⁴ Therefore, “a lawyer who counsels or assists a client in criminal

118. As a general principle, do we want the profession at large to adopt a tolerance for attorney conduct that assists or endorses the commission of a federal crime?

119. Sam Kamin, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013).

120. *State Adoption of the ABA Model Rules of Professional Conduct*, AMERICAN BAR ASSOCIATION. CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited June 28, 2015) (listing each state that has adopted a version of the ABA Model Rules of Professional Conduct. Every state has adopted the rules, but each with minor variations to certain rules).

121. For examples of law-related services, see MODEL RULES OF PROF’L CONDUCT R. 5.7 cmt. 7 (2013) (“A broad range of economic and other interests of clients may be served by lawyers’ engaging in the delivery of law-related services.” Some services include, “financial planning, accounting . . . real estate counseling . . . legislative lobbying . . . economic analysis . . . tax preparation . . .” and “medical or environmental consulting.”).

122. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2013).

123. See *id.*

124. Kamin, *supra* note 119, at 928.

conduct that violates criminal federal law is violating the rules of professional conduct in her state.”¹²⁵

If found to have violated the professional rules of conduct of their respective states, attorneys can be subject to professional discipline by the appropriate entity within their jurisdiction.¹²⁶ Examples of professional discipline include actions ranging from sanctions to suspension, or even to disbarment,¹²⁷ all of which can impact a lawyer’s career and professional reputation. Despite the fact that an attorney has yet to be disciplined for assisting a client in conduct involved with a legal cannabis industry, a few states have already addressed this very issue preemptively.¹²⁸

1. Conflicting State Ethics Opinions Concerning an Attorney’s Conduct Within Respective Legalized Marijuana Market(s)

If state ethics rules effectively prohibit attorneys from providing any transactional assistance to existing, operating entities in the strictly regulated medical cannabis market in the country, how can the state expect participating entities effectively adhere to such regulations and guidelines throughout the course of their business? By denying attorneys the ability to provide professional services to existing, operating entities within the cannabis market, the state is essentially eliminating clients’ rights to obtain legal services for their businesses. By restricting the procurement of legal services to operating entities (as evidenced in the ethical opinion), the state is likely undermining its goal to ensure that all entities are operating within the boundaries of the state law and regulations.

The ethics board in Maine has taken the conservative stance on the issue.¹²⁹ The issue presented to the Maine commission was “whether and how an attorney might act in regards to a client whose intention is to engage in conduct which is permitted by state law and which might not,

125. *Id.* at 928-29.

126. See MOD. RULES PROF. COND. R. 8.5: *Disciplinary Authority; Choice of Law* (providing guidance for how violations of professional conduct rules should be dealt with in the individual states).

127. *Id.* See also Wald, *supra* note 110, at 498.

128. Jay Stapleton, *State Creates Medical Marijuana Safe Harbor*, CONNECTICUT LAW TRIBUNE, June 30, 2014, at 4. Although Connecticut has one of, if not the most strictly regulated medical cannabis industry in the country, they are the first state to modify their Rules of Professional Conduct to address this issue; to allow attorneys to provide advice and assistance to individuals or enterprises involved in the state-legal cannabis markets. See *id.*

129. MAINE PROF’L ETHICS COMM’N, *Opinion 199* (2010), available at http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article.

currently, be prosecuted under federal law, but which nonetheless is a federal crime.”¹³⁰ The Maine opinion noted that although they cannot determine which specific activities would violate the ethical rules, the professional rules make no distinction between crimes that are enforced, and those that are not.¹³¹ Accordingly, the attorney, on a case-by-case basis, must analyze whether the service being requested constitutes assistance in violating federal law.¹³²

This opinion essentially suggests that once these entities are functioning within the medical cannabis markets, attorneys are prohibited from providing any transactional assistance because they would be providing assistance to clients who are in violation of federal criminal law.¹³³ This reasoning supports the idea that it is important to the professional integrity of the legal profession to avoid providing assistance to clients whose conduct is in violation of federal law, but such reasoning seems rather illogical from the state’s perspective. If the states want to strictly regulate their respective medical marijuana markets and ensure that all entities operating within the industry navigate the correct regulatory channels and are in compliance with state laws, it seems most unwise to effectively eliminate attorneys from this process. The stance taken in the Maine ethics opinion may result in the deprivation of a client’s right to legal assistance that is needed to engage in the conduct that the state law expressly permits.

As the only other state professional ethics board to provide guidance on this issue, the ethics committee in Arizona went the opposite direction of the Maine ethics opinion.¹³⁴ The Arizona opinion highlighted the problems created as a result of the professional guidance provided by the Maine and Connecticut opinions.¹³⁵ Furthermore, the opinion emphasized the potential problems that could result from an industry devoid of legal compliance advice and the other legal work necessary for the maintenance and operation of businesses in a strictly regulated environment.¹³⁶

130. *Id.*

131. *Id.*

132. *Id.*

133. Controlled Substances Act, § 812.

134. STATE BAR OF ARIZ. COMM. ON THE RULES OF PROF’L CONDUCT, *Opinion 11-01* (2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710> (“We decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client’s proposed conduct is in ‘clear and unambiguous compliance’ with state law from assisting the client in connection with activities expressly authorized under state law . . .”).

135. *Id.*

136. *Id.*

The State Bar of Arizona felt it is important that attorneys be able to counsel and assist clients with conduct that is in compliance with state laws, and it is the job of an attorney to provide legal services to ensure that clients are acting in compliance with state law.¹³⁷ The State Bar of Arizona determined that “[a] lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act [“Act”], despite the fact that such conduct potentially may violate applicable federal law,” and may continue to assist these clients, so long as “the lawyer advises the client regarding possible federal law implications of the proposed conduct.”¹³⁸ Essentially, this opinion advises that it is acceptable for attorneys to assist their client in conduct that is in violation of federal law so long as they are complying with state law and aware of the consequences of violating federal law.¹³⁹ In spite of the fact that lawyers are responsible for upholding and adhering-to federal *and* state law, the opinion from the State Bar of Arizona surprisingly suggests that attorneys are permitted to operate, and assist their clients to operate, in defiance of federal law.¹⁴⁰

The position emphasized in the Arizona opinion supports the larger notion that attorneys are needed in order to ensure entities within the state are acting in accordance with state laws full of regulatory controls, suggesting that “[l]egal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law.”¹⁴¹ As noted earlier, because attorneys are licensed to practice in their respective states, and they are subject to discipline by the appropriate entities within the state in which they practice, it is only logical that attorneys are permitted to assist clients act in compliance with their respective state laws.

2. Can we learn anything from the ethics opinions?

All three opinions recognize the importance of attorneys to their

137. *Id.* (“[I]t is important that lawyers have the ability to counsel and assist their clients about activities that are in compliance with the Act — and traditionally at the heart of the lawyer’s role — by assisting clients in complying with the Act’s requirements through the performance of such legal services as: establishing medical-marijuana dispensaries; obtaining the necessary licensing and registrations; representing clients in proceedings before Arizona agencies responsible for implementing the Act; and representing governmental entities to draft rules and regulations or otherwise counsel the governmental entity with respect to its rights and obligations under and concerning the Act.”).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

respective medical cannabis markets.¹⁴² The stance taken by Maine results in the deprivation of a client's right to legal assistance that is needed to engage in the conduct that the state law expressly permits.¹⁴³ In spite of this fact, the opinions also appear to endorse the notion that it is unethical for an attorney to assist a client with conduct that is in violation of the law (whether the law is federal or state, professional ethics rules do not differentiate).¹⁴⁴ Regardless, the Maine opinion provides guidance that results in limiting the conduct of attorneys in the state marijuana market. If similar guidance is offered to attorneys in other states around the country, such guidance limiting the attorney's conduct will ultimately result in a negative impact on their respective medical marijuana markets.

Conversely, the Arizona opinion essentially provides guidance to attorneys that they may provide assistance to clients that are possibly in violation of federal law, so long as they are in compliance with state laws.¹⁴⁵ This opinion fosters a healthier, more stable, and more legitimate state medical marijuana market by ensuring that attorneys are able to provide the necessary assistance to clients looking to act in accordance with state laws and regulations.¹⁴⁶ In states where there are medical marijuana laws, it is important that the patients have the ability to rely on the product that is being regulated by the state government. Thousands of patients will turn to the medical marijuana market as a means of obtaining their treatment, and it is important that businesses act in accordance with state laws and regulations, allowing patients to rely on the quality and effectiveness of the products on the market.¹⁴⁷

3. The Situation in Connecticut & The Model Approach

A 2013 ethics opinion delivered by the State of Connecticut

142. *Supra* note 134; STATE BAR OF ARIZ. COMM. ON THE RULES OF PROF'L CONDUCT, *Opinion 11-01* (2011); CT BAR ASSOCIATION PROF'L ETHICS COMM., *Informal Opinion 2013-02* (2013).

143. *See Opinion 199, supra* note 134.

144. *See id.*

145. *See Opinion 11-01, supra* note 134 ("A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.").

146. *Id.*

147. *See generally* Patrick Raden Keefe, *Buzzkill-Washington State discovers that it's not so easy to create a legal marijuana economy*, THE NEW YORKER (2013), available at http://www.newyorker.com/reporting/2013/11/18/131118fa_fact_keefe?currentPage=all.

Professional Ethics Committee expressly stated, “Lawyers may not assist clients with conduct that is in violation of federal criminal law.”¹⁴⁸ This opinion created an interesting problem for the medical marijuana industry in the state of Connecticut.

The Connecticut statute regarding the palliative use of medical marijuana establishes the necessary regulatory framework and all the required procedures, processes, and rules for how the medical marijuana industry in the state must operate.¹⁴⁹ This statute requires that any entities that plan on distributing or producing medical marijuana for the state program must obtain the necessary licenses, registrations, and approvals from the state Department of Consumer Protection.¹⁵⁰ Health professionals, caregivers, and businesses are expected to seek legal advice regarding the requirements of the act, and any legal advice pursuant to such objectives is encouraged, as any legal advice regarding the registration or requirements of the act would be the necessary result of an attorney performing their role as a *counselor*.¹⁵¹

In fact, this opinion caused some prominent attorneys whom provide legal assistance to clients involved in the Connecticut medical marijuana program to say, “I feel . . . like I’m the one out in the trenches right now, tiptoeing through landmines.”¹⁵² The restrictions created by the advisory opinion have already prevented clients from receiving the services they need to successfully operate their businesses within the confines of state law because, “[u]nlike with other clients, there are certain things we will not do for this client. And every step of the way . . . requires approval from our risk management committee.”¹⁵³ Thus, these ethical and practical challenges for attorneys pose a serious impediment to the adherence to the strict regulatory framework necessary for the state program to work.¹⁵⁴

If attorneys cannot be allowed to provide any assistance to functioning marijuana enterprises, it will be almost impossible to keep

148. CT BAR ASSOCIATION PROF’L ETHICS COMM., *Informal Opinion 2013-02* (2013).

149. See generally Palliative Use of Marijuana, CONN. GEN. STAT. § 21a-408-429 (2012).

150. *Id.*

151. CT BAR ASSOCIATION PROF’L ETHICS COMM., *Informal Opinion 2013-02*, (2013).

152. Hugh McQuaid, *Medical Marijuana Poses Ethical Challenges for Lawyers*, CT NEWS JUNKIE, http://www.ctnewsjunkie.com/archives/entry/medical_marijuana_poses_ethical_challenges_for_lawyers/ (last visited June 28, 2015, 2:04 PM) (internal quotations omitted).

153. *Id.* (quoting Attorney Diane W. Whitney with Pullman & Conley, who spoke about the challenges presented in Connecticut to an attorney wishing to assist medical marijuana clients).

154. See *id.*

the industry profitable, safe, legitimate, and reliable for patients who need access to this form of treatment.¹⁵⁵ If attorneys were to abide by the position suggested by the Connecticut Professional Ethics Committee, the functioning enterprises in the medical marijuana industry would have nowhere to go for any legal assistance needed throughout the lifecycle of their businesses.¹⁵⁶ Lawyers are essential to the success and stability of an industry so tightly regulated, as they are the entities responsible for ensuring that all actors in the industry are in compliance with the regulations and guidelines set by the state government.¹⁵⁷ Attorneys are also responsible for helping businesses navigate the pathways to achieve the growth and prosperity desired by most entrepreneurs and business owners.¹⁵⁸

In response to the challenges that were highlighted by practicing attorneys and brought to the Connecticut Bar Association Committee's attention, in June of 2014, the "Judicial Branch has made Connecticut the first state in the nation to directly amend its Practice Book rules to ensure that lawyers won't face ethics charges if they represent state-licensed, marijuana-related enterprises."¹⁵⁹ The State of Connecticut recognized the inherent roadblocks and challenges created by the conflicting state and federal laws and their ethics opinion, and became the first state to create a "safe harbor" for lawyers who counsel and assist their clients in conduct that is legal under state law.¹⁶⁰

The Connecticut Judicial Branch's Rules Committee went one step further than the Arizona ethics board and instead decided to change the

155. Michelle Hackman, *CT Medical Marijuana Regulations Approved*, YALE DAILY NEWS (Aug. 30, 2013), <http://yaledailynews.com/blog/2013/08/30/panel-approves-pot-regulations/>. When asked about the importance of a regulatory structure to the CT state medical marijuana law, commissioner of the Consumer Protection Bureau Bill Rubenstein said, "We've spent a lot of time putting together what we think are appropriate regulations . . . we've based the program on how we regulate other pharmaceuticals." *Id.*

156. Gutterman, *supra* note 101.

157. Dylan Scott, *Medical Marijuana: Do States Know How to Regulate It?*, GOVERNING.COM (Aug. 2012), <http://www.governing.com/topics/public-justice-safety/gov-medical-marijuana-becoming-mainstream.html> ("Connecticut . . . has crafted what some analysts say is the most tightly regulated medical marijuana system yet . . ."); STATE BAR OF ARIZ. COMM. ON THE RULES OF PROF'L CONDUCT, *Opinion 11-01* (2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710> ("Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law."). See also *Palliative Use of Marijuana*, CONN. GEN. STAT. § 21a-408-429 (2012) (for a comprehensive list of the extensive application procedures and strict requirements that prospective producers or distributors must meet before doing business in the industry).

158. See Gutterman, *supra* note 101.

159. Jay Stapleton, *State Creates Medical Marijuana Safe Harbor*, CONNECTICUT LAW TRIBUNE, June 30, 2014, at 4.

160. *Id.*

language of the professional rules of conduct to allow attorneys to operate within the bounds of the state laws.¹⁶¹ The rule-making body changed the language of Rules 1.2 so that a lawyer may, “counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.”¹⁶² This approach, implemented by Connecticut through actually changing their Rules of Professional Conduct, provides lawyers with the ability to counsel and assist clients involved in this extremely new, and tightly-regulated industry, while also serving as a model approach for other state ethics committees to adopt.

This modification to the professional rules, as implemented by the State of Connecticut, also seemingly recognizes that lawyers are essential to the success and stability of an industry so tightly regulated, as they are the entities responsible for ensuring that all actors in the industry are in compliance with the regulations and guidelines set by the state government.¹⁶³ Attorneys are also responsible for helping businesses navigate the pathways to achieve the growth and prosperity desired by most entrepreneurs and business owners.¹⁶⁴

The ethics opinions serve as a helpful tool to illustrate the larger roadblock preventing the growth, stability, and legitimacy of the legal cannabis industries around the country. Few states have issued ethical guidance to attorneys regarding the legalized cannabis industries at the state level, and it is inevitable that more states will have to address this issue in the near future.¹⁶⁵ It is the goal of this note to advocate for the course of action taken by the State of Connecticut Judicial Branch and Professional Ethics Committee and to encourage other states to adopt a

161. *See id.*

162. *Id.*; *See also Connecticut Practice Book Revisions*, CONNECTICUT LAW JOURNAL, July 1, 2014, at 15, available at http://www.jud.ct.gov/Publications/PracticeBook/pblj_070114.pdf.

163. Dylan Scott, *Medical Marijuana: Do States Know How to Regulate It?*, GOVERNING.COM (Aug. 2012), <http://www.governing.com/topics/public-justice-safety/gov-medical-marijuana-becoming-mainstream.html> (“Connecticut . . . has crafted what some analysts say is the most tightly regulated medical marijuana system yet . . .”); STATE BAR OF ARIZ. COMM. ON THE RULES OF PROF’L CONDUCT, *Opinion 11-01* (2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>; *see also* Palliative Use of Marijuana, CONN. GEN. STAT. § 21a-408-429 (2012) (providing a comprehensive list of the extensive application procedures and strict requirements that prospective producers or distributors must meet before doing business in the industry).

164. Gutterman, *supra* note 101.

165. *See generally* 23 *Legal Medical Marijuana States and DC - Medical Marijuana*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Jun. 20, 2015) (providing a comprehensive list of all state medical marijuana laws, some of their provisions, and the years in which they were enacted).

similar approach in order to allow the legal cannabis industries to flourish around the country. So long as federal laws and policy regarding cannabis remain stagnant, states that wish to establish legitimate, reliable, and highly regulated cannabis markets should consider adopting a similar approach to that of Connecticut.

III. UP IN SMOKE: WHY BUSINESSES & THE INDUSTRY WILL FAIL WITHOUT THE WORK OF LAWYERS

As more states around the country continue to adopt laws legalizing marijuana for various uses, many states have started implementing tight controls and strict regulations for those wishing to do business in the cannabis markets.¹⁶⁶ In order to navigate these complex business structures and regulatory environments, businesses will inevitably need the assistance of attorneys to do so.¹⁶⁷ Thus, in states that adopt the approach taken by the Maine Bar Ethics Committee,¹⁶⁸ businesses will encounter many challenges during their operation, and without the advice and assistance of attorneys, they will fail to meet the high standards and strict regulatory requirements set forth by their state legislature. This section will examine some of the unique challenges many “ganjapreneurs”¹⁶⁹ will encounter as they seek to operate their businesses in highly regulated environments under the present day landscape offered by the dichotomy between state and federal laws. Presenting some of these issues will lend support to the notion that attorneys are definitely in *high* demand, and they are necessary for the legitimacy, reliability, and proper functionality of the legal cannabis markets around the country.

166. Dylan Scott, *Medical Marijuana: Do States Know How to Regulate It?*, GOVERNING.COM (August 2012), <http://www.governing.com/topics/public-justice-safety/gov-medical-marijuana-becoming-mainstream.html>.

167. See Valerie Bauman, *A Legal High: Practicing Marijuana Business Law*, PUGET SOUND BUSINESS JOURNAL (Aug. 22, 2013, 9:00 PM), <http://www.bizjournals.com/seattle/news/2013/08/23/a-legal-high-practicing-marijuana.html?page=all>.

168. See generally MAINE PROF'L ETHICS COMM'N, *Opinion 199* (2010), available at http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article.

169. Eleazar David Melendez, *Marijuana Venture Capital Fund Launches As Ganjapreneurs Go Mainstream*, HUFFINGTON POST- BUSINESS (June 6, 2013, 8:34 AM), http://www.huffingtonpost.com/2013/06/06/marijuana-venture-capital_n_3393061.html. The term “ganjapreneur” is taken from the title of this article, it is being used in this note to refer to entrepreneurs involved in the legal cannabis industries around the country. *Id.*

A. *Some of the Issues Facing Businesses and Inhibiting Growth of the Industry*

As even the most sophisticated and experienced clients pioneering the complexities of the new laws in Washington, admit, “[w]ords can’t even begin to describe how complex and important it is to have an attorney You really need someone to get you through that whole process, because unless you’re an attorney yourself it can be very confusing.”¹⁷⁰ Businesses are quickly finding themselves in need of the advice and assistance of attorneys, “particularly as they [seek] to operate the way any other business would: following state law, paying taxes and insuring their businesses.”¹⁷¹ In addition to these basic business needs, clients are also seeking the work of lawyers to help them with more complex business concepts: attempts at private placement, copyright and trademark protection, shareholder agreements, and investment strategies.¹⁷² Additionally, businesses also need the legal expertise of lawyers in structuring corporations, business formation, landlord relationships, commercial real estate deals, distribution channels, securing financing, and handling money.¹⁷³ Therefore, a large industry, dependent on strict adherence to state regulatory guidelines and industry-specific rules, devoid of legal compliance and business advice, will inevitably fail.

One of the most pressing problems facing legal cannabis markets around the country is that banks are reluctant to provide traditional services and loans to marijuana businesses.¹⁷⁴ Realizing the obvious need for the participation of established financial institutions in this new industry, the Treasury Department’s Financial Crimes Enforcement Network (FinCEN) recently released new guidelines that will allow banks to legally provide financial services to state-licensed marijuana

170. Valerie Bauman, *A Legal High: Practicing Marijuana Business Law*, PUGET SOUND BUSINESS JOURNAL, (Aug. 22, 2013, 9:00 PM) <http://www.bizjournals.com/seattle/news/2013/08/23/a-legal-high-practicing-marijuana.html?page=all>. This is a quote from Marco Hoffman, owner of Evergreen Herbal, which offers edible marijuana products in medical dispensaries and retail locations throughout Washington. *See id.* He admits, “[e]very product label has to be approved by his business affairs attorney to ensure it meets state regulations. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Serge F. Kovalski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html?_r=0. Many banks fear federal prosecution or substantial fines for violating money-laundering and other federal criminal laws and regulations. *Id.*

businesses.¹⁷⁵

Bank participation will prevent business owners from having to store, protect, and transport enormous amounts of cash (in what is largely an all-cash industry), and “[l]eaders in the marijuana trade point out that giving accounts to businesses would allow for more transparency and meticulous regulation and would help ensure that jurisdictions receive the taxes they are entitled to.”¹⁷⁶ A major component of this memorandum is that the FinCEN distinguishes between businesses that are in violation of state law or one of the Justice Department’s enforcement priorities.¹⁷⁷ The distinction provides authorities with certain “red flags” to watch for, suggesting that the marijuana business in question deserves special scrutiny.¹⁷⁸ The problem here is that these “red flags” do not constitute a comprehensive list, and even though “FinCEN says its advice ‘should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses,’ it never actually says banks that follow the guidelines need not worry about getting into trouble with regulators.”¹⁷⁹ Because the memorandum does not protect banks from investigation or prosecution, many banks, cognizant of the risks at stake, will be wary to get involved with marijuana-related businesses.¹⁸⁰ So

175. Department of the Treasury Financial Crimes Enforcement Network, *Guidance-BSA Expectations Regarding Marijuana-Related Businesses*, (Feb. 14, 2014), available at http://extras.mnginteractive.com/live/media/site36/2014/0214/20140214_113553_Guidance-Marijuana-Related-Businesses.pdf.

176. Serge F. Kovalski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html?_r=0.

177. Department of the Treasury Financial Crimes Enforcement Network, *Guidance-BSA Expectations Regarding Marijuana-Related Businesses*, (Feb. 14, 2014), available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf?utm_source=Week+of+February+24&utm_campaign=Newsletter+Update&utm_medium=email.

178. Jacob Sullum, *The Feds’ Scary Reassurances To Banks That Deal With State-Licensed Marijuana Businesses*, FORBES (Feb. 17, 2014, 5:00 PM), <http://www.forbes.com/sites/jacobsullum/2014/02/17/the-feds-scary-reassurances-to-banks-that-deal-with-state-licensed-marijuana-businesses>. Some of the red flags that would trigger the special scrutiny are, but not limited to, “‘international or interstate activity,’ an inability to ‘demonstrate the legitimate source of significant outside investments,’ signs that the business is ‘using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity,’ and ‘negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.’” Such red flags are supposed to inform banks’ decisions about which customers to reject or drop as well as which sort of [Suspicious Activity Report] to file.” *Id.*

179. *Id.* (citing Department of the Treasury Financial Crimes Enforcement Network, *supra* note 184).

180. Department of the Treasury Financial Crimes Enforcement Network, *supra* note 184 (“Nothing herein precludes investigation or prosecution, even in the absence of any one of

long as the banks remain on the sidelines or are hesitant to get involved in the game, the industry will have an extremely difficult time separating itself from the black market marijuana industry of old.¹⁸¹

Just as the participation of financial institutions and banks is vital to the life of the industry,¹⁸² attorneys are equally important to the business interactions with these financial entities. “In our society, the transfer of significant capital assets is surrounded by substantial regulatory structures. . . . And it is the existence of these regulatory influences on the structure of a transaction” that “the legal profession continues to play a central role in designing the structure of business transactions.”¹⁸³ The strict guidelines and comprehensive state regulatory structures are necessary for the growth and viability of the legal cannabis industry, but they have also consequentially increased the demand for attorneys experienced in business and other transactional work.¹⁸⁴ Attorneys are the vital tools needed by businesses to navigate and operate in highly regulated commercial environments, and without them, the cannabis industry will struggle to reach the levels of legitimacy and stability for patients, consumers, businesses, and investors to rely on.

B. *The Results?*

If other states adopt the line of reasoning in the Maine opinion, they will effectively have impair the ability of participating entities to operate within the bounds of state laws and tightly-controlled regulatory structures, thereby severely limiting any growth or stability of the industries as the legislatures had likely envisioned. Thus, if the industries do not foster a stable, healthy market for medical marijuana, patients will be negatively impacted by such a condition.

Assuming the legislative intent behind the enactment of a state-legalized medical marijuana law is to provide patients safe access to a drug that can effectively be use it for treatment, if attorneys cannot provide legal services to existing businesses, there is virtually no way to

the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.”)).

181. See Rob Reuteman, *Medical Marijuana: New Age Entrepreneurs and a Hungry Market*, CNBC NEWS (Apr. 20, 2010, 12:05 AM), <http://www.cnbc.com/id/36179402>.

182. Serge F. Kovalski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html?_r=0 (“Banking is the most urgent issue facing the legal cannabis industry today,” said Aaron Smith, executive director of the National Cannabis Industry Association in Washington, D.C.”).

183. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239, 296-97, 301 (1984).

184. See generally Berman, *supra* note 9.

guarantee that such businesses are operating within the bounds of highly-regulated state laws. This could spell disaster for states that prohibit attorney conduct (like Maine and others), as patients are expecting and relying on the efficacy of a particular product that meets the standards set forth by state laws and regulations. Existing businesses in the industries will have nowhere to turn for legal services that are of paramount importance in ensuring that the business is operating in accordance with stringent state regulations,¹⁸⁵ and producing a product that a large network of patients can rely on for medical treatment and alleviation of their symptoms.

On the other hand, if states adopt a perspective similar to Arizona, or go *one step further* and implement a change similar to Connecticut, although attorneys will be allowed to assist their clients to act in accordance with state laws, the lawyers will essentially be responsible for undermining the upstanding professional culture of lawyers by encouraging and assisting clients in the commission of a federal crime. This dichotomy between the two sets of ethics opinions shows that it is impossible for professional ethics experts to get this question right as long as the clash between state and federal laws continues to exist.¹⁸⁶ This troubling phenomenon illustrates incompatibility of state and federal laws regarding marijuana and must be addressed at a federal level in order for the state legal marijuana markets to become successful and reliable markets for consumers and patients seeking the therapeutic benefits of cannabis, business owners, and investors alike.

Until the federal government reforms its stance regarding marijuana, attorneys across the country will be wondering whether or not they are violating the ethical rules of professional conduct by providing transactional assistance to this popular, emerging market. Without the ability for attorneys to confidently provide competent legal advice and representation, the rapidly growing legal cannabis industries will have a difficult time becoming legitimate, legal markets, with integrity, that entities can rely on.¹⁸⁷

185. STATE BAR OF ARIZ. COMM. ON THE RULES OF PROF'L CONDUCT, *Opinion 11-01* (2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

186. Compare MAINE PROF'L ETHICS COMM'N, *Opinion 199* (2010) available at http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article (prohibiting attorneys from assisting a client with conduct that is in violation of a federal or state law), with STATE BAR OF ARIZ. COMM. ON THE RULES OF PROF'L CONDUCT, *Opinion 11-01* (2011) (stating that a lawyer may counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act).

187. See generally Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239, 296, 302 (1984) (emphasizing the importance of the role of business lawyers in regulated industries, where a lot of transactions are being made).

CONCLUSION

For nearly seventy years in the United States, marijuana has been treated as one of the most dangerous, addictive substances, with absolutely no accepted medicinal use or application.¹⁸⁸ A rapid expansion in state legalization initiatives and an increase in public support have been accelerated by the medical community, evidencing marijuana's effectiveness as a form of medical treatment in a wide array of applications, and the overall safety of the drug.¹⁸⁹

State laws have recognized the utilization of this "remarkable substance" as an effective form of medical treatment, and have exposed the tremendous potential business and investment opportunities associated with regulated state markets for cannabis.¹⁹⁰ Participating entities will inevitably need the assistance of lawyers to navigate the complex and tightly monitored state laws and regulations.¹⁹¹ Until the federal government ameliorates its restrictions on marijuana, the entities operating in their respective legal marijuana markets will be doing so in violation of federal law.¹⁹²

Therefore, as marijuana remains a "Schedule I" drug under the CSA, the attorneys who provide transactional assistance to entities involved in the cannabis industry, attempting to germinate the industry and to seize the prodigious opportunities sprouting up across the nation, will be doing so at great risk to their livelihoods and professional licenses. This restriction on a lawyer's ability to provide necessary legal services to clients acting in compliance with their respective state laws will likely inhibit the viability and growth of this *budding* industry in the United States.

Ian Wagemaker*

188. BONNIE & WHITEBREAD, *supra* note 23.

189. *Recent Research on Medical Marijuana-A Review of the Scientific Literature, 2000-2012*, NORML.ORG, <http://norml.org/component/zoo/category/recent-research-on-medical-marijuana> (compiled list of medical research of marijuana, aggregated from various sources) (last visited June 28, 2015).

190. Schou, *supra* note 7.

191. Berman, *supra* note 9. *See also* STATE BAR OF ARIZ. COMM. ON THE RULES OF PROF'L CONDUCT, *Opinion 11-01* (2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>; Gutterman, *supra* note 101.

192. *See* Controlled Substances Act, § 812.

193. J.D., Western New England University School of Law, 2015. I would like to offer a special thank you to the entire staff of the Western New England Law Review for their tireless work and commitment to the editing process and to our journal. To my fiancé, Jessica—thank you for always being there at the end of a long day. And to my parents—I am so thankful for every opportunity that you have worked so hard to give me, and thank you for everything that you have taught me along the way. None of this would have been possible without you.