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ALEC ROTHROCK
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February 21, 2014

Justices of the Colorado Supreme Court
C/o Mr. Christopher Ryan
Clerk of the Supreme Court
2 E. 14th Avenue
Denver, Colorado, 80203

Re: Proposed Comment [2A] to Colo. RPC 8.4 and Colo. RPC 8.6

Dear Justices:

I am one of the members of the Court's Standing Committee on the Rules of Professional Conduct who voted against both proposals. I will explain here why I did so.

I oppose proposed Rule 8.6 chiefly for one reason. I think it would send the wrong message for the Court to pass an ethics rule that permits lawyers to assist clients in violating federal criminal law, however antiquated or inconvenient that law may be. This is not a civil rights issue.

"An attorney has a special duty to respect, abide by and uphold the law." *In re DeRose,* 55 P.3d 126, 130 (Colo. 2002). The message the Court would send with such a rule ("Colorado high court gives Colorado lawyers green light to help clients break federal marijuana laws.") would undermine respect for the law in the eyes of the legal community, including law students, and the general public.

I oppose proposed Comment [2A], Rule 8.4, for a similar reason. Especially if the Court did not adopt proposed Rule 8.6, adopting proposed Comment [2A] might look like the Court created a special rule just for lawyers. "The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." Preamble: A Lawyer's Responsibilities [12], Colo. RPC. It is not difficult to imagine the likely public reaction ("Colorado high court gives lawyers green light to get high.").

I hasten to add that I do not favor the disciplinary prosecution of Colorado lawyers for assisting clients in the marijuana business. Especially in this area, there is a great need for lawyers to provide to clients not just advice on the law (which Colo. RPC 1.2(d) does *not* prohibit) but also a full range of legal services in forming and supporting such clients. In this respect, I support the substance of proposed Rule 8.6, but not its adoption.

Nor do I favor the disciplinary prosecution of lawyers for personal marijuana-related conduct that is not illegal under Colorado law. A violation of federal law based on the conduct described in proposed Comment [2A] is, in my view, a rare criminal act that does not reflect adversely on a lawyer's "honesty, trustworthiness or fitness as a lawyer," within the meaning of Colo. RPC 8.4(b), unless it substantially impairs the lawyer's competency. *Accord* Colorado Bar Association Formal Opinion 124, "A Lawyer's Medical Use of Marijuana," 41 *The Colorado Lawyer* 28 (July 2012). As with proposed Rule 8.6, I support the substance of proposed Comment [2A], Rule 8.4, but not its adoption.

I favor the prosecutorial policies of the Office of Attorney Regulation Counsel (OARC). I believe that insofar as they have developed, they are consistent with proposed Comment [2A], Rule 8.4, and Rule 8.6. The only problem with OARC's policies is that they are not in writing. The vast majority of Colorado lawyers want to do the right and ethical thing, but they cannot rely on a policy they do not know about or cannot read.

If OARC's prosecutorial policies were reduced to writing, even in the form of a publicly available letter or a *Colorado Lawyer* article, there would be no need for the proposed rule changes. A written expression of policies would not have the permanence or force of a Colo. RPC comment or rule, but this would be a benefit, not a detriment. The light footprint of a policy is desirable in these early days of Colorado's marijuana experiment. Lawyers should be able to depend on an expression of OARC's policies unless and until OARC changes them in an equally public manner.

Finally, to the argument that Colorado might as well adopt the proposed rule changes if there would be no substantive difference between them and written policies, I say: Appearances matter.

Thank you.

Sincerely,

BURNS, FIGA & WILL, P.C.

Alec

Alexander R. Rothrock

CBA
COLORADO BAR ASSOCIATION
Established in 1897

Justice Nathan B. Coats
Justice Monica M. Marquez
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Hearing Regarding Proposed New Comment [2A] to Colo. RPC 8.4 and Proposed New Rule Colo. RPC 8.6

Dear Justice Coats and Justice Marquez:

As Chair of the Ethics Committee of the Colorado Bar Association ("the Committee") I write to provide the Committee's comments regarding the proposed revisions to the Colorado Rules of Professional Conduct. The Committee recommends the adoption of the proposed new Comment [2A] to Colo. RPC 8.4 and proposed new rule Colo. RPC 8.6.

As way of a brief history, in 2012, the Committee issued Formal Opinion 124. That opinion concluded that a lawyer's personal use of medical marijuana under C.R.S. § 12-43.3-101 - 1001 (the Medical Marijuana Code), standing alone, does not violate the Colorado Rules of Professional Conduct as long as the lawyer complies with the Medical Marijuana Code. In June of 2013, the Committee extended Opinion 124, by addendum, to include a lawyer's personal, recreational use of marijuana under the constitutional amendment, Amendment 64, adopted by Colorado voters in November of 2012.

On April 20, 2013 the Committee approved a resolution supporting the proposed changes to the Colorado Rules of Professional Conduct concerning the ability of lawyers to represent clients in connection with issues concerning the use of medical and recreational marijuana. The resolution, which was approved overwhelmingly by the Committee, stated as follows:

> The Ethics Committee of the Colorado Bar Association encourages the Supreme Court Standing Committee on the Rules of Professional Conduct to recommend to the Supreme Court the adoption of a rule which provides that an attorney will not be subject to discipline for providing advice to a client regarding conduct which is lawful under Colorado law.

Before adopting this resolution, the Committee considered recommending changes to Rule 1.2(d) regarding a lawyer's counseling and advising a client about marijuana-related conduct. The Committee decided against such

changes, in part, after learning that the Colorado Supreme Court Standing Committee on Rules of Professional Conduct had undertaken the proposed revisions that are now the subject of the March 6th hearing.

In 2013 the Committee issued Formal Opinion 125 which opinion addressed whether a lawyer violates the Colorado Rules of Professional Conduct by counseling or assisting clients in legal matters related to the cultivation, possession, use, or sale of medical marijuana under Colorado law. The Committee concluded that a lawyer does not violate the Rules by representing a client in proceedings relating to the client's past activities; by advising governmental clients regarding the creation of rules and regulations implementing Amendment 64 and the Medical Marijuana Code; by arguing or lobbying for certain regulations, rules, or standards; or by advising clients regarding the consequences of marijuana use or commerce under Colorado or federal law. The Committee further concluded that under the plain language of Colo.RPC 1.2(d), it is unethical for a lawyer to counsel a client to engage, or to assist a client, in conduct that violates federal law. It is between these two points that a range of conduct exists in which the application of Colo.RPC 1.2(d) is unclear. This concerns the Committee and, in Formal Opinion 125, the Committee expressed its dismay that Colo.RPC 1.2(d) prevents Colorado lawyers from ethically assisting their clients in planning their affairs in order to comply with Colorado's and the federal government's complex statutory and regulatory scheme regarding marijuana. The Committee believes that the proposed revisions and new rule would "provide guidance to lawyers" and "provide a structure for regulation conduct through disciplinary agencies." Colo.RPC, Scope [20].

On behalf of the Committee, Ronald Nemirow and I offer to appear at the Colorado Supreme Court's March 6, 2014 hearing should the Court wish to hear from the Committee or address questions to the Committee. Mr. Nemirow was the chair of the Ethics sub-committee charged with drafting Opinions 124 and 125.

Thank you for your consideration of the Committee's comments and the proposed Rule changes.

Respectfully,

Cindy Fleischner

Cecelia "Cindy" Fleischner
Chair, Ethics Committee
Colorado Bar Association

cc: Ron Nemirow, Esq.

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January 29, 2014

Honorable Nancy Rice
Chief Justice of the Colorado Supreme Court
Colorado Supreme Court
2 East 14th Ave.
Denver, CO 802003

Re: Amending the Ethical Rules so the Marijuana Industry can receive Legal Counseling

Dear Chief Justice Rice,

On October 22, 2013, a Subcommittee of the Colorado Supreme Court: Standing Committee on Rules of Professional Conduct concluded that "the plain language of Colo. RCP 1.2(d) prohibits lawyers from assisting clients in structuring and implementing transactions which by themselves violate federal law." This interpretation means a lawyer could never draft a lease for a grow facility or counsel a client on how to structure a sale or purchase agreement to sell a business. If immediately applied all of the lawyers directly involved in the marijuana industry, this interpretation would deprive an entire industry of legal representation and result in the disbarment of hundreds of lawyers. By this letter, on behalf of Colorado NORML (the National Organization for the Reform of Marijuana Laws), we are asking the Supreme Court to change the ethics rule so an entire industry is not deprived of legal guidance.

Thankfully, the Subcommittee recommended that the Colorado Supreme Court change the rules so that Colorado licensed attorneys are not considered unethical if they counsel clients on matters allowed under state law. Similarly, the Ethics Committee for the Colorado Bar Association also supports this change. Colorado NORML agrees with the recommendations to change the rules. If the rule is not changed, the marijuana industry could be effectively relegated to a system of legal apartheid where they are not entitled to equal treatment with other industries that deal in much more dangerous substances, such as the alcohol and tobacco industries.

The marijuana industry was already a $300 million dollar per year industry prior to the passage of Amendment 64. This year the state economist believes it will grow to over $400 million in sales and many believe we will quickly see sales in the volume of $1 billion per year. A billion dollar industry deserves and demands legal counseling from experienced lawyers who

do not fear disbarment for merely counseling clients to engage in a business that is legal under state law. Without an attorney to advise clients on how to stay compliant with Colorado law, our citizens face serious legal repercussions and avoidable consequences. As licensed Colorado lawyers, we take an oath to defend and protect the Constitution of the state of Colorado, which includes provisions for medical and retail marijuana. Colorado NORML believes that attorneys have a free speech right to discuss any matter with their clients that is legal under state law.

Colorado NORML believes the State Bar of Arizona Ethics Opinion, adopted the appropriate approach, stating:

> 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. Lawyers may do so only if: (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

The marijuana industry is in serious need of legal representation. We urge you to change the rule to allow lawyers to advise Colorado citizens how to comply with Amendment 64 and Amendment 20 and the plethora of regulations that have followed. Thank you for your attention to this important matter.

Sincerely,

Colorado NORML Board of Directors
Rachel Gillette, Lenny Frieling, Craig Small, Mark Miller, Jeri Shepherd, Sean McAllister, Lauren Davis, Lauren Maytin, Jason Savela, Titus Peterson, and Brian Schowalter

Cc:

Marcy Glenn, Chair
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
2 East 14th Ave.
Denver, CO 802003

Justice Nathan B. Coats, Liason
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
2 East 14th Ave.
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Justice Monica Marquez, Liason
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
2 East 14th Ave.
Denver, CO 802003

Mr. John W Hickenlooper
Governor of Colorado
136 State Capitol
Denver, CO 80203-1792

Mr. John Suthers
Colorado Attorney General
1300 Broadway, 10th Floor
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February 25, 2014

Honorable Nancy E. Rice
Chief Judge, Colorado Supreme Court
2 E. 14th Ave.
Denver, CO 80203

Sent via Electronic Mail

Re: Public Comment to Proposed Amendments to CRPC 8.4 and Rule 8.6

Dear Judge Rice:

First and foremost I would like to personally thank you for taking the time to confront this important emerging issue regarding marijuana legalization both medically and recreationally as applicable to attorneys. As you are likely aware, current trends across the United States and the world show an emergence of policies concerning the decriminalization of marijuana in some form or another. Whether legalized outright or for medicinal use, marijuana decriminalization has the power to change many lives.

Colorado, in being one of two states to first legalize recreational marijuana use for adults, is being closely watched by other states contemplating medicinal or decriminalized marijuana regulations. In being at the forefront of this revolution, your ruling on this matter will help guide future court decisions and policies across the nation.

The People of Colorado chose to modify the Colorado Constitution in a manner that allows for both medicinal and recreational marijuana use. Although still technically classified a "Schedule I" narcotic under federal law, the current trend shows an increasing acceptance of marijuana decriminalization measures at the federal level. For example, the Department of Justice released a statement on August 29, 2013 highlighting priorities for the federal enforcement of marijuana law. These priorities include preventing distribution of marijuana to children and across state lines. Specifically the memo detailed that lawful consumption or possession by adults in decriminalized states was not a priority for enforcement of federal laws. Furthermore, on February 14, 2014, the Financial Crimes Enforcement Network released guidance to banks regarding legal marijuana businesses and the Bank Secrecy Act. These guidelines now allow banks to do business with legal marijuana businesses. Finally, President Obama has publicly stated that he believes marijuana is no more harmful than alcohol. These recent actions and trends at the federal level show recognition of the validity of state marijuana laws in decriminalized states and the government's unwillingness to be involved in personal consumption by adults.

Medical marijuana patients and recreational users in Colorado and many other states are finally benefitting from the natural therapeutic properties of marijuana. A quick search online yields thousands of peer reviewed articles indicating marijuana is less harmful than alcohol, tobacco and firearms. To prevent lawyers from exercising the same free rights as other Colorado citizens violates a lawyer's constitutional rights and further undermines the choice of the people in voting for marijuana decriminalization.

I urge the Colorado Supreme Court to rule in favor of the proposed changes to the Colorado Rules of Professional Conduct. A favorable amendment will give Colorado lawyers a clear rule for personal use and it will set a positive precedent across the country for all lawyers in states with decriminalization measures.

Sincerely,

Crofton Sacco
Attorney at Law

February 5, 2014

Christopher Ryan
Clerk of the Supreme Court
2 East 14th Avenue
Denver, Colorado
80202

VIA EMAIL TRANSMISSION & U.S. MAIL
christopher.ryan@judicial.state.co.us

Re: Proposed new Comment [2A] to CRPC 8.4; Proposed new CRPC 8.6

Dear Mr. Ryan:

The Board of Trustees of the Denver Bar Association met on January 9th, 2014 and considered both the recommended new Comment to CRPC 8.4 as well as the proposed new CRPC 8.6. The Board passed a resolution approving those changes and the reporting of their action to the Court. If the Court has any questions regarding this action, please correspond directly with either of the undersigned.

Thank you for the opportunity to participate in this process.

Respectfully,

Daniel R. McCune
DBA, President

Chuck Turner
CBA, Executive Director

Gerald D. Pratt
Scott P. Landry[◆]
Stephen A. Mathews[◆]

[◆] Also admitted in New Mexico and Wyoming
[◆] Also admitted in Texas

February 25, 2014

Mr. Christopher Ryan
Clerk of the Supreme Court
2 East 14th Avenue
Denver, Colorado 80203

HAND DELIVERED

Re | Comments of the Colorado Bar Association in support of Proposed new Comment [2A] to Colo. RPC 8.4, and Proposed new Colo. RPC 8.6

Dear Mr. Ryan:

In my letter of February 24, 2014, I provided notice that the Colorado Bar Association (CBA) wishes to participate in the hearing on March 6, 2014 at 1:30 p.m. regarding the proposed new Comment [2A] to Colorado Rule of Professional Conduct 8.4 and proposed new Colorado Rule of Professional Conduct 8.6.

As the person designated to speak for the CBA at the hearing, I provide here a brief outline of the CBA's comments in support of both of the proposals.

The proposed new Comment [2A] to Colorado Rule of Professional Conduct (Colo. RPC) 8.4 would provide that the medical or personal use of marijuana as permitted by the Colorado Constitution by a lawyer does not, in and of itself, reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The CBA supports this proposed new Comment because: (1) it treats lawyers the same as other individuals under the Colorado Constitution, (2) as a Comment to Colo. RPC 8.4 it does not change that Rule, but it provides guidance for interpreting and implementing that Rule in the changing legal landscape where the voters of Colorado, among some other states, have chosen to decriminalize marijuana, (3) consistent with existing Comment [2], it recognizes that there is a distinction between

determining on the one hand whether certain conduct is legal or illegal depending on the jurisdiction and, on the other hand, determining whether that conduct involves dishonesty, untrustworthiness, or lack of fitness in other respects, and (4) the limiting phrase "soley because that same conduct, standing alone, may violate federal criminal law" clarifies that the regulatory authorities (the Colorado Supreme Court, the Presiding Disciplinary Judge, and the Office of Attorney Regulation Counsel) may consider other factors, not just the use of marijuana standing alone, in determining whether a lawyer's conduct has involved dishonesty, untrustworthiness, or lack of fitness as a lawyer in other respects.

The proposed new Colo. RPC 8.6 would clarify that it is not an ethical violation for a lawyer to counsel or assist a client in legal matters relating to the production, sale, or use of marijuana in compliance with Colorado law. The CBA supports this proposed new Rule because: (1) the voters of Colorado have chosen to legalize and regulate the production, sale, and use of marijuana under certain circumstances, (2) individuals, businesses, government agencies, and regulatory bodies are in need of counseling and assistance in legal matters related to the production, sale, and use of marijuana, (3) those who wish to comply with Colorado law relating to marijuana should not be precluded from obtaining legal advice and assistance, (4) lawyers who provide needed advice and assistance to clients relating to compliance with Colorado marijuana laws should not be subjected to professional discipline for doing so, and (5) inclusion in the Rule of the phrase "solely because that same conduct, standing alone, may violate federal criminal law" makes clear that a lawyer could be disciplined for advising a client conerning conduct such as money laundering, which violated federal law and was not within the safe harbor created by the marijauna amendments to our Constitution.

Two opinions of the CBA Ethics Committee provide an excellent discussion of these issues. *See,* Formal Ethics Opinion 124, *A Lawyer's Medical Use of Marijuana* (Adopted April 23, 2012) and Formal Ethics Opinion 125, *The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities* (Adopted April 23, 2012, addendum issued December 21, 2013).

Thank you for your time and attention to these matters. The CBA welcomes any questions the Supreme Court may have about the CBA's support of these two proposals, and we look forward to the opportunity to provide any further clarification at the hearing on March 6.

Sincerely,

Gerald D. Pratt

Gerald D. Pratt, Esq.
On Behalf of the
Colorado Bar Association

Court of Appeals

STATE OF COLORADO
101 WEST COLFAX AVENUE, SUITE 800
DENVER, COLORADO 80203
(303) 861-1111

Daniel M. Taubman
Judge

February 25, 2014

Chris Ryan, Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, Colorado 80203

Re: Proposed Comment [2A] to Colo. RPC 8.4 and Proposed New Rule 8.6

Dear Mr. Ryan:

I write to support the proposed new Colo. RPC 8.4 Comment [2A] and proposed new Colo. RPC 8.6 submitted to the Supreme Court this past October by Marcy Glenn on behalf of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct.

As you may know, I am the immediate past chair of the Colorado Bar Association's Ethics Committee. In that capacity, I had the opportunity to preside over numerous discussions with respect to the adoption of Formal Opinion 125, which concerns the extent to which lawyers may represent clients on marijuana-related matters. I also attended earlier meetings of the Ethics Committee concerning

the adoption of Formal Opinion 124 regarding a lawyer's personal use of medicinal and recreational marijuana. In addition, I have had the opportunity to present a number of continuing legal education sessions on ethical issues concerning both a lawyer's ability to represent clients on marijuana-related issues and a lawyer's personal use of medical or recreational marijuana. Last year, I also attended several meetings of the Standing Committee and presented my views on behalf of the Ethics Committee regarding the proposed new rule and comment.

Based on these experiences, I would like to share my perspective as to why the Supreme Court should approve the new proposed Rule 8.6 and the proposed Comment [2A] to Rule 8.4.

I. Lawyers' Representation of Clients on Marijuana-Related Issues

As you know, the ethical issues concerning marijuana stem from the conflict between state and federal law. Article XVIII, Miscellaneous, sections 14 and 16, authorize medical use of marijuana for persons suffering from debilitating medical conditions and personal use and regulation of

marijuana, under specific circumstances. Those constitutional provisions have been implemented by both state statutes and local ordinances. In contrast, federal law criminalizes the cultivation, sale, distribution, and use of marijuana for virtually any purpose under the Controlled Substances Act, 21 U.S.C. sections 801-904. Although the Controlled Substances Act's provisions would normally prevail over conflicting state constitutional, statutory, and regulatory provisions under the Supremacy Clause of the United States Constitution, the issue has been muddied by the Obama administration's decisions to permit states to implement both medical and recreational marijuana provisions while the federal government retains the discretion to prosecute violators of the Controlled Substances Act in appropriate circumstances.

Twenty states plus the District of Columbia have now authorized medical marijuana use, while both Colorado and the state of Washington have authorized recreational marijuana use. The conflict between these laws and the Controlled Substances Act has created dilemmas that neither

the American Bar Association's Model Rules of Professional Conduct nor the Colorado Rules of Professional Conduct ever contemplated. When the Model Rules of Professional Conduct were adopted by the American Bar Association and reconsidered over the years, there was no consideration of the applicability of Rule 1.2(d) to conflicts between state and federal law.[1]

Colo. RPC 1.2(d) states that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. As Formal Opinion 125 notes, "If the conduct is illegal, Comment [9] to Colo. RPC 1.2 advises the lawyer not to undertake the representation or to limit the lawyer's advice to an honest opinion about the actual consequences that appear likely to result from a client's conduct."

This language has resulted in divergent interpretations of Colo. RPC 1.2(d) by members of the Ethics Committee,

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[1] Rule 1.2(d) does not address conflict between state and federal law. *See* A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, 43-60 (American Bar Association, 2006).

scholarly commentators, and ethics opinions in three other states. Two scholarly commentators, Professors Sam Kamin and Eli Wald, of the Sturm College of Law at the University of Denver, authored an article expressing an expansive view of Rule 1.2(d).[2] In that article, they posit that lawyers may assist a client in such activities as filling out application forms for a marijuana dispensary license, negotiating a lease for a commercial space for a medical marijuana dispensary, drafting a lease agreement, and drafting a purchase and sales agreement to be used in the course of doing business at the dispensary, as long as the lawyer does not form the intent to assist the client.

In contrast, Alec Rothrock has written an article with a more cautionary approach.[3] Rothrock's article suggests that "lawyers who represent medical marijuana dispensaries in the business setting almost cannot help but violate" Rule 1.2(d).

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[2] Sam Kamin & Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?*, 91 Or. L. Rev. 869, 919-920 (2013).

[3] Alec Rothrock, *Is Assisting a Medical Marijuana Dispensary Hazardous to a Lawyer's Professional Health?*, 89 Denv. U. L. Rev., 1047, 1058 (2012).

Similarly, ethics opinions from Arizona, Maine, and Connecticut present additional contrasting views, as noted in Formal Opinion 125, n.2. Arizona's ethics committee refused to "apply Ethics Rule 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in 'clear and unambiguous compliance' with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits." State Bar of Arizona Ethics Op. 11-01 (2011). Conversely, the ethics opinions from Maine and Connecticut noted the conundrum presented by the conflict between state and federal law, but left it to individual lawyers to determine circumstances under which they could advise clients concerning the requirements of their states' medical marijuana laws. *See* Maine Prof. Ethics Commission, Opinion 199 (2010); Connecticut Bar Association Prof. Ethics Committee, Informal Opinion 2013-02 (2013).

The quandary presented by Colo. RPC 1.2(d) was recognized by the Ethics Committee in Formal Opinion 125:

> This conflict between federal and state law creates a dilemma for Colorado lawyers. On the one hand, members of the public need legal advice on how to apply or how to reconcile conflicting federal and state laws regarding the cultivation, sale, manufacture, distribution, or use of marijuana. On the other hand, a potential client's cultivation, sale, manufacture, distribution, or use of marijuana, although legal under Colorado law, violates federal law.[4]

In light of this dilemma, the Ethics Committee provided alternative guidance for Colorado's lawyers. First, in Formal Opinion 125, it declared that "unless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations." The opinion endeavored to describe "a spectrum of conduct," ranging from representation that is "unquestionably permissible" to conduct which the committee believes is "undoubtedly unethical," and concluding with intermediate situations in which "reasonable minds may differ." Accordingly, the committee concluded in Formal Opinion 125

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[4] Formal Opinion 125 at 5.

that lawyers may represent clients with regard to past conduct, such as representing a client accused of violating Colorado's rules and regulations regarding marijuana in any area in which that conduct may become an issue.

In contrast, Formal Opinion 125 concluded that the limitations of Colo. RPC 1.2(d) would preclude a lawyer from engaging in the following conduct: (1) representing a client in negotiating a contract to purchase the sale of marijuana; (2) negotiating a lease for a facility for the sale or cultivation of marijuana; and (3) representing a lessor in connection with a transaction if the lawyer knows the client intends to lease property for a marijuana clinic or dispensary.

Formal Opinion 125 then discussed areas such as tax law, where the differences between tax preparation and tax planning are unclear, and family law, where the extent to which a lawyer could negotiate a parenting plan or separation agreement in which one component is the permissible use of marijuana, are also unclear.

Given these circumstances, an amendment to the Rules to add proposed Rule 8.6 would eliminate these uncertainties.

Not only does the above-quoted language in Formal Opinion 125 recognize the need for modification of the Rules of Professional Conduct, the Ethics Committee also approved a formal addendum to Formal Opinion 125 supporting the adoption of the proposed new Rule 8.6.

The breadth of areas in which the need for legal advice concerning future conduct involving marijuana demonstrates the benefit of approval of proposed Rule 8.6. A few examples should suffice:

- May a lawyer represent a client seeking to negotiate a lease for property on which to operate a marijuana clinic or dispensary?

- May a lawyer who represents a property owner negotiate a lease for the use of that property for a marijuana business?

- In a family law case, may a lawyer negotiate a parenting plan or separation agreement that provides that a client may not use medicinal or recreational marijuana for a stated number of hours before exercising parenting time? If the answer to this question is no, would a trial court permit a

lawyer to provide unbundled services and represent the client in all issues of a dissolution of marriage except issues concerning use of marijuana?

- In the employment context, may a lawyer advise an employee whether he or she can smoke marijuana outside of working hours under the Lawful Activities Statute?[5]

- The Denver Post noted recently that Colorado homeowners associations are approaching lawyers to find out whether they can ban marijuana use, even in homes.[6] May a lawyer representing a homeowner association advise the association that residents of the association may use recreational or personal marijuana? If an HOA bans the use of medical or recreational marijuana, may a lawyer represent an individual homeowner and argue that such ban is unlawful?

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[5] The Colorado Supreme Court has recently granted certiorari in *Coats v. Dish Network, LLC*, 2013 COA 62 (cert. granted Jan. 27, 2014) to address the issue of whether an employee may be discharged for using marijuana during nonworking hours or whether such action violates the Lawful Activities Statute, section 24-34-402.5, C.R.S. 2013.

[6] *See* Carlos Illescas, The Denver Post, Jan. 14, 2014, *Can HOA's Ban Pot?*, at 6A.

- On February 14, 2014, the Obama administration gave banks a green light to offer services to the legal marijuana industry under certain parameters.[7] Although bankers' association officials indicated that this change in policy was insufficient and that a change in federal law is necessary, may a lawyer nevertheless advise a bank that it could offer services to the legal marijuana industry in light of this federal policy change?

- When recreational marijuana sales became legal on January 1, 2014, The Denver Post quoted a marijuana store owner regarding applicable rules governing sales of marijuana "to sit down and read them, at the end of the day it's mind-boggling, and they're constantly changing them."[8] May a lawyer advise a dispensary owner how to interpret and comply with the applicable marijuana regulations?

- At an Ethics Committee meeting in 2013, a judge reported that he had been sitting on a criminal case dealing

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[7] David Migoya & Allison Sherry, *The Marijuana and Banking, Given the Grow-Ahead*, The Denver Post, Feb. 15, 2014, at 1A.

[8] Joey Bunch, *Pot Sales in High Country Attract Crowds, Music, Good Cheer*, The Denver Post, Jan. 2, 2014, at 11A.

with recreational use of marijuana. After the case was resolved, the prosecutor and defense counsel, in open court, discussed what might be done to avoid future prosecution. The judge wondered whether such discussion was consistent with Colo. RPC 1.2(d).

Because of situations like these, Marcy Glenn noted in her letter to the Supreme Court that the result of the current situation "appears to be that many Colorado citizens and businesses are being denied the benefit of legal counsel on important personal and business conduct."

Following a Denver Post article last December regarding Formal Opinion 125 and the proposed new rules, the Post conducted an informal opinion poll concerning whether Rule 1.2(d) should be changed. More than 72% of over 3,000 respondents favored Colorado changing "a rule that bars lawyers from giving advice to marijuana businesses because pot is still illegal under federal law."[9]

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[9] Opinion Poll, The Denver Post, Dec. 21, 2013, at 21A.

The Denver Post reported on February 20, 2014 that in the coming fiscal year, recreational and medical marijuana sales will add nearly $134 million in tax and fee revenues into state coffers and that the marijuana industry sales will approach $1 billion in the coming fiscal year.[10]

As the marijuana industry continues to grow,[11] it is imperative to adopt the new Rule 8.6 to clarify that lawyers may represent clients on marijuana-related issues and to enable Coloradans throughout the state to obtain legal representation on the wide scope of marijuana issues that have arisen and will continue to arise in the coming years. Although promulgation of this rule will not provide Colorado lawyers a safe harbor from federal law, it will permit the will of Coloradans to be effectuated, as long as the Obama administration and perhaps future administrations acquiesce in the development of state laws allowing medical and recreational use of marijuana.

II. Proposed Comments to [2A] to Rule 8.4

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[10] John Ingold, *Lots of Green Will Roll In*, The Denver Post, Feb. 20, 2014, at 1A.

[11] I would say no pun intended, but you wouldn't believe me.

This proposed Comment parallels Formal Opinion124 of the Ethics Committee and would provide that lawyers could not be subject to discipline for conduct that, standing alone, is consistent with state law regarding personal or recreational use of marijuana even though such conduct still violates federal law. Formal Opinion 124 carefully addresses the scope of Rule 8.4. Consistent with existing Comment [2], this opinion clarifies that not all criminal violations reflect adversely "on the lawyer's honesty, trustworthiness, or fitness." Although Formal Opinion 124 addresses only medicinal marijuana use, the Ethics Committee has agreed to add an addendum to expand the rationale of that opinion to recreational marijuana use.

This opinion appropriately analyzes the scope of Colo. RPC 8.4 and explains why lawyers should not be subject to discipline for personal use of recreational or medicinal marijuana in accordance with state law. If this proposed comment is not adopted, lawyers could infer that their personal use of medical or recreational marijuana in accordance with state law would subject them to discipline.

In October 2013, the Ethics Committee supported the adoption of this Comment, as well as the adoption of new Rule 8.6 discussed above.

I support the adoption of this Comment to provide appropriate guidance to lawyers in this situation.

Very truly yours,

Daniel M. Taubman

Daniel M. Taubman, Judge
Colorado Court of Appeals

DMT/pg

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
DENVER, COLORADO 80203

February 21, 2014

Re: Proposed Comment [2A] to R.P.C. 8.4

Dear Mr. Ryan:

This letter responds to the Supreme Court's solicitation of public comment on a rule change proposed by the Standing Committee on the Rules of Professional Conduct (Standing Committee). The undersigned were among the members of the Standing Committee's Amendment 64 Subcommittee (Subcommittee). The Subcommittee developed what became, with some changes, the Standing Committee's proposal.[1]

Chilling Effect

Approximately fifty-five per cent of Colorado electors voted in favor of Amendment 64. As a result of its passage, coupled with the Medical Marijuana Amendment passed over a decade ago, Colorado citizens may engage in many activities involving marijuana, without fear of any adverse state action. But because such activities may still violate the federal Controlled Substances Act (CSA), Colorado lawyers whose conduct concerning marijuana complies with Colorado law in every respect are still subject to discipline under R.P.C. 8.4(b). This would be so even if the lawyer was neither prosecuted nor convicted of a CSA violation.

This risk of discipline could deter lawyers from engaging in conduct that our constitution permits for purposes of Colorado law. Proposed Comment [2A] removes this chilling effect by precluding discipline based solely on marijuana-related conduct that complies with Colorado law. Removal of this chilling effect is consistent with the position of John Gleason. A few months before his retirement, he publicly stated:

> We will respect the will of the Colorado electorate. Colorado voters did not distinguish between any

[1] This letter is not sent on behalf of the Standing Committee, the Subcommittee, or the Court of Appeals.

> group of people when they passed Amendment 64. Our duty is to determine whether a lawyer is fit to practice law and not to govern their personal lives. Lawyers have to make their own decisions on this issue.

We understand that the current Regulation Counsel, James C. Coyle, agrees with Mr. Gleason's statement.

However, only a few months after Mr. Gleason's statement, the Office of Attorney Regulation Counsel (OARC) representative on the Subcommittee opposed proposed Comment [2A]. OARC presented to the Standing Committee a written opposition to the Subcommittee's recommendation. Despite acknowledging that "There has been no change in OARC's view since Mr. Gleason made that statement," the opposition also stated:

- OARC submits that the issue is whether this committee should suggest to the Supreme Court that it condone violations of federal law by adopting changes to the Rules of Professional Conduct. OARC submits that the Committee should not do so.

- If an attorney is convicted of a crime OARC should be free to exercise its discretion and determine if the conduct reflects adversely on the lawyer's fitness to practice law.

These points warrant separate discussion.

The concern over conviction of a crime could only implicate federal law. At that time, the Subcommittee's recommendation included all activity permitted by Amendment 64, both personal and commercial, in proposed Comment [2A]. But as explained in Ms. Glenn's letter to the liaison justices of October 18, 2013, the Standing Committee limited this safe harbor to personal use and medical use of marijuana. It did so by cross-referencing specific sections of Amendment 64 and the Medical Marijuana Amendment.

The likelihood of a federal prosecution for personal conduct permitted by state law is remote. The U.S. Department of Justice's most recent public comment appeared in an August 29, 2013 memorandum from Deputy Attorney General James Cole: "[T]he Department of Justice has historically not devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities . . . ." Yet, despite the personal and medical use limitation in proposed Comment [2A] and the DOJ position, the OARC representatives voted

against the proposed comment at the final meeting of the Standing Committee on the subject.

The concern that the proposal would "condone violations of federal law" ignores existing Comment [2] to Rule 8.4. The comment explains that while "[m]any kinds of illegal conduct reflect adversely on fitness to practice law, . . . some kinds of offenses carry no such implication." It identifies "moral turpitude" as the litmus test, exemplified by "offenses involving fraud." Thus, the existing comment in no way condones lawyers committing offenses that constitute moral turpitude. Likewise, proposed Comment [2A] only clarifies that state-law-compliant conduct involving personal and medical use of marijuana does not involve moral turpitude. And in this regard, it conforms to CBA Ethics Committee Formal Opinion No. 124.

But without the proposed comment, a cautious Colorado lawyer would refrain from engaging in personal and medical use of marijuana, compliant with Colorado law, because of OARC's position before the Standing Committee. The undersigned do not perceive any legitimate reason why lawyers' personal conduct, compliant with state law, should be restrained by concern over what OARC might do based solely on federal law. Adopting the proposed comment would remove that concern by limiting OARC's prosecutorial discretion. But rejecting the proposed comment could enhance this chilling effect.

OARC Prosecutorial Discretion

Before the Standing Committee, OARC opposed proposed Comment [2A] on the basis of preserving its prosecutorial discretion. Whether that remains OARC's position is unclear, but we have not seen any response of OARC to the solicitation of public comment. The exercise of such discretion to prosecute for medical or personal use would be problematic, at two levels.

First, to the extent that OARC fears a restriction on its investigative functions, such fear is unfounded. The qualifying phrase, "solely because that same conduct, standing alone, may violate federal criminal law," makes clear that OARC could fully investigate complaints such as:

- A lawyer's lack of competence (Rule 1.1), resulting from marijuana use.
- A lawyer's lack of diligence (Rule 1.3), resulting from marijuana use.
- A lawyer's violation of other state laws, such as DWAI or DUI, resulting from marijuana use.

- A lawyer's violation of federal law, other than the CSA, such as money laundering.

Such investigations might well encompass the lawyer's use of marijuana. But discipline could not be sought "solely because" of use permitted by our state constitution.

Second, if OARC prosecuted a lawyer for medical or personal use of marijuana, the lawyer might assert selective prosecution, based on the public statement of Mr. Gleason, quoted above. Unless and until OARC disavows this statement, the inquiry might shift from the lawyer's conduct to why the lawyer had been singled out for discipline. *See People v. Kurz*, 847 P.2d 194, 197 (Colo. App.1992) ("A defendant must show the selective prosecution had a discriminatory effect and was motivated by a discriminatory purpose. Once a defendant has made a prima facie showing of selective prosecution, 'the burden of going forward with proof of nondiscrimination" shifts to the government.'") (internal citations omitted); *cf. State ex rel. Counsel for Discipline of Nebraska Supreme Court v. James*, 267 Neb. 186, 197, 673 N.W.2d 214, 225 (Neb. 2004) ("James' argument is largely predicated on the claim that he has been singled out for prosecution while numerous other violators of rule 9(E) have gone unpunished. We conclude that this argument is akin to a defense based on selective prosecution.").

For these reasons, the undersigned urge the Court to adopt proposed Comment [2A] to R.P.C. 8.4. We also support adoption of proposed Rule 8.6, but believe that it has been sufficiently addressed by Ms. Glenn.

Respectfully,

John R. Webb
Subcommittee chair

Michael H. Berger
Subcommittee member

cc: Marcy G. Glenn

Regulation Counsel
James C. Coyle

Chief Deputy Regulation Counsel
James S. Sudler

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Staff Attorneys
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Alan C. Obye

February 25, 2014

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed new comment to Colo. RPC 8.4, Comment [2A]; and proposed new rule, Colo. RPC 8.6

Dear Chief Justice Rice and other Members of the Court:

On October 18, 2013, the Supreme Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee) proposed to the Court a new comment to Colo. RPC 8.4, Comment [2A], and a new rule, Colo. RPC 8.6. The proposed comment and rule address different aspects of limited legalization of marijuana in Colorado.

On December 11, 2013, the Standing Committee proposed an additional comment. This new comment would follow Colo. RPC 1.2, and would be Comment [12A] to such rule. This proposed comment would simply alert the reader of Colo. RPC 1.2 to the existence of new proposed Colo. RPC 8.6.

Chief Deputy Regulation Counsel Jamie Sudler was a member of the subcommittee charged with exploring the topic and drafting these proposals, and represented this office throughout the subcommittee's work [we opposed the subcommittee proposals]. Mr. Sudler and I both had the opportunity to express our position to the proposed comment and rule at the full committee level [we opposed the proposed comment and rule at the full committee level].

I. Introduction

We respect the significant work performed by the subcommittee and full committee members on these difficult matters. Putting the "personal use" issue aside for the moment, we also fully recognize that to prohibit lawyers from assisting clients with legal matters in an effort to comply with state law would "be depriving clients of the very legal advice and assistance ... needed to engage in the conduct that the state law expressly permits;"[1] particularly when the state has implemented regulatory and enforcement systems to address public safety, public health and other law enforcement interests, and the risk of federal intervention seems unlikely at this point in time.[2]

This office understands the intent behind these proposals, to give written Supreme Court guidance on these rapidly evolving issues. Nevertheless, Supreme Court rules and comments are not needed on either issue. This office's enforcement priorities are consistent with the underlying reasoning contained in the rules. These enforcement priorities have developed over time, based on experiences with the Attorney Regulation Committee (ARC), the Presiding Disciplinary Judge (PDJ) and hearing boards. These enforcement priorities demonstrate that the checks and balances of the attorney regulation system work well and no new Supreme Court rule or comment is needed.

Also, we are concerned that the proposed Supreme Court rule and Supreme Court comments send an odd message to the public that lawyers have a "get out of jail free" card on marijuana-related issues. Finally, a Supreme Court rule and comments should be clear, concise, unambiguous and consistent with all other Rules of Professional Conduct; proposed Colo. RPC 8.6 fails in each of these respects.

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[1] State of Arizona Ethics Opinion 11-01(2011).

[2] *See* James M. Cole, Deputy Attorney General, U.S. Department of Justice, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (August 29, 2013), ("Cole memorandum"), attached as Appendix 1.

II. Background.

A. The Court.

The Colorado Supreme Court has the exclusive authority to regulate and control the practice of law in Colorado.[3] This authority extends to rule-making authority.[4] Pursuant to this power, the Court has adopted the Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, which establish the procedures for the attorney regulation system.[5] The Court has also adopted the Colorado Rules of Professional Conduct.[6] The Rules of Professional Conduct apply to all attorneys who practice law in Colorado, whether licensed or otherwise authorized to practice law here.[7]

B. The Rules.

The primary purpose for regulating the practice of law in Colorado is protection of the public.[8] A Colorado lawyer's record of conduct should be one that justifies the trust of clients, adversaries, courts and others with respect to the professional responsibilities owed to them. These professional responsibilities are codified in the Rules of Professional Conduct.[9] These professional responsibilities include competence, diligence, trustworthiness, reliability, honesty, integrity and judgment.

When an attorney's record of conduct falls below the Rules' standards of character and fitness, the rules regarding discipline and disability proceedings provide a procedure to suspend or otherwise impact the lawyer's ability to continue to practice law. These procedures are time-proven and provide active citizen participation in the Attorney Regulation Committee and hearing board deliberations. This is the enforcement side of attorney regulation, set forth in C.R.C.P. 251.1, et seq.

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[3] Colo. Const. art. VI; *Smith v. Mullarkey*, 121 P.3d 890, 891 (Colo. 2005).
[4] *Id.*
[5] *See* C.R.C.P. 251.1, *et seq.*
[6] Appendix to Chapter 18 to 20, the Colo. RPC.
[7] C.R.C.P. 251.1(b).
[8] *People v. Goldstein*, 887 P.2d 634, 643-44 (Colo. 1994) (citing *People v. Grenemyer*, 745 P.2d 1027, 1029 (Colo. 1987)).
[9] Colo. RPC, Preamble, ¶ 7.

Comments accompanying each rule should explain and illustrate the meaning and purpose of the rule.[10] Comments are guides to interpretation of the rule, but the text of each rule is authoritative.[11]

The Rules of Professional Conduct are rules of reason.[12] Unfortunately, the Rules of Professional Conduct do not always give an attorney a clear or satisfying answer to every ethical quandary. Each client's legal situation is nuanced by unlimited circumstances that cannot be easily quantified or qualified. Attorneys must then exercise professional judgment in the application of these rules.

Similarly, as officers of the courts and public citizens, lawyers have a special responsibility to obey the law. Although a lawyer is personally answerable to the entire criminal law, not all violations of the law require disciplinary enforcement.

III. A Lawyer's Medical or Limited Personal Use of Marijuana

A. Colo. RPC 8.4(b)

Colo. RPC 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Not all criminal acts rise to the level of a disciplinary enforcement violation under this rule.

When enforcing this rule, most often the "criminal act" referred to in Colo. RPC 8.4(b) has already been established by a criminal conviction. There are some unusual or egregious circumstances in which this office has charged a criminal act without a prior conviction.[13] If this office does charge a Colo. RPC 8.4(b) violation when there is no conviction, the office must establish each element of the specific crime charged. Simply put, this office has never attempted to charge a violation of the federal Controlled Substances Act for personal use involving small amounts of marijuana, nor does this office intend to do so.

Even if there is a criminal conviction, another element of this particular disciplinary rule must be proven: the criminal act must "reflect adversely on the

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[10] Colo. RPC, Scope, ¶ 21.
[11] *Id.*
[12] Colo. RPC, Scope, ¶ 14.
[13] *See, e.g., People v. Musick*, 96 P.2d 89 (Colo. 1998).

lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." If the criminal act does not reflect adversely on a lawyer's honesty, trustworthiness or fitness in other respects, the matter will be dismissed. Recent examples in which a criminal act did not result in a disciplinary prosecution include littering, dog at large, or simple trespass on federal land while skiing. While lawyers must abide by all laws, these particular violations did not rise to the level of a disciplinable action in that they did not reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

The medical or personal use of marijuana in compliance with state law does not, in and of itself, constitute a criminal act "that reflects adversely on a lawyer's honesty, trustworthiness or fitness in other respects." [14] Thus, this office has not disciplined and does not intend to seek discipline of lawyers who engage in medical or personal use of marijuana in Colorado, in full compliance with Colorado law, and not the subject of a federal conviction, unless some other disciplinary rule is implicated.[15]

B. Proposed Comment on Personal Use.

The Standing Committee has proposed that the Court adopt a comment to Colo. RPC 8.4. This proposed Comment [2A] would provide:

[2A] A LAWYER'S "MEDICAL USE" OR "PERSONAL USE" OF MARIJUANA THAT, BY VIRTUE OF ANY OF THE FOLLOWING PROVISIONS OF THE COLORADO CONSTITUTION, IS EITHER PERMITTED OR WITHIN AN AFFIRMATIVE DEFENSE TO PROSECUTION UNDER STATE CRIMINAL LAW, AND WHICH IS IN COMPLIANCE WITH LEGISLATION OR REGULATIONS IMPLEMENTING SUCH PROVISIONS, DOES NOT REFLECT ADVERSELY ON THE LAWYER'S HONESTY, TRUSTWORTHINESS, OR FITNESS IN OTHER RESPECTS, SOLELY BECAUSE THAT SAME CONDUCT, STANDING ALONE, MAY VIOLATE FEDERAL

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[14] *See, e.g.,* Formal Ethics Opinion 124, Colorado Ethics Handbook, Fifth Edition (CLE in Colo., Inc. Supp. 2011).

[15] *See* Appendix 2 for a listing of published discipline and published summaries of alternatives to discipline involving marijuana, from 2000 to present.

12 CRIMINAL LAW: (1) ARTICLE XVIII. MISCELLANEOUS,
13 SECTION 14, MEDICAL USE OF MARIJUANA FOR PERSONS
14 SUFFERING FROM DEBILITATING MEDICAL
15 CONDITIONS, SUBSECTION 14 (1) (B); (2) ARTICLE XVIII.
16 MISCELLANEOUS, SECTION 14, MEDICAL USE OF
17 MARIJUANA FOR PERSONS SUFFERING FROM
18 DEBILITATING MEDICAL CONDITIONS, SUBSECTION
19 14(4); OR (3) ARTICLE XVIII, MISCELLANEOUS, SECTION
20 16, PERSONAL USE AND REGULATION OF MARIJUANA,
21 SUBSECTION 16(3).

C. The Proposed Rule Comment is Not Necessary.

A Supreme Court comment directed at specific conduct such as medical or personal use of marijuana is not necessary:

First, Colorado lawyers who familiarize themselves with published discipline and alternatives to discipline already know that an attorney's medical or personal use of marijuana in Colorado, in full compliance with local and state law, and not the subject of a federal conviction, has not resulted in discipline or diversion in the past 13 years.[16] This office is aware of only one recent matter in which a Colorado attorney was convicted of a federal marijuana-related crime; that conviction did not involve medical use of small amounts of marijuana.[17]

Second, lawyers have already received sufficient guidance from CBA formal ethics opinions, such as Formal Ethics Opinion 124. While these ethics opinions are not binding on the Court, hearing boards or Attorney Regulation Counsel, the opinions provide persuasive legal analysis of ethics issues. Members of this office occasionally collaborate or participate in the drafting or review of these formal ethics opinions. More importantly, we regularly review and often rely upon the legal analysis contained in these opinions. Applicable analysis from formal ethics opinions are often provided by both parties in trial briefs and packets of legal authority for hearing board review, and applicable ethics opinions are often referred to in Attorney Regulation Committee discussions, and cited in hearing board findings and appellate proceedings. We agree with the underlying analysis of Formal Ethics Opinion 124 that the use of Colorado-legal medical marijuana (and

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[16] *See* Appendix 2.

[17] *People v. Huff*, No. 12PDJ89, 2012 WL 6651127 (Colo. O.P.D.J. Dec. 18, 2012).

Colorado-legal personal use of marijuana for that matter) does not, in and of itself, constitute a criminal act "that reflects adversely on a lawyer's honesty, trustworthiness or fitness in other respects."

Third, the federal government has traditionally left to local law enforcement the investigation and prosecution of low-level, localized activity such as use or possession of small amounts of marijuana for personal use on private property. The Cole memorandum reaffirmed that the federal government relies on state and local law enforcement agencies to address localized marijuana activity, such as "possession of small amounts of marijuana for personal use on private property," through enforcement of state and local law.[18]

And fourth, this office has already announced that medical or personal use of marijuana in Colorado, in full compliance with Colorado law and not the subject of a federal conviction, standing alone, will not result in attorney disciplinary proceedings.[19] This position has not been withdrawn in any way, and has been reaffirmed when requested, including in Standing Committee meetings. Only two media requests on the topic have been made (BuzzFeed's Rachel Zarrell and an AP reporter) in the past year, so the topic already seems well-settled.

Thus, Colorado attorneys already have sufficient assurance that should they choose to engage in medical or personal use of small amounts of marijuana in compliance with state laws, such conduct standing alone will not result in discipline proceedings. There really is little or no need for proposed comment [2A] to Colo. RPC 8.4.

D. The Proposed Comment is Self-Serving.

As public citizens, lawyers have a special responsibility to obey the law and should seek improvement of the law (at any level) if needed.[20] Lawyers should not just seek exemption from the law as it may apply to them. Self-regulation by the profession is conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.[21] Proposed Comment [2A] does not further the primary purpose of attorney regulation, which is protection of the public. Until and

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[18] *See* Appendix 1, page 2.
[19] *See* November 2012 Law Week article, attached as Appendix 3.
[20] Colo. RPC, Preamble, ¶ 6.
[21] Colo. RPC, Preamble, ¶ 13.

unless this comment can be shown as protecting the public, lawyers do not need such a comment.

IV. Counseling Clients Concerning Marijuana.

A. Colo. RPC 1.2(d).

Colorado Rules of Professional Conduct 1.2(d) provides:

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

The public policy supporting a lawyer's representation of clients in Colorado-legal marijuana activity is compelling. Colorado clients should be able to avail themselves of a lawyer's services when navigating the ever-changing landscape of issues that arise when establishing a marijuana-related business; obtaining licensing and registration; and representing clients in the many immediate and ancillary proceedings associated with Colorado, marijuana-related conduct. In providing these legal services to the client, the lawyer helps ensure the strong and effective state regulatory system that is required under federal enforcement guidelines. The lawyer also helps protect the client and the public, which protection remains the primary purpose of the Colorado Rules of Professional Conduct.

In making determinations on whether to proceed on a Colo. RPC 1.2(d) violation, the office is regularly reminded of this compelling public policy. Such public policy is reinforced through discussions with the six attorney and three non-attorney citizen members of the Attorney Regulation Committee, and in reviewing ethics opinions from other jurisdictions. This office also looks to prior discipline cases.[22] And the office has carefully considered the specific language of the Colorado Constitution, Article XVIII, Sections 14 and 16, the essential eligibility requirements of a lawyer, CBA Formal Ethics Opinion 125, ethics opinions from other states, the August 2013 Cole memorandum, recent Department of Treasury Guidelines and the February 2014 Cole Memorandum Regarding Marijuana Related Financial Crimes.

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[22] Examples of discipline for Colo. RPC 1.2(d) violations are contained in Appendix 4.

Since medical marijuana was first legalized in 2000, no Colorado lawyer has been disciplined for counseling or representing clients in the course of a traditional attorney-client relationship regarding marijuana use or commerce that is lawful under Colorado law and consistent with federal enforcement guidelines. The one case that did involve marijuana-related conduct was *People v. Nimtz*, No. 13PDJ056, 2013 WL 4506458 (Colo. O.P.D.J. 2013), referred to in both Appendix 1 and 4. In that case, the attorney applied for a medical marijuana business license in his own name because his client and friend was prohibited by law from obtaining such a license. This respondent attorney's conduct went well beyond a traditional attorney-client relationship in that the attorney participated in fraudulent conduct.

This office shall continue to work within the framework of the present regulatory system in analyzing an attorney's fitness, as it has done since the advent of medical marijuana in Colorado. This office recognizes the fundamental need for legal services for conduct that is not only specifically permitted under state law, but acknowledged and allowed to continue by federal authorities. Thus, conduct by a lawyer that involves counseling or representing a client with regard to marijuana use or commerce that is lawful under Colorado law and within the federal enforcement guidelines, will not result in disciplinary proceedings.

B. Proposed Colo. RPC 8.6.

The Committee proposes that the Court adopt a new rule, Colo. RPC 8.6. This proposed new rule would provide:

RULE 8.6. COUNSELING CLIENTS CONCERNING MARIJUANA

NOTWITHSTANDING ANY OTHER PROVISION OF THESE RULES, A LAWYER SHALL NOT BE IN VIOLATION OF THESE RULES OR SUBJECT TO DISCIPLINE FOR COUNSELING OR ASSISTING A CLIENT TO ENGAGE IN CONDUCT THAT, BY VIRTUE OF (1) ARTICLE XVIII. MISCELLANEOUS, SECTION 14, MEDICAL USE OF MARIJUANA FOR PERSONS SUFFERING FROM DEBILITATING MEDICAL CONDITIONS, OR (2) ARTICLE XVIII, MISCELLANEOUS, SECTION 16, PERSONAL USE AND REGULATION OF MARIJUANA, THE LAWYER REASONABLY BELIEVES TO BE EITHER PERMITTED OR WITHIN AN

AFFIRMATIVE DEFENSE TO PROSECUTION UNDER STATE CRIMINAL LAW, AND WHICH THE LAWYER REASONABLY BELIEVES IS IN COMPLIANCE WITH LEGISLATION OR REGULATIONS IMPLEMENTING SUCH PROVISIONS, SOLELY BECAUSE THAT SAME CONDUCT, STANDING ALONE, MAY VIOLATE FEDERAL CRIMINAL LAW.

C. Proposed Colo. RPC 8.6 is Not Necessary.

Again, a Supreme Court rule on this issue is not needed. The present regulatory process has been working well in handling these matters. To the extent that a public pronouncement is needed, this letter should be sufficient to address enforcement priorities involving Colo. RPC 1.2(d).

From a regulatory standpoint, this office will not prosecute lawyers for counseling or representing clients in the course of a traditional attorney-client relationship regarding marijuana use or commerce that is lawful under Colorado law and consistent with federal enforcement guidelines. Thus, proposed Colo. RPC 8.6 is not needed.

D. Proposed Rule 8.6 is Incongruent with the RPC and Ambiguous.

To date, the Colorado Rules of Professional Conduct set forth an attorney's professional responsibilities in a clear, concise and unambiguous fashion. Thus, the present RPC is written in a way that is readily understandable to a licensed lawyer.[23]

Proposed RPC 8.6 does not set forth a Colorado attorney's professional responsibilities, but instead creates a safe harbor from prosecution for marijuana-related counseling and assistance. The parameters of this safe harbor are vague, with language referencing "these rules," "reasonable belief" standards, an additional "sole" requirement, and reference to any federal criminal law rather than just the Controlled Substances Act. In effect, the proposed rule is one sentence stuffed with 13 or more clauses, and each clause is subject to interpretation on its own and in

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[23] *People v. Morley*, 725 P.2d 510, 516 (Colo. 1986) ("Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer.")

relation to each other clause. Further, this proposed rule would be the only rule in the RPC that creates a safe harbor "notwithstanding" any other RPC adopted by this Court. I am not certain how this rule can be construed to give consistent, harmonious and sensible effect to all of its parts in disciplinary matters.

My office must be afforded the latitude to consider the unique facts and circumstances of each individual case, particularly in this area that may involve dynamic and subtle changes in the future, which creates additional unique situations that may affect a lawyer's responsibilities to clients and the public. The proposed rule, with its many clauses and broad application that impacts each and every rule of professional conduct, would tie the hands of the Attorney Regulation Committee and Attorney Regulation Counsel in enforcing the rules against an attorney who may have failed to discharge professional duties owed to clients. At a minimum,

1. The language should only be a part of Colo. RPC 1.2(d);
2. The clauses should be simplified;
3. The "Notwithstanding" clause in line 1 should be dropped;
4. The language in line 2 should be changed from "shall not be in violation of these rules" to "shall not be in violation of Rule 1.2(d);" and
5. The language of line 16 should be changed from "violate the federal criminal law" to "violate the federal Controlled Substances Act."

Even with the above changes, the proposed rule is less than clear in providing guidance to the practicing attorney, Attorney Regulation Counsel, the Attorney Regulation Committee, the PDJ and hearing boards. And, as stated above, the rule is not needed.

Every consumer of legal services in Colorado should expect quality legal services by a lawyer using professional judgment. All Rules of Professional Conduct must be conceived in the public interest and not in the furtherance of parochial concerns by lawyers.[24] In the end, this proposed rule does not provide the latitude necessary to ensure that all clients receive quality professional services and the public is protected.

[24] Colo. RPC, Preamble and Scope ¶12.

V. Conclusion

For the reasons described above, the Office of Attorney Regulation Counsel opposes the proposed changes to the Colorado Rules of Professional Conduct. Thank you for the opportunity to address the above concerns. I am available to provide the Court with any additional information.

Sincerely,

James C. Coyle
Attorney Regulation Counsel

JCC/cl
Attachments

APPENDIX 1

APPENDIX 1

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch
United States Attorney
Eastern District of New York
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
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Drug Enforcement Administration

H. Marshall Jarrett
Director
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Ronald T. Hosko
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation

APPENDIX 2

APPENDIX 2

Summaries of Marijuana-Related Matters Resulting in Discipline or Diversion, November 2000-present

1. ***People v. Nimtz*, No. 13PDJ056, 2013 WL 4506458 (Colo. O.P.D.J. 2013), Suspended for 1 year and 1 day, 60 days served with successful completion of 1 year of probation with conditions** (Conditional Admission of Misconduct, approved July 22, 2013).

   Respondent applied for a Colorado Business Medical Marijuana License to operate a medical marijuana dispensary. In that application, Respondent lied and stated that he was the owner of the dispensary when in fact his friend owned and operated the business. At the time Respondent applied for the license, he knew that his friend was subject to a tax lien and was not eligible for the Colorado Business Medical Marijuana License under state law. When the SWAT team searched the dispensary, Respondent was at the dispensary, processing marijuana. Respondent's friend identified Respondent as his attorney. On July 26, 2012, Respondent pled to Possession of Marijuana pursuant to C.R.S. § 18-18-406(4)(b), a class 1 misdemeanor.

   Respondent violated Colo. RPC 1.2(d) (engaging or assisting a client in conduct that a lawyer knows is criminal or fraudulent), 4.1(a) (knowingly making a false statement of material fact to a third person), 8.4(b) (criminal act).

2. ***People v. Huff*, No. 11PDJ089, 2012 WL 6651127 (Colo. O.P.D.J. 2012), Suspended for 3 years** (Conditional Admission of Misconduct, approved December 18, 2012).

   Respondent was convicted of a felony, Conspiracy to Distribute 1,000 kilograms or more of marijuana pursuant to 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and 18 U.S.C. § 2. He served 18 months of imprisonment and in fall of 2011 began serving a 5-year term of supervised release.

   Respondent violated Colo. RPC 8.4(b) (criminal act).

3. ***People v. Jensen*, No. 10PDJ035, (published on PDJ website), Suspended for 6 months** (ordered January 7, 2011).

   Respondent had a license to cultivate medical marijuana since 2002, and although she was permitted to have 6 marijuana plants, she had at least 40 plants when police investigated her home one night while she was away and her teenage daughter had a party. The police found the marijuana plants and 16 grams of psilocybin mushrooms. Respondent entered an *Alford* plea to a class 3 felony involving possession of more than one gram of psilocybin, a schedule I controlled substance. Respondent was also charged with a class 4 felony involving cultivation of marijuana, a class 4 felony involving possession with intent to manufacture or distribute marijuana, a class 5 felony involving possession of eight ounces or more of

marijuana, and a class 6 felony involving possession of one gram or less of cocaine, but those charges were dismissed.

Respondent violated Colo. RPC 8.4(b).

4. ***People v. Wingler*, No. 07PDJ053, 2007 WL 4465794 (Colo. O.P.D.J. 2007), Suspended for 1 year and 1 day** (Conditional Admission of Misconduct approved December 21, 2007)

Respondent pleaded guilty to cultivation of marijuana (class 4 felony), unlawful possession of more than one ounce but less than eight ounces of marijuana (class 1 misdemeanor), menacing (class 3 misdemeanor), and telephone harassment (class 3 misdemeanor).

Respondent violated Colo. RPC 8.4(b).

5. ***People v. Cooper*, No. 01PDJ096, 2001 WL 1638790 (Colo. O.P.D.J. 2001), Suspended for 1 year and 1 day** (Conditional Admission of Misconduct approved December 17, 2001).

Respondent was arrested after a traffic stop. At the time of the traffic stop, Respondent possessed less than half of 1 gram of cocaine in violation of C.R.S. § 18-18-405; possessed less than ¼ ounce of marijuana in violation of C.R.S. § 18-18-406(1); and also possessed drug paraphernalia in violation of C.R.S. § 18-18-428(1). Respondent was also driving while impaired by alcohol in violation of C.R.S. § 42-4-1301(1)(b).

Respondent violated Colo. RPC 8.4(b).

Diversion Agreements

1. In June 2008, respondent was charged with violations of CRS § 42-4-1101 (speeding); CRS § 18-18-406(1) (possession of one ounce or less of marijuana); and CRS § 18-18-428 (possession of drug paraphernalia). In August 2008, respondent was convicted of violation of CRS § 18-18-428 (possession of drug paraphernalia). As part of the conditions of the Diversion Agreement, respondent shall attend Ethics School and pay all costs associated with the one-year Diversion Agreement. Rule Implicated: Colo. RPC 8.4(b).

   Colorado Supreme Court Attorney Regulation Counsel, From the Courts: Matters Resulting in Diversion, 38 Colo. Law 93 (Jan. 2009)

2. Respondent was charged under CRS § 18-18-406(4)(a)(I) with possession of more than one ounce, but less than eight ounces, of marijuana (a class 1 misdemeanor). Respondent entered into a one-year deferred judgment agreement for the offense of possession of less than one ounce of marijuana. Rule Implicated: Colo. RPC 8.4(b). Diversion Agreement: As part of the conditions of the Diversion Agreement, respondent shall comply with the conditions in the criminal case; comply with all recommendations of the evaluator; provide OARC with quarterly progress reports during the term of the diversion; abstain from the use of mood-altering substances,

including marijuana, during the course of the diversion, unless prescribed by a duly licensed Colorado physician; submit to full screen urinalysis testing at least one time per month for a period of one year; attend and successfully pass Ethics School within one year; pay all costs; and have no disciplinable conduct for one year.

Colorado Supreme Court Attorney Regulation Counsel, Disciplinary Case Summaries for Matters Resulting in Diversion and Private Admonition, 37 Colo. Law 117 (April 2008)

3. After a jury trial, the respondent was convicted of obstructing a peace officer, resisting arrest, possession of drug paraphernalia and possession of not more than one ounce of marijuana or marijuana concentrate. At the request of the Office of Attorney Regulation Counsel, the respondent was evaluated through an independent medical examination. As part of the conditions of the Diversion Agreement, the respondent must attend Ethics School, abstain from the use of mood altering substances, and have an evaluation by a psychologist. The rule implicated is Colo. RPC 8.4(b).

   Colorado Supreme Court Attorney Regulation Counsel, Matters Resulting in Diversion and Private Admonition, 33 Colo. Law 131 (April 2004)

4. On January 3, 2002, respondent pled guilty to Driving While Ability Impaired (Drugs) in violation of C.R.S. 42-4-1301(1)(b). The conviction resulted from an incident wherein respondent was driving while impaired by marijuana. As a result of that conviction, the court sentenced respondent to eighteen (18) months of probation, to perform twenty-four (24) hours of community service, to undergo a substance abuse evaluation and follow any treatment recommendations as a condition of probation, and assessed fines, surcharges and fees. After reporting the conviction to the Office of Attorney Regulation Counsel, respondent underwent an Independent Medical Examination and as part of the evaluation, respondent submitted urine samples that tested positive for the metabolite of marijuana. Respondent admitted recent and continuing use of marijuana to the evaluator. As part of the conditions of the diversion agreement, the respondent must abstain, must have random urinalysis twice monthly for one year, must provide lab results to the Office of Attorney Regulation Counsel, and therapy. The rule implicated is Colo. RPC 8.4(b).

   Colorado Supreme Court Attorney Regulation Counsel, Matters Resulting in Diversion and Private Admonition, 32 Colo. Law 147 (Oct. 2003)

5. The respondent's former girlfriend complained, among other things, that the respondent used marijuana on a regular basis. The respondent denied any other wrongdoing, but admitted to using marijuana on a recreational basis. The respondent denies ever being under the influence of marijuana while performing legal services for any of his clients, and denies any negative consequences resulting from his recreational marijuana use. The rules implicated are Colo. RPC 8.4(b), and C.R.C.P. 251.5(b).

Colorado Supreme Court Attorney Regulation Counsel, Matters Resulting in Diversion and Private Admonition, 32 Colo. Law 111 (Jan. 2003)

6. The respondent went through security screening at an airport. Security personnel found a film canister containing marijuana in respondent's pocket. The respondent was issued a summons and complaint charging him with possession of less than one ounce of marijuana, in violation of CRS § 18-18-406(1), a Class 2 petty offense. The plea of guilty was accepted and the respondent was assessed fines and costs in the amount of $118. The rules implicated are Colo. RPC 8.4(b) and C.R.C.P. 251.5(b).

   Colorado Supreme Court Attorney Regulation Counsel, Matters Resulting in Diversion and Private Admonition, 31 Colo. Law 165 (July 2002)

7. In the early morning hours, the respondent was observed driving a vehicle that was weaving between lanes of travel. The respondent was stopped by law enforcement personnel, who observed several indicators of intoxication. The law enforcement officers administered field sobriety tests, which respondent failed. The respondent was arrested for driving under the influence of alcohol. The law enforcement officers searched the respondent's vehicle, and discovered a small amount of marijuana in a rolled, half-smoked cigarette. The respondent submitted to a blood test, which determined his BAC was 0.181. A couple of months later, the respondent pled guilty to an amended charge of driving while ability impaired and to possession of one ounce or less of marijuana. The other charges were dismissed. The respondent was sentenced to one year of unsupervised probation. The terms of probation included payment of a $100 fine, payment of numerous court costs, performing community service, and compliance with all rules and regulations of the appropriate agencies to which he was referred. The respondent was also ordered to complete a Level II Alcohol Education program. A condition of the diversion agreement was compliance with the conditions in the criminal case. The rules implicated are Colo. RPC 8.4(b) and C.R.C.P. 251.5(b).

   Colorado Supreme Court Attorney Regulation Counsel, Matters Resulting in Diversion, 30 Colo. Law 187 (Oct. 2001)

8. The respondent was stopped for speeding. Upon making contact with the respondent, the officer smelled an odor of marijuana coming from the respondent's vehicle. The officer made other observations of the respondent and noticed several indicators of intoxication, including a green tint on his tongue and blisters consistent with the use of marijuana. At the officer's request, the respondent performed several roadside field sobriety tests, which he failed. The officer arrested the respondent for driving a vehicle while under the influence of drugs. Chemical testing revealed that the respondent's urine contained the metabolite of marijuana. The respondent pled guilty to driving while ability impaired. He was sentenced to probation for three to twelve months. As conditions of probation, the respondent was ordered to complete community service, to pay a fine and various other court costs, to attend a Level I

drug and alcohol education program, and to submit to random urinalysis testing at his probation officer's request. Some of the conditions of the diversion agreement are as follows: Evaluation completed by the Office of Attorney Regulation Counsel treatment coordinator; comply with terms and conditions of court sentence; evaluation by a mental health professional for co-dependency within forty-five days of agreement; verify participation in treatment support program with monthly reports; attend peer support meetings on a weekly basis; and random urinalysis one time a month for one year with releases from lab. The rules implicated are Colo. RPC 8.4(b) and C.R.C.P. 251.5(b).

Colorado Supreme Court Attorney Regulation Counsel, Matters Resulting in Diversion, 30 Colo. Law 187 (Oct. 2001)

APPENDIX 3

APPENDIX 3

Regulation Office Won't 'Govern Personal Lives'

Regulation Counsel John Gleason says his office will "respect the will" of voters

By James Carlson

LAW WEEK COLORADO

DENVER — The Office of Attorney Regulation Counsel last week said it would not bring disciplinary cases against attorneys who choose to use marijuana in their personal time under the recently passed Amendment 64.

That's the position indicated by a statement given to Law Week last week by John Gleason, director of the office.

"We will respect the will of the Colorado electorate," he said. "Colorado voters did not distinguish between any group of people when they passed Amendment 64. Our duty is to determine whether a lawyer is fit to practice law and not to govern their personal lives. Lawyers have to make their own decisions on this issue."

In last month's elections, Colorado residents voted to legalize the sale and possession of small amounts of marijuana. Since then, media stories have been teasing out the legal ramifications of the new amendment. Experts have spoken about how employers will handle their drug-testing policies, how the state and federal government could square off, and how cities opposed to retail marijuana shops will respond. Lawyers are at the heart of all those issues.

But what about the impact on lawyers, themselves. Gleason's statement last week represents the first official word on how such cases would be handled by the body governing attorney ethics.

Left unclear however is how firms will deal with their internal drug policies and whether attorneys will be allowed to advise clients about opening retail marijuana shops still considered illegal under federal law.

"There are definitely some tough issues here," said Alec Rothrock, a shareholder at Burns Figa & Will who delivered a talk last week about ethics and marijuana.

Mixed messages

The position may not be surprising given that its reasoning mirrors that expressed by many politicians in the state, most of whom opposed the measure.

The state's Democratic congressional representatives have already drafted legislation to exempt the state from the Controlled Substances Act. They were joined by a critic of the amendment, GOP Rep. Mike Coffman, who said he respects the voters' choice. Gov. John Hickenlooper, also an opponent of the measure, nonetheless said he would help implement the new policy per voters' demands.

The regulation office runs on a complaint-driven system. It said, for instance, even if the neighbor of a lawyer were to complain to the office about that lawyer using marijuana, the office's priority remains the fitness of a lawyer to practice.

Of course, as Gov. John Hickenlooper pointed out in his now famous "Don't break out the Cheetos" statement, the federal government still considers marijuana use illegal. And the regulation office did say if a lawyer is convicted of a crime in federal or state court, the office will initiate disciplinary proceedings.

How that proceeding would end up is another matter.

In July, the Colorado Bar Association's Ethics Committee issued a formal opinion about the use of medical marijuana by attorneys. It concluded that medical-marijuana use in compliance with the Colorado law might be committing a federal crime, but Rothrock, who sits on the ethics committee, said committing a crime doesn't necessarily violate the rules of professional conduct.

Rule 8.4(b) says that the criminal act has to "reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Essentially, if attorneys' off-duty use doesn't lead to them filing motions late or failing to keep in communication with a client, they're OK.

"I don't think it's a leap to say that the same principles would apply to recreational use of marijuana," Rothrock said.

Uncertain territory

Just because the regulation office isn't going to sanction an attorney for off-duty use of marijuana doesn't necessarily mean firms won't.

Employment law attorneys in the area are telling their business clients that their drug-testing policies are probably legal as long as any company "no-drug policy" is based off federal law. Even if firms can govern marijuana use on an employee's personal time, will they? Most of the nearly 20 firms contacted for this story either didn't respond or declined to comment officially. Many, however, said they haven't yet discussed the impact of the amendment on their employees.

It's a discussion that needs to happen, said Jim Johnson, managing partner at Otten Johnson Robinson Neff + Ragonetti. He said there have been talks at his firm around the proverbial water cooler but nothing formal.

"But I suspect we won't regulate personal time," he said. "Of course, if you're engaging in that off-duty, and it's becoming a problem at work, then we'll be concerned."

Not (yet) a focus for regulation

Rothrock is getting a lot of calls from lawyers about another unsettled question. How do they grapple with advising clients in the marijuana industry?

He said there's a distinction between the law and enforcement. He believes drafting a contract is pretty clearly against federal law. But he hasn't seen any case before attorney regulation solely because an attorney counseled a client about the medical-marijuana laws.

"My sense is that attorney regulation counsel isn't hot and bothered about prosecuting attorneys who are helping clients in the medical marijuana industry," he said.

He speculates the counsel would treat attorneys advising clients under Amendment 64 the same.

The bar association's ethics committee is considering whether to issue a formal opinion on the ethics of an attorney counseling clients in the medical marijuana field, said Daniel Taubman, a judge on the Colorado

Court of Appeals and chair of the ethics committee. He wasn't sure whether the committee would extend its inquiry to recreational marijuana, as well.

— James Carlson, JCarlson@CircuitMedia.com

APPENDIX 4

APPENDIX 4

Attorneys Assisting in Criminal or Unlawful Conduct

Case and Summary

***People v. Lee*, No. 12PDJ084, 2013 WL 6152178 (Colo. O.P.D.J. Oct. 31, 2013)**

The attorney arranged for her client (a defendant in a juvenile theft case) to sit in the back of the courtroom, while a friend of the client sat at the counsel's table. The attorney assisted and counseled her client to misrepresent the defendant's identity.

***People v. Nimtz*, No. 13PDJ056, 2013 WL 4506458 (Colo. O.P.D.J. July 22, 2013)**

The client had been prohibited from obtaining a license to operate a medical marijuana dispensary due to a pending tax lien. Knowing his client could not obtain the license, the attorney applied for the license in his own name, even though the dispensary was owned by his client.

***People v. Rokahr*, No. 04PDJ036, 2004 WL 1616587 (Colo. O.P.D.J. June 16, 2004)**

The attorney colluded with her clients to backdate an easement and filed the false easement in the land records.

***People v. Salazar*, No. 03PDJ003, 2003 WL 22383093 (Colo. O.P.D.J. Oct. 9, 2003)**

The attorney assisted a client in violating a court order in a child custody case.

***People v. Gifford*, 76 P.3d 519 (Colo. O.P.D.J. 2003)**

In a dissolution of marriage proceeding, the attorney counseled her client to offer real estate in exchange for a recantation of testimony by the client's wife and another witness. In doing so, the attorney advised her client to engage in conduct that was illegal – bribing a witness.

***In re Cardwell*, 50 P.3d 897 (Colo. 2002)**

The attorney represented a client in two unrelated DUI cases. In negotiating a plea bargain for the first DUI, the attorney did not inform the DA of his client's other pending DUI. The attorney and the client then signed a plea agreement containing the condition that "the client has no prior or pending alcohol related driving offenses in this or any state." Furthermore, both the attorney and his client stated in court that the client had not had another alcohol driving offense. The attorney knew these were false representations to the court.

***People v. DeRose*, 35 P.3d 708 (Colo. O.P.D.J. 2001) *aff'd sub nom. In re DeRose*, 55 P.3d 126 (Colo. 2002)**

The attorney engaged in 11 financial transactions which involved the purchase of money orders which the attorney knew the funds to be the proceeds from an unlawful activity. The attorney, on behalf of his client, conceal these transactions from others to evade currency reporting requirements. The attorney aided and abetted his client's illegal activities.

***People v. Aron*, 962 P.2d 261 (Colo. 1998)**

In a custody matter, a mother had custody of her children for the summer months while the father had custody during the school year. The mother lived in Arizona and was seeking full custody of the children. The mother's attorney advised that keeping the children in Arizona for a period of six months could give Arizona jurisdiction over the matter, and it was possible that an Arizona court order could change custody. The attorney failed to advise his client that keeping the children in Arizona for 6 months violated the Colorado custody order, which had criminal consequences.

***People v. Casey*, 948 P.2d 1014 (Colo. 1997)**

A teenager was caught trespassing on a third party residence. The teenager gave the police a driver's license that belonged to a friend, and she was charged with trespassing under her friend's name. The attorney who represented the teenager falsely stated that he represented the teenager's friend and not his actual client. The attorney violated 1.2(d) by assisting his client in a criminal impersonation.

***People v. Theodore*, 926 P.2d 1237 (Colo. 1996)**

In a dissolution of marriage matter, the attorney represented the husband who had a permanent restraining order against him. In violation of this order, at the client's request, the attorney drove the husband to the wife's residence to inspect the home. The husband yelled at the wife who was outside at the time they drove by.

***People v. Chappell*, 927 P.2d 829 (Colo. 1996)**

In a dissolution of marriage matter, the attorney represented the mother who had temporary custody of her son. A custody evaluation was done by an appointee who was going to advise that the father have sole custody. The attorney counseled the mother to leave the state with the child and assisted her by liquidating her assets and contacting a friend to help with the move. After the mother moved, the attorney asserted attorney-client privilege, and refused to tell the court where her client was. The attorney assisted her client in violating the custody order.

***People v. Bullock*, 882 P.2d 1390 (Colo. 1994)**

A criminal defense attorney aided his client's escape from prison by supplying him with money. The attorney knew his client was an escapee and fugitive at the time he assisted him in the escape.

***People v. Calt*, 817 P.2d 969 (Colo. 1991)**

The attorney's client worked for an employer that was offering reimbursements to employees due to a relocation plan. The attorney advised his client to offer to sale his current residence to his employer. The employer refused the offer, but the attorney prepared a fraudulent statement of settlement representing that the sale occurred, and his client subsequently received the reimbursement fees from his employer.

***People v. Hebenstreit*, 764 P.2d 51 (Colo. 1988)**

The attorney represented a client who was under police investigation because of criminal activities. The attorney counseled and advised his client to continue committing the criminal enterprise, and assisted the client in avoiding criminal prosecution.

***People v. Morley*, 725 P.2d 510 (Colo. 1986)**

The attorney counseled and advised undercover FBI agents who told the attorney they were trying to establish a prostitution service. The attorney helped initiate contacts and gave advice for setting up the service.

February 25, 2014

Mr. Christopher Ryan
Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO. 80203

Re: Colorado Rules of Professional Conduct/Revised Rules 8.6 and 8.4

Dear Mr. Ryan:

On behalf of the Marijuana Industry Group (MIG), a Colorado trade association representing more than 50 individual marijuana businesses in the State, thank you for the opportunity to comment on the proposed changes to the Colorado Rules of Professional Conduct Rule. In particular, we are commenting on proposed new Comment (2A) and proposed new rule 8.6.

First, MIG applauds the Colorado Bar Association and the Supreme Court for recognizing and addressing the conundrum that Colorado attorneys are experiencing while providing professional counsel to clients who are either engaged in or interacting with businesses that are engaged in marijuana.

Passage of Amendment 64 has sanctioned the cultivation, distribution, sale and use of marijuana for recreational purposes. In so doing it has legitimized these as lawful business enterprises under Colorado law and set in motion an expansive regulatory construct to license, regulate and tax these businesses. Attorneys who are routinely engaged for counsel on business and regulatory matters – including real property, taxation – have either declined to provide such counsel, or been engaged these clients at their professional peril. Similarly, marijuana businesses are deprived of the benefit of legal counsel despite being lawful enterprises in Colorado.

Second, we have reviewed and are generally supportive of both the proposed new comment (2A) and the proposed new rule 8.6. That said, we strongly suggest the Court also give consideration to adding language which directly addresses the situation where a Colorado licensed attorney is an owner, co-owner or partner in a lawful marijuana business. In other words, while the proposed changes address attorney counseling of marijuana clients and an attorney's medical and personal use of marijuana, we believe a gap remains which has the potential to create unnecessary professional exposure for some licensed attorneys in the State.

Thank you for this opportunity to comment on the proposed changes. We offer our expertise as a resource to you and the Court if this is helpful.

Sincerely,

Marijuana Industry Group

By: */s/ Michael Elliott*
Director, Marijuana Industry Group

WIDNER MICHOW & COX
ATTORNEYS AT LAW

February 25, 2014

SENT VIA EMAIL to: Christopher.ryan@judicial.state.co.us

Mr. Christopher Ryan
Clerk of the Supreme Court
2 E. 14th Avenue, 4th Floor
Denver, Colorado 80203

Re: Proposed New Rule 8.6 of the Colorado Rules of Professional Conduct

Dear Mr. Ryan:

I write on behalf of the Municipal Attorney's Section of the Colorado Municipal League and the Metropolitan Municipal Attorney's Association. The Municipal Attorney's Section of the Colorado Municipal League is the formal organization of essentially all Municipal and Town attorneys (collectively "Municipal Attorneys") in Colorado. The Metropolitan Municipal Attorney's Association is a professional organization of Municipal Attorneys who practice in communities located primarily along the Front Range.

We are aware of the proposed new Rule 8.6 to the Colorado Rules of Professional Conduct (CRPC), and urge the approval and adoption of the new rule as recommended by the Court's Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee.

Municipal Attorneys face daily questions regarding the implementation of Article XVIII, Section 14, Medical Use of Marijuana and Article XVIII, Section 16, Personal Use of Marijuana.

Municipal Attorneys often find themselves between the proverbial rock and a hard place in advising municipal officials and employees regarding these matters.

For example, municipal building and zoning officials are often called upon to review and approve building and development plans involving marijuana facilities such as grow facilities, medical marijuana centers, product manufacturing facilities and retail marijuana stores. Municipal Attorneys face the conundrum of advising governmental officials regarding land use applications which may be in accordance with both state law and the local regulations implementing the state constitutional provisions regarding medical and personal use of marijuana, but which applications seek approval of proposed land uses involving an activity that violates federal law.

Similarly, in those jurisdictions which have not completely banned medical and retail marijuana-related activities, Municipal Attorneys are routinely called upon to assist their clients with developing and implementing comprehensive regulatory schemes related to medical and retail-

marijuana facilities and the associated land uses including medical marijuana centers, grow operations, and other marijuana establishments authorized under the state constitution.

The above examples are only a few that place Municipal Attorneys in the impossible ethical position of having to refuse advice to their clients as to how to comply with state law since most of the activities are prohibited and punishable under federal law.

In Formal Opinion 125, "The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities" (2013), the Colorado Bar Association Ethics Committee provided written guidance regarding whether, and to what extent, a Colorado lawyer may counsel clients regarding the use of, and commerce in, marijuana consistent with CRPC 1.2(d). Relying on Section 885(d) of the Controlled Substances Act, 21 U.S.C. §§ 801-904 and case law interpreting Section 885(d) of the CSA, the Committee concluded that " . . . government lawyers advising [governmental] officials do not violate CRPC 1.2(d) when they work to help their clients enforce, interpret, or apply marijuana laws."

The proposed new Rule 8.6 goes a step further, and to good end. The safe harbor provision contained within the proposed Rule 8.6 will allow Municipal Attorneys to clearly provide guidance and counsel to their respective local governmental clients without the question of whether such conduct violates CRPC 1.2(d), and without having to rely exclusively on the guidance set forth in Formal Opinion 125 cited above.

Should Municipal Attorneys decline to advise Colorado elected and appointed officials and the municipal staffs and consultants that implement the local regulatory schemes due to the current risk of violating CRCP 1.2(d), municipal officials will be deprived of the benefit of legal counsel on important municipal issues regarding the medical use and personal use of marijuana, which activities are expressly authorized under the state constitution and have been mandated by the will of the Colorado electorate.

The Municipal Attorneys believe that the public interest is best served by clarifying that Municipal Attorneys may advise and counsel their municipal clients regarding the medical and personal use of marijuana within the boundaries of their respective clients, including but not limited to the development and implementation of local regulations governing such activities, without fear of violating the Colorado Rules of Professional Conduct.

The Municipal Attorneys respectfully ask the Court to favorably consider the proposed Rule 8.6.

Sincerely,

Marcus McAskin

cc: Sam Mamet, CML Executive Director
Geoff Wilson, CML General Counsel
Rachel Allen, CML Staff Attorney

David Liberman
Law Office of David Liberman, L.L.C.
Mancos Town Attorney

Kendra L. Carberry
Hayes, Phillips, Hoffmann & Carberry, P.C.
Platteville, Superior, Winter Park, Vail and Mountain View Town Attorney

Corey Y. Hoffmann
Hayes, Phillips, Hoffmann & Carberry, P.C.
Northglenn and Black Hawk City Attorney
Elizabeth, Kiowa, Foxfield, Hudson, Gilcrest and Deer Trail Town Attorney

David D. Smith
Garfield & Hecht, P.C.
Delta Municipal Attorney for and DeBeque Town Attorney

Bryan R. True
Eagle County Attorney

Christopher K. Daly
Arvada Municipal Attorney

Dirk W. Nelson
Bayfield and Ignacio Town Attorney

Wynetta Massey
Colorado Springs Interim City Attorney

Dan Slater
Williamsburg, Coal Creek and Rockvale Town Attorney

David H. McConaughy
Garfield & Hecht, P.C.
New Castle Town Attorney

Thad W. Renaud
Murray Dahl Kuechenmeister & Renaud LLP
Edgewater City Attorney and Frisco Town Attorney

Edward P. Sands
Sands Law Office, LLC
Fruita, Palisade, Dinosaur, Parachute and Eagle Town Attorney
De Beque Municipal Prosecutor

Timothy H. Berry
Timothy H. Berry, P.C.
Breckenridge Town Attorney

Laura C. Makar
Pitkin County Assistant Attorney

John Merrill
Routt County Attorney

Jan Shute
Glenwood Springs City Attorney

Eric Butler
Jefferson County Attorney

MiletichCohen PC
Attorneys at Law

February 25, 2014

Colorado Supreme Court Justices
c/o Christopher Ryan
Clerk of the Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed New Rule 8.6

Dear Justices of the Colorado Supreme Court:

I write in support of proposed new Rule 8.6. My primary reason for support of the proposed rule is that it allows access to justice for those persons and companies who are associated or affiliated with the marijuana industry to competent ethical lawyers. Many lawyers currently are concerned about the ethical ramifications of providing legal services to such clients. Clients seek the advice of a lawyer in order to ensure compliance with state law and understand the risks under federal law. However, the current rule presents a challenge for clients to hire lawyers and for lawyers to have a clear understanding of their ethical obligations in representing the client.

In addition to representing lawyers on grievance matters and professional liability litigation, I have been retained by lawyers and law firms to provide ethics advice, including advice about the risks of representing marijuana businesses or representing persons who are involved in transactions with marijuana businesses. It is my experience that Colorado lawyers are concerned about violating the Colorado Rules of Professional Conduct if they are asked to provide advice and prepare transactional documents to clients who have marijuana-related matters. This is not an issue of providing advice about past acts. Colo. RPC 1.2(d) permits lawyers to provide this type of advice. Rather, it is for clients (cities, the State of Colorado, marijuana business, other types of businesses) who are actively involved, directly or tangentially, in the marijuana industry. The laws and regulations concerning marijuana businesses and transactions are difficult to navigate. These clients are in need of legal services. Lawyers should not be fearful of being disciplined because they provide such services.

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Although the voters of Colorado approved Amendment 20 amending the Colorado Constitution for the use of medical marijuana in November 2000, the impact was not felt until late 2009 and early 2010 when the state regulations became effective.

As you are aware, Colo. RPC 1.2(d) prohibits a lawyer from counseling or assisting clients on matters that the lawyer knows to be criminal or fraudulent. Lawyers are legitimately concerned that providing advice and preparing documents for clients in this industry is a violation of this rule. I understand from the Office of Attorney Regulation Counsel ("OARC") that there have been no prosecutions to date under Colo. RPC 1.2(d) as it relates to providing advice or drafting documents. However, with Amendment 64 just becoming effective, I believe there will be more complaints filed against lawyers

My understanding of the purpose of proposed Rule 8.6 is to protect a lawyer from being disciplined if the lawyer complies with the proposed Rule in providing legal services to clients involved in the marijuana industry. The proposed rule provides guidance to lawyers about their ethical obligations in representing these clients and provides lawyers with peace of mind that they are not violating their professional ethical obligation by such representation. The federal government can certainly take action against a lawyer for violation of a federal law. It is my understanding that the proposed rule does not prohibit or prevent the federal government from doing so.

If it is OARC's policy that it will not prosecute lawyers who provide advice or draft documents for clients with a marijuana industry matter, why not adopt Rule 8.6 that addresses the limitations of aiding and assisting clients in need of legal services in this area? Will the OARC policy be in writing and published in order for lawyers fully to understand its impact? Will the policy be the policy of the Court? Does failure to enforce Rule 1.2(d) negate the rule? I respectfully submit that a policy, rather than proposed Rule 8.6, raises more questions and provides less guidance especially since policies can change.

For all of these reasons, I am in support of this new proposed rule. Thank you for considering this letter.

Respectfully submitted,

Nancy L. Cohen

VICENTE SEDERBERG LLC

BRIAN VICENTE, ESQ.
CHRISTIAN E. SEDERBERG, ESQ.
JOSHUA KAPPEL, ESQ.
PHILIP A. CHERNER, ESQ.
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February 25, 2014

Colorado Supreme Court
2 E. 14th Street
Denver, CO 80203

On behalf of the burgeoning recreational and medical marijuana industry and the lawyers who assist them, we urge the court to adopt proposed new RPC 8.6 and proposed comment [2A] to Rule 8.4

The conundrum is aptly set out in the recent CBA Opinion 125. Colorado lawyers are presently stuck between a rock and a hard place. It is historically the role of lawyers to advise clients so they may follow the law; society benefits as a result. Presently lawyers who explain Colorado law regarding marijuana use and business-related concerns to clients risk facing a grievance for urging conduct which is illegal under Federal law. Alternatively, if the lawyer withholds advice clients are left without guidance. Neither result is beneficial; both are harmful. Thus the rule change is needed to promote public welfare and shield lawyers from accusations of unethical conduct.

We acknowledge that Regulation Counsel takes an enlightened view of the problem and is not presently, nor to our knowledge have they previously, prosecuted lawyers for conduct which the rule changes would shield. Nevertheless the rule should be changed to conform to the current practice and remove uncertainty. We are also aware that under 21 U.S.C.§ 885(d)("no civil or criminal liability shall be imposed by virtue of this subchapter upon . . . any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.") government lawyers engaged in marijuana enforcement efforts appear to have immunity. A rule change would bring the rest of us one step closer to equality.

Under the current rules counsel can represent industry members after they commit crimes (by defending them in criminal court), but are restricted from counseling them beforehand. This is, to say the least, anomalous. It is also contrary to the spirit of

RPC Preamble [6], which emphasizes improvement of the law, access to the legal system, and confidence in the rule of law.

The Colorado marijuana industry could reach $1billion in annual sales and contribute $135 million in tax revenues to the state, per state estimates. An industry this large must have the advice of counsel.

In the words of Opinion 125, “Colorado is one of a handful of states conducting an experiment in democracy: the gradual decriminalizing of marijuana. The Committee notes that, as a consequence of Colo. RPC 1.2(d) as written, Colorado risks conducting this experiment either without the help of its lawyers or by putting its lawyers in jeopardy of violating its rules of professional conduct.”

For these reasons we recommend adoption of the new RPC 8.6 and proposed comment [2A] to Rule 8.4

Respectfully submitted,

Philip a Cherner
Vicente Sederberg, LLC

Daniel J. Garfield, Evan Husney and Brian Proffitt
Foster Graham Milstein & Calisher, LLP

Colorado Criminal Defense Bar

Liberty, Justice, Equality

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Denver, Colorado 80204
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February 24, 2014

Christopher Ryan
Clerk of the Supreme Court
2 E. 14th Avenue
Denver, Colorado, 80203

Dear Mr. Ryan:

The Colorado Criminal Defense Bar urges the court to adopt proposed new RPC 8.6 and proposed comment [2A] to Rule 8.4

The conundrum is aptly set out in the recent CBA Opinion 125. As we all know, Colorado lawyers are presently stuck between a rock and a hard place. It is historically the role of lawyers to advise clients so they will follow the law; society benefits as a result. If lawyers advise clients to follow Colorado law regarding marijuana use and business-related concerns, and even if they follow the Colorado constitutional requirements for medical marijuana, they risk facing a grievance for participating in Federally-illegal conduct under rule 1.2. If they withhold advice clients are left without guidance. Thus the rule change is needed to promote public welfare and shield lawyers from accusations of unethical conduct.

We acknowledge that Regulation Counsel takes an enlightened view of the problem and is not presently, nor to our knowledge have they previously, prosecuted lawyers for conduct which the rule changes would shield. Nevertheless as criminal defense lawyers we are aware of the fallibility of relying on prosecutorial discretion to shield the accused. The better practice is to change the rules so that they protect with no uncertainty.

We are also aware that under 21 U.S.C.§ 885(d)("no civil or criminal liability shall be imposed by virtue of this subchapter upon . . . any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.") government lawyers engaged in marijuana enforcement efforts appear to have immunity. A rule change would bring the rest of us one step closer to equality.

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experiment either without the help of its lawyers or by putting its lawyers in jeopardy of violating its rules of professional conduct."

For these reasons we recommend adoption of the new RPC 8.6 and proposed comment [2A] to Rule 8.4

Respectfully submitted,

Sean McDermott
President

TITUS D. PETERSON **ATTORNEY AT LAW**

600 17th Street, Suite 2800 South, Denver, CO 80202 / 303-260-6412 office
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November 12, 2013

January 29, 2014

Honorable Nancy Rice
Chief Justice of the Colorado Supreme Court
Colorado Supreme Court
2 East 14th Ave.
Denver, CO 802003

Re: Amending the Ethical Rules so the Marijuana Industry can receive Legal Counseling

Dear Chief Justice Rice,

I am writing to you as a lawyer and member of the Colorado Bar. I have been practicing law for almost 24 years now. For five of those years I was a Deputy D.A. in the 5th Judicial District and the managing Deputy of the Clear Creek County Office. During that time I convicted hundreds of people whose only crime was consuming an "illegal substance". Currently, I am a member of Law Enforcement Against Prohibition which is a 50,000 member organization dedicated to ending the drug war. We are former law enforcement officers who believe that the Drug War has: corrupted our system of government, threatens our judicial system, has created a world of drug cartels and gang violence (just as the prohibition of alcohol once did), fueled violence and killings by generating "black market" money that should be taxed and brought out of the shadows and, most sadely, locked away millions of people for victimless crimes that has torn at the fabric of the American dream and caused an explosion in the growth of the "Law Enforcement" industrial complex.

A leading economist from Harvard (last name Miron) has estimated that if we legalized all drugs and taxed them we could send all Americans every year to college for free (by the time you include the savings to law enforcement) every year. The drug war has been a monumental failure. It is a perverted jobs program -- pushed on us by the private prison industry and the rural constituencies desperate for jobs where their prisons are located (who all have financial motives for ever increasing what is defined as a crime...the next target is supposedly HIV positive people). It is estimated that by 2050 one in three adults in this country will be in prison, on probation or on parol – all in the "Land of the Free"; we have more people in prison pere capita than any other nation on earth including N. Korea, China and Iran. These are real statitics and studies that I will be happy to provide you if you can't find them yourselves on the web.

Like homosexuality, which also used to be illegal, the consumption of drugs is a victimless crime. The courts should be stepping in to make clear that the "majority" can't just make a minority "illegal" and then lock them away for profit. Thus far the courts have not been so brave our so dedicated to the Constitution of the US Constitution. The victims, if any, are the

same people who commit the crimes. Recently, the DEA has been linked with ties to the notorious drug cartels in Mexico.

I mention all these facts because the people of Colorado have finally had enough. We passed Amendment 64 which brings us one step closer to regaining our sanity as a nation. But those with perverted financial interests in the drug war will not listen to the people. Although there are strong majorities throughout the US to legalize MJ those who want to implement a new system of slavery – interestingly the Drug War started as Federal legislation immediately after the courts struck down the end of Jim Crow – are surrepticiously trying to undue what the electorate says its wants.

For example, On October 22, 2013, a Subcommittee of the Colorado Supreme Court: Standing Committee on Rules of Professional Conduct concluded that "the plain language of Colo. RCP 1.2(d) prohibits lawyers from assisting clients in structuring and implementing transactions which by themselves violate federal law." This interpretation means a lawyer could never draft a lease for a grow facility or counsel a client on how to structure a sale or purchase agreement to sell a business. If immediately applied all of the lawyers directly involved in the marijuana industry, this interpretation would deprive an entire industry of legal representation and result in the disbarment of hundreds of lawyers. This is outrageous. I don't do this sort of work. So, I have no financial interests here. Nevertheless, it is clear that the opponants of sanity, the opponants of human rights, are trying to make it impossible for a legal activity to be implemented because they know it is the end of their new form of slavery.

I am asking you all, with the greatest respect, and in the name of freedom and democracy to change the ethics rule so an entire industry is not deprived of legal guidance.

Thankfully, the Subcommittee recommended that the Colorado Supreme Court change the rules so that Colorado licensed attorneys are not considered unethical if they counsel clients on matters allowed under state law. Similarly, the Ethics Committee for the Colorado Bar Association also supports this change. I agree with these actions. If the rule is not changed, the marijuana industry could be effectively relegated to a system of legal apartheid where they are not entitled to equal treatment with other industries that deal in much more dangerous substances, such as the alcohol and tobacco industries.

The marijuana industry was already a $300 million dollar per year industry prior to the passage of Amendment 64. This year the state economist believes it will grow to over $400 million in sales and many believe we will quickly see sales in the volume of $1 billion per year. A billion dollar industry deserves and demands legal counseling from experienced lawyers who do not fear disbarment for merely counseling clients to engage in a business that is legal under state law. Without an attorney to advise clients on how to stay compliant with Colorado law, our citizens face serious legal repercussions and avoidable consequences. As licensed Colorado lawyers, I have taken an oath to protect the Constitution of the state of Colorado, which includes provisions for medical and retail marijuana.

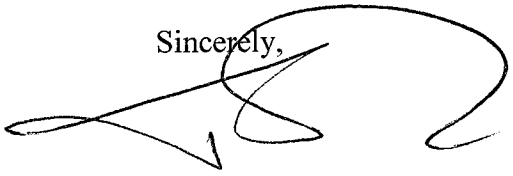
I believe the State Bar of Arizona Ethics Opinion, adopted the appropriate approach, stating:

> 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. Lawyers may do so only if: (1) at the time

> the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

The marijuana industry is in serious need of legal representation. I would ask you personally to begin to look at the entire structure of the drug war and begin to defend liberty as you have sworn you would. In the mean time, I urge you to change the rule to allow lawyers to advise Colorado citizens how to comply with Amendment 64 and Amendment 20 and the plethora of regulations that have followed. Thank you for your attention to this important matter.

Sincerely,



Cc:

Marcy Glenn, Chair
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
2 East 14th Ave.
Denver, CO 802003

Justice Nathan B. Coats, Liason
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
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Justice Monica Marquez, Liason
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Mr. John W Hickenlooper
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February 25, 2014

VIA EMAIL: CHRISTOPHER.RYAN@JUDICIAL.STATE.CO.US

Christopher Ryan
Clerk of the Colorado Supreme Court
2 E. 14th Avenue
Denver, Colorado 80203

Re: Comments re Proposed Colorado Rule of Professional Conduct 8.6

Dear Mr. Ryan:

I am submitting this letter in support of the proposed new Colorado Rule of Professional Conduct ("RPC") 8.6. I am an attorney in the Denver office of the law firm of Perkins Coie LLP. My practice focuses on business litigation, compliance, and white collar defense and investigations. As part of my practice, I regularly represent banks and other financial institutions.

In light of the developments in state and federal law related to the legalization of marijuana in the State of Colorado and elsewhere, the adoption of proposed RPC 8.6 is necessary. Specifically, the adoption is necessary to permit lawyers to provide much needed legal advice to the myriad of clients that are affected by the constantly evolving and complex state and federal marijuana regulations and laws.

The developments in marijuana law not only affect frontline sellers and purchasers, but any business or other third party that directly or indirectly conducts business with the marijuana industry. Perhaps no other industry — beyond the marijuana industry itself — is more affected than the financial industry. Indeed, the financial industry faces numerous compliance and regulatory challenges caused by the evolution of the marijuana industry that beg for legal advice. Under the current RPC, however, lawyers risk running afoul of their ethical obligations if they provide that much needed advice.

Banks, for instance, have various interests in real estate, including interests that may directly or indirectly concern a marijuana-related business. Specifically, a bank may have an interest in

certain commercial real estate that a marijuana-related business occupies as a tenant. In that situation, numerous legal questions arise for the bank including whether and how it can take a security interest in the rental income generated from the marijuana-related tenant, whether it can permit the landlord and borrower to continue leasing space in the building in which the bank holds a security interest, and whether the bank can extend a loan in the first instance to the borrower if it knows a marijuana-related entity is one of the tenants of the building. While the bank can seek legal advice related to these issues, a lawyer likely cannot provide any guidance that would encourage the bank to permit the landlord to continue its relationship with the marijuana-related business, take a security interest in any proceeds related to marijuana-related activity (even if the activity is permitted by state law), or accept loan payments that may include proceeds from the sale of marijuana. To do so, would put the lawyer at risk of running afoul of the current RPC.[1]

The legal questions for banks do not stop there. Banks, further, face the increasing challenges of navigating the evolving regulatory rules concerning banking proceeds of the marijuana industry. The federal Bank Secrecy Act, for instance, requires banks to monitor money passing through their institutions for potential money laundering activity.[2] Banks, further, are required to file Suspicious Activity Reports ("SAR"s) related to transactions they suspect involve potential money laundering activities.[3] Because the cultivation, possession, and distribution of marijuana remains illegal under federal law, banks have been cautious to accept and bank marijuana proceeds (even if those proceeds flowed from marijuana-related businesses that were in compliance with state law). To do so, would put banks at risk of running afoul of their anti-money laundering obligations.

On February 14, 2014, the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") and the Department of Justice ("DOJ") issued separate guidance to the financial industry related to providing banking services to the marijuana industry.[4] The catalyst for the guidance was the much publicized public safety concerns that the "cash only" nature of marijuana businesses create. FinCEN's stated goals in issuing its guidance was to clarify "expectations for financial institutions seeking to provide services to marijuana-related

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[1] *See* RPC 1.2(d).

[2] 31 U.S.C. § 5311, *et seq.*

[3] *Id.*

[4] FinCEN Guidance, "BSA Expectations Regarding Marijuana-Related Businesses," February 14, 2014, available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf; James M. Cole, "Guidance Regarding Marijuana Related Financial Crimes," U.S. Department of Justice, February 14, 2014, available at http://www.justice.gov/usao/co/news/2014/feb/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014.pdf.

businesses" and to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses."[5]

To encourage the financial industry to provide banking services to marijuana-related businesses, the guidance sets forth comprehensive framework for financial institutions engaging in such transactions. The guidance, for instance, describes the parameters of due diligence programs, processes required for verifying that the marijuana businesses are in compliance with state law and federal marijuana enforcement priorities, and guidelines for filing marijuana-related SARs. While the financial industry faces significant compliance risks in engaging the marijuana-industry, the federal regulations have begun setting forth complex framework to permit that conduct. It is no longer the situation where Colorado marijuana laws and related activity find no support in federal law or regulations. Indeed, the FinCEN guidance was designed not only to encourage financial institutions to provide banking services to the marijuana industry, but also to provide the framework to facilitate that conduct. Lawyers, however, are currently prohibited by RPC 1.2(d) from assisting financial industry clients in developing internal compliance and due diligence programs, or providing other legal advice, that would help them comply with the new FinCEN and DOJ regulations. The RPC should reflect these regulatory changes to permit lawyers to advise financial industry clients on these complex and evolving regulations.

As recognized by Colorado Formal Ethics Opinion 125 related to lawyers providing advice concerning the marijuana industry, the evolution of the legalized marijuana industry is an "experiment in democracy."[6] This democratic experiment is being conducted under the umbrella of some of the most rigorous and constantly evolving federal and state regulations and laws. All without the guidance of lawyers who are professionally trained to interpret laws and guide clients through complex legal challenges. The new proposed RPC 8.6 would serve the limited purpose of granting the myriad of industries and people who are directly and indirectly affected by the marijuana industry access to lawyers.

Very truly yours,

Zane A. Gilmer, Esq.
Colorado Bar Number 41602

ZAG

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[5] Press release announcing FinCEN guidance, available at http://www.fincen.gov/news_room/nr/html/20140214.html.

[6] Formal Op. 125, p. 6.