

1                   **REPORT OF AMENDMENT 64 SUBCOMMITTEE**

2           The Amendment 64 Subcommittee<sup>1</sup> respectfully submits the  
3 following report.

4                                   Executive Summary

5           Possessing, cultivating, and selling marijuana remain illegal  
6 under federal law but are, under some circumstances, no longer  
7 criminal under state law because of two amendments to the  
8 Colorado Constitution. This discrepancy creates uncertainty  
9 whether lawyers could face disciplinary action based on either their  
10 personal conduct or their advice to clients under these  
11 amendments. A majority of the subcommittee<sup>2</sup> recommends that  
12 this uncertainty be removed by two changes to the Rules of  
13 Professional Conduct:

- 14           • A new comment to Rule 8.4 clarifying that a lawyer will not be  
15           deemed dishonest, untrustworthy, or unfit as a lawyer solely  
16           because the lawyer engages in personal conduct that may

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<sup>1</sup> F. Alvarez, M. Berger, G. Blum, R. Nemirow, A. Rothrock, M. Squarrell, J. Sudler, E. Wald, and J. Webb.

<sup>2</sup> In lieu of a minority report, The Office of Attorney Regulation Counsel (OARC) has chosen to prepare a memorandum opposing both proposed changes. A draft of that memorandum had been circulated before this report was released.

1 violate federal law, but is permitted under a specific provision  
2 of the state constitution.

- 3 • A new Rule 8.6 clarifying that notwithstanding any other Rule,  
4 a lawyer will not be subject to discipline for engaging in  
5 personal conduct, or for advising clients concerning activity,  
6 that may violate federal law, but which is permitted under a  
7 specific provision of the state constitution.

## 8 II. Background

9 The medical marijuana amendment (Attachment 1) and  
10 Amendment 64 (Attachment 2) afford lawyers the opportunity to  
11 engage in personal conduct that is permitted under state law.

12 However, because such conduct still violates federal criminal law,  
13 lawyers remain vulnerable to discipline under R.P.C. 8.4(b)<sup>3</sup> for  
14 such conduct. The background for this anomaly is discussed at

15 length in Colorado Bar Association Ethics Committee Formal

16 Opinion No. 124 -- A Lawyer's Medical Use of Marijuana.

17 (Attachment 3) For the same reason, a lawyer who counsels a client  
18 about selling, possessing, or cultivating marijuana, or engaging in

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<sup>3</sup> "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

1 related activity, such as leasing property to a marijuana dispensary,  
2 could be subject to discipline under R.P.C. 1.2(d).<sup>4</sup>

### 3 III. The Need for Clarification

4 Whether the federal government will take action in response to  
5 Amendment 64 remains uncertain.<sup>5</sup> Federal law enforcement  
6 action could effectively shut down the cultivation and distribution of  
7 marijuana contemplated by the amendments, although little such  
8 action has been taken concerning medical marijuana. Whether the  
9 federal government could use the Supremacy Clause, U.S. Const.  
10 art. VI, cl. 2, to invalidate one or both of the amendments to the  
11 Colorado Constitution is unclear. Hence, the subcommittee  
12 believes that the possibility of federal action does not preclude the  
13 need to clarify ethical limitations on lawyers' conduct in this area.

#### 14 A. Personal Conduct

15 How many lawyers have been, or without changes to the Rules  
16 will be, deterred from engaging in personal conduct permitted by

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<sup>4</sup> "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal . . . ."

<sup>5</sup> Federal criminal law could be amended to exempt from prosecution action that conforms to state law, as Representative DeGette has proposed (Attachment 4).

1 the amendments is unknowable. As for the potential chilling effect,  
2 the Ethics Committee recognized in Formal Opinion No. 124 that it  
3 “cannot speak to how the Colorado Supreme Court Office of  
4 Attorney Regulation Counsel . . . may regard the lawful use of  
5 medicinal marijuana by [lawyers] under either the Colorado Rules  
6 or other disciplinary rules.” Similarly, whether a hearing board  
7 would discipline a lawyer for violating R.P.C. 8.4(b) based on  
8 conduct permitted by either of the amendments is indeterminable.

9 Comment [2] to R.P.C. 8.4(b) explains that while “[m]any kinds  
10 of illegal conduct reflect adversely on fitness to practice law . . .  
11 some kinds of offenses carry no such implication.” This distinction  
12 was adopted in Formal Opinion No. 124, which cited *People v. Hook*,  
13 91 P.3d 1070, 1073-74 (Colo. OPDJ 2004) (lawyer’s committing the  
14 felony of illegal discharge of a firearm does not by itself determine  
15 professional discipline that should be imposed). Although the  
16 ethics opinion did not cite any authority involving personal use of  
17 marijuana by a lawyer in conformity with state law, (nor has the  
18 subcommittee found any such authority), it concluded:

19 [A] lawyer’s medical use of marijuana in  
20 compliance with Colorado law does not, in and  
21 of itself, violate Colo. RPC 8.4(b).1 Rather, to

1 violate Colo. RPC 8.4(b), there must be  
2 additional evidence that the lawyer's conduct  
3 adversely implicates the lawyer's honesty,  
4 trustworthiness, or fitness as a lawyer in other  
5 respects.

6  
7 OARC's memorandum, discussed further below, views this  
8 opinion "as well reasoned and persuasive." However, whether this  
9 rationale would have equal force concerning possession or  
10 cultivation of marijuana for personal use but without medical need,  
11 as now permitted by Amendment 64, could be questioned.

#### 12 B. The Lawyer as Advisor

13 The Ethics Committee is considering, but has not yet issued, a  
14 formal opinion concerning whether a lawyer who advises clients on  
15 activities involving or relating to personal use<sup>6</sup>, as well as  
16 cultivation and sale of marijuana for profit, would be subject to

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<sup>6</sup> For example, a client could seek advice concerning how the client's prospective use of marijuana would implicate other criminal laws, employment, and parenting time. *See, e.g., Coats v. Dish Network, L.L.C.*, 2013 COA 62 (lawful off-duty conduct statute); *People v. Watkins*, 2012 COA 15 (parole revocation); *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011) (unemployment compensation); *In re Marriage of Parr and Lyman*, 240 P.3d 509 (Colo. App. 2010) (parenting time).

1 discipline for having given such advice. At its most recent meeting,  
2 the Ethics Committee adopted the following resolution:

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

12  
13          Other indications that this subject is of interest to lawyers  
14 include:

- 15          • Law review commentary<sup>7</sup>
- 16          • Several related programs presented by CLE of Colorado over  
17          the last two years
- 18          • Two C.A.R. 4.2 petitions requesting the Court of Appeals to  
19          take interlocutory review of lower court orders addressing an  
20          illegality defense to contracts involving marijuana businesses.<sup>8</sup>

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<sup>7</sup> See *Marijuana Lawyers: Outlaws or Crusaders*, Sam Kamin and Eli Wald (Attachment 5); *Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health?*, A. Rothrock (Attachment 6).

<sup>8</sup> Both petitions were denied in unpublished orders.

1 • Divergent ethics opinions in other states.<sup>9</sup>

2 C. Uniformity

3 Because of the uniquely local nature of the marijuana  
4 amendments to our constitution, the majority does not perceive a  
5 uniformity concern in conforming the Rules to our constitution.

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<sup>9</sup> The bar association ethics committees of three other states -- Arizona, Connecticut, and Maine -- have addressed the uncertainty surrounding a lawyer's duties when considering the conflicting provisions of federal and state marijuana laws. Arizona's Ethics Committee refused to "apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in 'clear and unambiguous compliance' with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits." State Bar of Arizona Ethics Opinion 11-01 (February 2011). Maine's Professional Ethics Commission opined that so long as both the federal law and the language of the Rule 1.2(d) each remain the same, a lawyer must perform the analysis required by Rule 1.2(d) and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. Maine Opinion 199 (July 7, 2010). In Informal Opinion 2013-02, the Connecticut Bar Association Professional Ethics Committee identified the problem, and, quoting the Maine opinion, noted that "the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not . . .," but left it to individual lawyers to decide for themselves when it was permissible to advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act or whether doing so constitutes assisting clients in conduct that violates federal law.

1 D. Prosecutorial Discretion

2 The majority recognizes that the proposals will limit  
3 prosecutorial discretion, as noted in OARC's memorandum.  
4 However, it disagrees with many of the views expressed in that  
5 memorandum, for the following reasons.

6 First, as discussed in the next two sections of this report, the  
7 proposed changes would still permit discipline where a lawyer's  
8 personal use of marijuana implicated rules other than Rule 8.4.  
9 The same would be true if the lawyer's personal conduct or client  
10 advice implicated federal laws beyond those prohibiting the mere  
11 possession, sale, or cultivation of marijuana. For example, a lawyer  
12 could be subject to discipline for counseling a client on how to  
13 circumvent the federal money laundering statute, although the  
14 funds in question may have arisen from marijuana-related activity  
15 that is lawful under our state constitution.

16 Second, and with respect for the new (and old) management of  
17 the Colorado attorney regulation system, while all prosecutors  
18 necessarily have wide discretion in charging, this discretion is not  
19 without limits. A prosecutor has no discretion to decide that  
20 certain conduct is inimical to society and should be prosecuted, if



1 the legislature has not seen fit to criminalize the conduct.<sup>10</sup> Here,  
2 the voters have spoken by twice amending the Constitution, while  
3 recognizing that federal prohibitions would remain.<sup>11</sup> The initiative  
4 power under Art. V, section 1 of the Colorado Constitution vests  
5 “legislative power directly in the people.” *Vagneur v. City of Aspen*,  
6 295 P.3d 493, 504 (Colo. 2013) (emphasis in original). Thus, if  
7 adopted by the supreme court, in its quasi-legislative, rule-making  
8 capacity, the proposed comment and rule change would  
9 appropriately subordinate discretion to the will of the people.

10 Third, the majority believes that OARC misses the mark in  
11 stating, “The Attorney Regulation Committee, the Presiding

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<sup>10</sup> See *People v. Gallegos*, 644 P.2d 920, 930 (Colo. 1982) (“If the habitual criminal statute delegated to prosecutors the power to define criminal conduct then it might run afoul of separation of powers limitations . . . . Only the legislature may declare an act to be a crime.”).

<sup>11</sup> The Blue Book summary of Amendment 64 includes the following: “Even if Amendment 64 is adopted, the possession, manufacture, and sale of marijuana remain illegal under current federal law, so the adoption of the measure may expose Colorado consumers, businesses, and governments to federal criminal charges and other risks”; “The adoption of Amendment 64 will send a message to the federal government and other states that marijuana should be legal.” The summary of the medical marijuana amendment says, “Under federal criminal law, it will continue to be illegal to sell or use marijuana for any purpose.”

1 Disciplinary Judge, Hearing Boards and ultimately the supreme  
2 court are checks on OARC's discretion." When disciplinary  
3 proceedings are initiated, a lawyer will incur expense and lost time  
4 in defending the charge, and may suffer anxiety over the potentially  
5 catastrophic outcome. Even if the lawyer is ultimately vindicated,  
6 those impacts are not erased. Hence, the specter of disciplinary  
7 action will very likely have a chilling effect on lawyers, in both their  
8 personal conduct and the representation they accept, unless the  
9 proposed comment and rule change remove this cloud. Indeed, the  
10 majority believes that this chilling effect would *increase* if lawyers  
11 were to read the following sentences in the memorandum:

- 12 • "It may be that an attorney decides not to engage in certain  
13 conduct based on the fear of being investigated by OARC."
- 14 • "[U]ntil Congress changes drug laws, an attorney may still be  
15 subject to discipline for violating federal criminal laws and for  
16 counseling or assisting a client in doing so."

17 Fourth, the memorandum takes inconsistent positions by  
18 saying, "Personal use of marijuana in Colorado in compliance with  
19 state law is not an area of misconduct that OARC considers a  
20 violation of Colo. RPC 8.4(b) even if a violation of federal law," but

1 then also saying, “case-by-case review would include matters  
2 involving personal use of marijuana.” The memorandum offers no  
3 explanation as to why such state-law-compliant conduct would *ever*  
4 reflect adversely on a lawyer’s honesty, trustworthiness or fitness in  
5 other respects to practice law. This inconsistency illustrates the  
6 very broad discretion of OARC in determining what conduct to  
7 charge based on this undefined standard. Hence, rulemaking is an  
8 appropriate restriction on discretion, prior to proceedings before a  
9 hearing board.

10 In sum, the memorandum says that “OARC has already stated  
11 that the office will follow the will of the Colorado electorate on this  
12 issue.” However, the majority submits that the likely chilling effect,  
13 without a restriction on OARC’s discretion to prosecute in this area,  
14 deters lawyers from furthering “the will of the Colorado electorate”  
15 by providing citizens with advice on engaging in conduct that is now  
16 lawful under our constitution.

#### 17 IV. Personal Conduct of the Lawyer

18 A majority of the subcommittee recommends the following new  
19 comment to Rule 8.4:

1 [2A] Conduct of a lawyer that by virtue of a  
2 specific provision of the Colorado Constitution  
3 (and in implementing legislation or regulations)  
4 is either (a) permitted, or (b) within an  
5 affirmative defense to prosecution under state  
6 criminal law, does not reflect adversely on the  
7 lawyer's honesty, trustworthiness, or fitness in  
8 other respects, solely because that same  
9 conduct, standing alone, may violate federal  
10 criminal law. This comment specifically  
11 addresses two constitutional amendments:  
12 Article XVIII. Miscellaneous, § 14. *Medical use*  
13 *of marijuana for persons suffering from*  
14 *debilitating medical conditions*, and Article  
15 XVIII. Miscellaneous, § 16. *Personal use and*  
16 *regulation of marijuana*. The phrase "solely  
17 because" clarifies that a lawyer's use of  
18 marijuana, while itself permitted under state  
19 law, may cause a lawyer to violate other state  
20 laws, such as prohibitions upon driving while  
21 impaired, and other rules, such as the lawyer's  
22 duties of competence and diligence, which may  
23 subject the lawyer to discipline. See Rules 1.1  
24 and 1.3. The phrase "standing alone" is  
25 explained in Comment [2] to Rule 8.6.  
26

27 The majority believes that by endorsing the rationale of Formal  
28 Opinion No. 124, in which the OARC memorandum concurs, the  
29 comment would lessen the chilling effect on lawyers' personal  
30 conduct in this area out of concern over the exercise of  
31 prosecutorial discretion based on violation of federal law. However,  
32 because the majority recognizes that such conduct, coupled with  
33 other activity by the lawyer, could implicate federal law more

1 broadly, the phrase “standing alone” is intended to limit the safe  
2 harbor of this comment. This phrase is explained in a proposed  
3 comment to new Rule 8.6, discussed in the next section of this  
4 report.

5 The subcommittee considered the principle that comments  
6 should not contradict rules. Here, because engaging in illegal  
7 activity does not always adversely reflect on a lawyer’s “honesty,  
8 trustworthiness, or fitness in other respects,” the majority believes  
9 that this limitation can be addressed in a comment without  
10 contradicting the rule.

11 As to the phrase “specific provision of the Colorado  
12 Constitution,” the subcommittee considered, but ultimately  
13 rejected, a proposal broadening the scope of the comment, (as well  
14 as of proposed Rule 8.6, using similar language), by adding “or  
15 other state law.” The majority submits that constitutional  
16 provisions have more force and greater longevity than legislation.  
17 However, the majority also believes that the phrase “(and in  
18 implementing legislation or regulations)” is necessary to give full  
19 effect to the constitutional provisions.



1           The majority believes that this new rule, rather than modifying  
2 the language of Rule 1.2(d) or adding a definition of “assisting,”<sup>12</sup>  
3 better implements the objective of allowing a lawyer to counsel or  
4 assist clients concerning marijuana-related activities that are lawful  
5 under state law, but which may violate federal law.

6           The majority also recommends a comment to the new rule  
7 explaining that it derives from the amendments, using the same  
8 language as in the proposed comment to Rule 8.4:

9           [1] This rule specifically addresses two  
10 constitutional amendments: Article XVIII.  
11 Miscellaneous, § 14. *Medical use of marijuana*  
12 *for persons suffering from debilitating medical*  
13 *conditions*, and Article XVIII. Miscellaneous,  
14 § 16. *Personal use and regulation of marijuana*.

15  
16 The majority further recommends the following comment:

17           [2] The phrase “standing alone” clarifies that  
18 this rule does not preclude disciplinary action  
19 if a lawyer’s personal conduct, or advice to  
20 clients, includes, but is not limited to activity,  
21 permitted by the Colorado constitution, and  
22 that conduct in total contravenes federal laws

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<sup>12</sup> For example, Rule 1.2(d) could be revised by adding the italicized language, “a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal . . . *with the intent of facilitating or encouraging the conduct.*” RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 94(2) (2000) (emphasis added).

1 other than those prohibiting possession or  
2 cultivation of marijuana.

3  
4 Finally, because this new rule would limit Rule 1.2(d), the majority  
5 proposes adding the following comment to Rule 1.2:

6 [14A] Paragraph (d) should be read in  
7 conjunction with Rule 8.6.

8  
9 Respectfully submitted,

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11 John R. Webb



To: Colorado Supreme Court Standing Rules Committee  
From: Office of Attorney Regulation Counsel (OARC)  
Re: Proposed Amendments to Colo. RPCs re: Medical and  
Recreational Use of Marijuana  
Date: April 26, 2013

I. Introduction.

The Standing Rules Committee appointed a subcommittee to address possible changes to the Colorado Rules of Professional Conduct due to two recent amendments to the Colorado Constitution that address medical and recreational use or possession of marijuana. The Subcommittee has proposed two changes: one a comment to Colo. RPC 8.4 and the other a new Rule 8.6. The Office of Attorney Regulation Counsel is opposed to both proposals as explained below.

As everyone knows, the use or possession of marijuana is a crime under federal law.<sup>1</sup> It is also still a crime in Colorado unless one follows the medical marijuana laws and the soon-to-be personal use marijuana laws in obtaining and possessing certain limited amounts. There are gray areas in the interpretation of the amendments to the state constitution.

OARC submits that the issue is whether this committee should suggest to the Supreme Court that it make any changes to the Colorado Rules of Professional Conduct in this particular area at this time. OARC submits that the proposals are premature and not necessary. The proposed rule and comment take discretion away from OARC to handle allegations of misconduct in this area. There is no need to do so. OARC should maintain the discretion to handle these cases under the current rules in the same manner it has in the past. Should OARC's exercise of discretion not comport with appropriate views of attorney misconduct, there are checks on OARC. The

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<sup>1</sup> 21 U.S.C. § 841 (a) (1) provides that it shall be unlawful for any person to knowingly or intentionally distribute or possess with intent to distribute a controlled substance. 21 U.S.C. § 812 (c) includes marihuana as a controlled substance. 21 U.S.C. § 846 makes it a crime to conspire to violate § 841.

Attorney Regulation Committee, the Presiding Disciplinary Judge, Hearing Boards and ultimately the Supreme Court are checks on OARC's discretion.

OARC understands that any attorney whom it investigates incurs expenses and experiences anxiety. It may be that an attorney decides not to engage in certain conduct based on the fear of being investigated by OARC. That does not mean that the Supreme Court of Colorado should relieve this anxiety by stating attorneys are permitted to violate federal laws without any possible consequences on their licenses to practice law.

The subcommittee states in its report, "A prosecutor has no discretion to decide that certain conduct is inimical to society and should be prosecuted, if the legislature has not seen fit to criminalize the conduct." The U.S. Attorney still has the discretion to prosecute federal drug laws pursuant to acts of Congress. Under the current Rules of Professional Conduct, an attorney is subject to discipline if he/she violates federal law. Of course, if the Supreme Court were to adopt the subcommittee's proposals, OARC would follow those rules. But until that time, or until the Congress changes drug laws, an attorney may still be subject to discipline for violating federal criminal laws and for counseling or assisting a client in doing so.

## II. Personal Use of Marijuana.<sup>2</sup>

OARC has never had a written policy about its exercise of discretion in any area of attorney misconduct, and all matters are addressed on a case-by-case basis.<sup>3</sup> Such case-by-case review would include matters involving personal use of marijuana; however, OARC receives few requests for investigation in which it is alleged an attorney has used or possessed small amounts of marijuana.

OARC has already stated that the office will follow the will of the Colorado electorate on this issue. Personal use of marijuana in Colorado in

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<sup>2</sup> Personal use of medical marijuana has been addressed by the Colorado Bar Association Ethics Committee in Opinion 124, adopted April 23, 2012. OARC views the Opinion as well reasoned and persuasive.

<sup>3</sup> See *In re Attorney F*, 285 P.3d 322, 327 (Colo. 2012) ("As we have previously observed, 'individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases.'") (quoting *In re Rosen*, 198 P.3d 115, 121 (Colo. 2008)).

compliance with state law is not an area of misconduct that OARC considers a violation of Colo. RPC 8.4(b) even if a violation of federal law. Of course, any attorney who uses marijuana lawfully under state law and violates other rules such as those involving competence, adequate communication, or diligence is still subject to discipline.

From a historical perspective, before passage of both of the marijuana amendments, an attorney's personal use or possession of marijuana in Colorado in small amounts was never the sole misconduct in an attorney disciplinary case or a diversion matter as far as anyone in OARC remembers.<sup>4</sup> Of course, such conduct standing alone *could* have been the subject of a disciplinary case. Based upon our collective memories there are very few cases in which a lawyer was alleged to have violated a law involving personal use or possession of marijuana. The only cases that we remember involving such an allegation were dismissed.

Before passage of either the state medical marijuana statute or Amendment 64, C.R.C.P. 251.5(b) and Colo. RPC 8.4(b) were the rules arguably applicable to an attorney's use of marijuana.<sup>5</sup> As many members of the Committee remember, C.R.C.P. 251(b) was changed in 2011 so that it mirrored Rule 8.4(b). OARC supported that change. Before that change, it was possible that a lawyer could have been subject to discipline under C.R.C.P. 251.5(b) for committing any criminal act even if it did not reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects as required by Rule 8.4(b). Since the change, in order to violate Rule 8.4(b) and C.R.C.P. 251.5(b) there must be clear and convincing evidence that an attorney's criminal conduct reflects adversely on a lawyer's honesty, trustworthiness or fitness in other respects to practice law.<sup>6</sup>

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<sup>4</sup> In 2011 OARC entered into a diversion agreement with an attorney who was convicted of violating a Wyoming criminal law for personal use of marijuana. Additionally, in *People v. Jensen*, 10 PDJ 035, (Colo. O.P.D.J. Jan. 7, 2011) a hearing board imposed a six-month suspension on an attorney who entered an *Alford* plea to one charge of possession of more than one gram of psilocybin, a controlled substance. In that case the attorney had also been charged with possession of marijuana with intent to distribute. That marijuana charge was dismissed in the criminal matter.

<sup>5</sup> Colo. RPC 8.4(b) provides in pertinent part: 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.

<sup>6</sup> See, e.g., *People v. Rotenberg*, 911 P.2d 642, 643 (Colo. 1996) (a conviction for driving under the influence of intoxicating liquor adversely reflects on the attorney respondent's fitness to practice law).

OARC has not viewed conduct involving personal use of small amounts of marijuana, standing alone, as a violation of Colo. RPC 8.4(b). Any reflection on the attorney's fitness to practice is not significant enough to warrant discipline or diversion.

There are other minor criminal infractions that an attorney may commit that are relatively insignificant, such as having a dog at large or littering. Minor criminal conduct that does not involve violence or dishonesty usually results in a dismissal by OARC. The exercise of discretion here is based on the judgment that such conduct does not reflect adversely on an attorney's fitness to practice law. 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.

As far as conduct involving the personal use of marijuana, OARC submits that there is no reason to change the rule to carve out a specific area of conduct from a general rule.

### III. Marijuana Cultivation and Sale Not For Personal Use

Amendment 64 allows personal use and possession of marijuana in addition to operation of cultivation facilities, product manufacturing facilities and retail stores.<sup>7</sup> The subcommittee's proposals appear to allow an attorney to own and operate a state-licensed marijuana cultivation and retail facility. This part of this memo discusses the propriety of the proposed rule changes involving an attorney's cultivation and retail sale.

Both the proposed comment to Colo. RPC 8.4(b) and the proposed Rule 8.6 state that an attorney shall not be subject to discipline if engaging in conduct lawful under Colorado law even if a violation of federal law. Under these proposals attorneys would be permitted to operate a marijuana-related facility, as the Amendment 64 Task Force has dubbed the new operations, without jeopardizing their licenses to practice law.

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<sup>7</sup> The state legislature has not yet enacted statutes as mandated by Amendment 64. The Task Force on Implementation of Amendment 64 established by Governor Hickenlooper has issued its Report dated March 13, 2013.

None of us know how the adult-use marijuana industry will be legislated and regulated. Amendment 64 mandates that the State begin accepting and processing licenses no later than October 1, 2013, and begin issuing licenses by January 1, 2014. Until the legislature acts, it is not clear how ownership and operation of facilities will be permitted.

OARC does not support the subcommittee proposals that would permit a licensed attorney to own or operate a marijuana-related facility. Federal laws prohibit cultivation and distribution of marijuana. Unless and until the federal government changes its laws, the integrity of the bar is diminished by allowing attorneys to cultivate or distribute significant amounts of marijuana in violation of federal law, even if lawful under the state constitution.

There have been no cases brought to the attention of OARC in which the sole alleged conduct was a lawyer engaging in the sale of medical marijuana pursuant to a Colorado license.

#### IV. Advice to Clients and Assisting Clients

The subcommittee is also proposing a new Rule 8.6. This proposed rule would permit attorneys to 1) advise clients about conduct that violates federal law; and 2) assist clients in conduct that is a violation of federal criminal law. OARC submits that the Committee should not recommend to the Court that attorneys be permitted to advise a client how to violate federal law or to assist clients in violation of federal law. An attorney's knowing assistance to a client and participation in a crime itself should still be subject to regulation, and initiation of disciplinary proceedings if warranted under OARC's discretion.

##### A. Current Rule 1.2(d)

Under the current rules, Colo. RPC 1.2(d)<sup>8</sup> prohibits a lawyer from advising a client how to violate a law, or from assisting a client in violating a

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<sup>8</sup> Colo. RPC 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.

law.<sup>9</sup> It is never a violation of any rule for a lawyer to advise a client about whether the client's intended conduct violates a law. And, of course it is never a violation of any rule for a lawyer to represent someone charged with a crime. However, there is a sharp distinction between advising what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction.<sup>10</sup> As Alexander Rothrock has written, factual differences in this area can be subtle.<sup>11</sup> Regulation of an attorney's conduct may be determined by those differences.

With regard to attorneys giving advice, there are many different situations in which a lawyer might be in the position of advising a client concerning the new marijuana laws and regulations in Colorado. Under the current rules, an attorney's advice about licensing requirements under state marijuana laws would in general not be any problem. An attorney's advising and assisting clients in the rule making or licensing process for medical or adult-use marijuana facilities would be permitted under RPC 1.2(d).<sup>12</sup> However, as the rules currently stand, the attorney must not go further and assist a client in conduct that is a violation of federal criminal law.

#### B. Proposed Rule and Comment

The subcommittee's proposals would allow certain conduct by an attorney to assist a client with no repercussions on the attorney's license to practice law even if the attorney is convicted of a federal crime.

Some lawyers might be heavily involved in transactions which violate federal law. Once again, it is difficult to state categorically that attorneys

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<sup>9</sup> Denver University Law School professors Wald and Kamin have proposed an amendment to Rule 1.2(d) that would require proof that an attorney *intended* to aid or abet their client's criminal activity as opposed to assisting their clients *knowing* the client was engaged in criminal conduct. See "Marijuana Lawyers: Outlaws or Crusaders," Eli Wald and Sam Kamin, *Oregon Law Review*, forthcoming (2013). The subcommittee rejected this proposal. OARC's view is that this distinction between knowing assistance and intentional assistance is not helpful to cure the current ambiguity and could lead to litigation about the difference.

<sup>10</sup> ABA Comm. On Prof'l Ethics & Grievances, Formal Op. 281 (1952); see Alexander Rothrock, "Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health?" 89 *Denver University Law Review* 1047, 1052 (2012).

<sup>11</sup> *Id.*

<sup>12</sup> See Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 2013-02, Jan. 16, 2013).

involved in such situations would always be subject to discipline. The facts of each case are critical.

There are too many unforeseen situations that could arise that should still be subject to regulation of an attorney's license to practice law. For these reasons, OARC is opposed to the subcommittee's proposals.

V. Conclusion.

OARC understands the subcommittee's desire to clarify what is currently a vague area of legal ethics. However, the Committee should not be recommending to the Supreme Court that lawyers can violate federal law with no possible response from the attorney regulation system. While personal use of marijuana in compliance with state law has not been a significant enough concern to warrant discipline that may not be true for advising a client to violate federal law, or assisting the client to do so.

**RECEIVED**  
APR 26 2013  
Holland & Hart LLP

April 24, 2013

Marcy Glenn, Chair  
Colorado Supreme Court Standing Committee on  
Rules of Professional Conduct  
Holland & Hart, LLP  
P.O. Box 8749  
Denver, Colorado 80203-8749

Dear Marcy:

I write to formally advise you, in my capacity as Chair of the Ethics Committee of the Colorado Bar Association, that the Ethics Committee last Saturday, April 20, approved a resolution to support 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 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.

This motion was approved overwhelmingly by the Committee, in the context of the Committee's continued discussion of a proposed formal opinion concerning the ethical issues associated with lawyers' representation of clients concerning medical and recreational marijuana issues.



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I will try to attend the Committee's meeting on Friday, May 3rd, at which time I would be happy to provide further input if the committee believes it would be helpful.

Very truly yours,

A handwritten signature in cursive script that reads "Dan Taubman".

Daniel M. Taubman, Chair  
Ethics Committee,  
Colorado Bar Association

cc: Hon. John Webb

DMT/pg