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## To Discipline or Not to Discipline: A Framework for New Mexico to Analyze the Ethics of Medical Marijuana Representation

Jesse Montoya

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# TO DISCIPLINE OR NOT TO DISCIPLINE: A FRAMEWORK FOR NEW MEXICO TO ANALYZE THE ETHICS OF MEDICAL MARIJUANA REPRESENTATION

Jesse Montoya\*

## INTRODUCTION

Complex regulatory schemes in many states, including New Mexico, create a “legal minefield” for producers of medical marijuana.<sup>1</sup> This regulatory minefield is far-reaching and can present business owners with an array of legal issues including problems with local law enforcement,<sup>2</sup> obtaining capital, navigating commercial real-estate deals, planning distribution channels, and other ordinary business needs.<sup>3</sup> Producers of medical marijuana must navigate this legal and regulatory minefield in order to operate their businesses.<sup>4</sup> Worst of all, in many states, like New Mexico, medical marijuana producers must perform these legal gymnastics—sometimes without access to an attorney.<sup>5</sup> In New Mexico, lawyers are hamstrung by the interpretation of ethical rules forbidding lawyers from “assisting” legal producers of medical marijuana.<sup>6</sup> Compounding the confusion, the exact

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1. See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 97 (2015).

2. See Michael Berkey, *Mary Jane’s New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL’Y & ETHICS J. 417, 438–39 (2011).

3. See Ian Wagemaker, *Professional Ethics—The High Risk of Going Green: Problems Facing Transactional Attorneys and the Growth of the State-Level Legal Marijuana Industries*, 37 W. NEW ENG. L. REV. 371, 399 (2015).

4. See *id.*; see also Ian S. Clement, *Representation in Marijuana Industry Chilled by Ethics Rules*, A.B.A. LITIGATION NEWS (May 2, 2016), [https://apps.americanbar.org/litigation/litigationnews/top\\_stories/050216-marijuana-ethics-rules.html](https://apps.americanbar.org/litigation/litigationnews/top_stories/050216-marijuana-ethics-rules.html).

5. See Chemerinsky et al., *supra* note 1, at 95, 97 (“One of the biggest obstacles facing marijuana businesses is finding attorneys who are willing to provide them with legal services. . . . [Medical marijuana businesses] may or may not be able to secure legal representation to help them through the legal minefield created by complex state regulatory apparatuses.”).

6. See State Bar of N.M. Ethics Advisory Comm., Formal Op. 2016-01, <http://www.nmbar.org/nmbardocs/formembers/eao/2016-01.pdf>.

parameters of what constitutes “assistance” under New Mexico’s Rule 16-102(D)<sup>7</sup> are unclear.<sup>8</sup> This uncertainty can chill the emerging business and legal market.<sup>9</sup>

The problem of medical marijuana and legal ethics reveals a far more fundamental challenge. What are attorneys to do when their obligations to their clients conflict with their obligations to the law? How are state ethics systems expected to manage conflicting obligations to state and federal law? Legal ethics and medical marijuana are catalysts for discussing these pervasive problems. This article explores these ethical conundrums in the unique context of New Mexico’s medical marijuana regulatory regime.

Part I of this article will establish the background of medical marijuana regulation in New Mexico, including an explanation of the regulatory regime and a brief overview of the applicable rules of legal ethics. This section will also highlight the legal challenges facing medical marijuana producers and attorneys who desire to assist them. In Part II, this article will offer and apply a framework for approaching the legal ethics of medical marijuana representation in New Mexico. The analysis will begin with an explanation of the New Mexico advisory ethics opinion on medical marijuana representation. The ethics advisory opinion left more questions than it answered and did not systematically analyze the problem. To create a more coherent and consistent framework, the analysis will distill and synthesize principles in different ethics advisory opinions selected from across the country. The interplay between federalism and the state-controlled attorney discipline system will be crucial to understanding the varying ethics advisory opinions. Then the analysis will turn to New Mexico and apply the new framework to New Mexico’s unique legal environment. Applying the framework, New Mexico should reconsider its approach to the problem of medical marijuana legal ethics. The conclusion argues that the most appropriate course of action for New Mexico is to refrain from disciplining lawyers who assist medical marijuana businesses in effectuating New Mexico law.

## PART I: BACKGROUND

The medical marijuana regulatory regime spans both state and federal law. Federal law criminalizes marijuana, regardless of whether it is used medicinally or recreationally.<sup>10</sup> Some state laws allow for medical marijuana, but implement a regulatory regime to ensure medicinal use.<sup>11</sup> Other states, like Colorado, allow marijuana use for any purpose.<sup>12</sup> The ABA Model Rules of Professional Conduct

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7. See Rule 16-102(D) NMRA (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal.”).

8. See N.M. Formal Op. 2016-01 (“The Committee is unable to agree as to the exact parameters of ‘assistance.’”).

9. See Lorelei Laird, *Do Ethics Rules Allow Lawyers to Advise Clients on New Laws Legalizing Marijuana?*, A.B.A. J. (June 1, 2014, 8:40 AM), [http://www.abajournal.com/magazine/article/do\\_ethics\\_rules\\_allow\\_lawyers\\_to\\_advise\\_clients\\_on\\_new\\_marijuana\\_laws](http://www.abajournal.com/magazine/article/do_ethics_rules_allow_lawyers_to_advise_clients_on_new_marijuana_laws) (“But there are concerns that, without formal changes in the ethics rules, attorneys will be reluctant to take on clients in the emerging marijuana industry”); see also Chemerinsky et al., *supra* note 1, at 97.

10. See Controlled Substances Act, 21 U.S.C. §§ 841, 844 (2012) (listing criminal penalties).

11. See, e.g., N.M. STAT. ANN. §§ 26-2B-1 to -7 (2009) (Lynn and Erin Compassionate Use Act).

12. See, e.g., COLO. CONST. art. XVIII, § 16.

guide discussion of legal ethics, but states codes of ethics govern attorney discipline.<sup>13</sup>

### A. Controlled Substances Act and Federal Law

The Controlled Substances Act currently criminalizes all use of marijuana.<sup>14</sup> Marijuana is a “Schedule I” controlled substance.<sup>15</sup> Congress views Schedule I substances as substances which have “no currently accepted medical use in treatment in the United States.”<sup>16</sup> While the federal law is still on the books, the enforcement priorities of the Justice Department under the Trump administration remain uncertain.<sup>17</sup> Under the Obama administration, it was not a federal priority to enforce the law against state-legal medical marijuana businesses.<sup>18</sup> The Justice Department “Cole Memorandum” stated that federal priorities were unlikely to be threatened by states that legalize marijuana under a tightly regulated scheme.<sup>19</sup> The memorandum urged prosecutorial discretion, but also cautioned that large-scale operations or for-profit marijuana businesses may interfere with federal enforcement priorities.<sup>20</sup> Congress may have effectively endorsed the policy when it passed a spending bill with a provision that restricted federal funds used for enforcement of federal drug laws against state-legal medical marijuana businesses.<sup>21</sup> The federal government’s enforcement policy is largely dependent upon the president’s policy and may change with the Trump administration.<sup>22</sup> However, the enforcement objectives of the Justice Department under the Trump administration may not differ much from objectives under the preceding administration.<sup>23</sup>

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13. See GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, & PETER R. JARVIS, *THE LAW OF LAWYERING* § 1.17 (4th ed. 2016).

14. See Controlled Substances Act § 812 (listing “marihuana” as a Schedule I controlled substance); see also *id.* §§ 841, 844 (listing criminal penalties).

15. *Id.* § 812(b)–(c).

16. See *id.* § 812(b)(1)(B).

17. See Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t Justice, to Head of Dep’t Component U.S. Atty’s (April 5, 2017), <https://www.justice.gov/opa/press-release/file/955476/download> (stating that existing policies concerning marijuana will be reviewed).

18. See Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t Justice, to all U.S. Att’y’s (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

19. See *id.*

20. See *id.*

21. See Russell Berman, *Why Congress Gave in to Medical Marijuana*, *THE ATLANTIC* (Dec. 17, 2014), <http://www.theatlantic.com/politics/archive/2014/12/a-congressional-surrender-in-the-medical-marijuana-fight/383856/>. However, not all commentators interpret the bill the same way. See Jacob Sullum, *Congress Did Not Legalize Medical Marijuana*, *FORBES* (Dec. 31, 2015, 8:15 AM), <http://www.forbes.com/sites/jacobsullum/2015/12/31/congress-did-not-legalize-medical-marijuana/#35fc258d715c>.

22. See Jeremy Berke, *The Trump Administration Doesn’t Appear to be Slowing Investment in the Marijuana Industry*, *BUS. INSIDER* (Feb. 9, 2017, 6:16 PM), <http://www.businessinsider.com/marijuana-industry-reactions-to-jeff-sessions-and-trump-administration-2017-2> (“[I]t remains to be seen how Trump and [Attorney General] Sessions will handle marijuana . . .”).

23. Compare Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t Justice, to Head of Dep’t Component U.S. Atty’s (April 5, 2017), <https://www.justice.gov/opa/press-release/file/955476/download> (emphasizing control of violent crime as a primary objective) with Memorandum from James

## B. New Mexico Regulatory Scheme

The legal use of medical cannabis in New Mexico is based on the Lynn and Erin Compassionate Use Act (the Act).<sup>24</sup> Under the Act, qualified patients<sup>25</sup> who are diagnosed with debilitating medical conditions<sup>26</sup> are allowed to use cannabis for medical purposes and are not subject to civil or criminal penalty based on that use.<sup>27</sup> The Act affords similar protections to licensed producers,<sup>28</sup> medical practitioners,<sup>29</sup> and primary caregivers of a patient.<sup>30</sup> The Act also protects property interests connected with medical cannabis from destruction, damage, or forfeiture caused by state officials.<sup>31</sup>

At the core of the New Mexico regulatory scheme is a licensing system. The Act authorizes the New Mexico Department of Health (NMDOH) to promulgate regulation of licenses for patients, caregivers, practitioners, and distributors.<sup>32</sup> The regulations divide eligible producers into two categories—qualified patients and non-profit producers.<sup>33</sup> Qualified patients are restricted to a maximum of four female plants and up to twelve of a combination of male plants or seedlings.<sup>34</sup> Patients are also limited to an “adequate supply” of medical cannabis.<sup>35</sup>

The regulations regarding corporate entities are considerably more complicated. First, corporate producers must be non-profit entities.<sup>36</sup> The board of directors for the corporate entity must have a minimum of five members—including a medical provider (e.g. a licensed medical doctor, a registered nurse, or any of the following: nurse practitioner, licensed practical nurse, physician assistant), and three qualified patients under the Act.<sup>37</sup> Corporate entities are limited to a combined total

M. Cole, Deputy Att’y Gen., U.S. Dep’t Justice, to all U.S. Att’ys (emphasizing control of violent crime as one objective among many).

24. See N.M. STAT. ANN. §§ 26-2B-1 to -7 (2009).

25. *Id.* § 26-2B-3(G) (defining “qualified patient” as “a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card issued pursuant to the [Act].”).

26. *Id.* § 26-2B-3(B) (listing the qualifying medical conditions).

27. See *id.* § 26-2B-4(A).

28. See *id.* § 26-2B-4(F).

29. See *id.* § 26-2B-4(E). A “practitioner” is defined as “a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act. . . .” *Id.* § 26-2B-3(E).

30. See *id.* § 26-2B-4(B).

31. See *id.* § 26-2B-4(G).

32. See generally *id.* § 26-2B-7 (promulgating rules for licensing scheme).

33. See N.M. CODE R. § 7.34.4.8(A) (2015).

34. *Id.*

35. *Id.* An “adequate supply” is defined as the amount no more than reasonably necessary to ensure uninterrupted availability over a 90-day period. See *id.* § 7.34.4.7(B).

36. See *id.* § 7.34.4.8(A)(2); see also *id.* § 7.34.4.7(OO) (defining “private entity” as “a private, non-profit organization that applies to become or is licensed as a producer and distributor of cannabis, concentrates, or cannabis-derived products.”). To be considered a non-profit entity by the New Mexico Taxation and Revenue Department, a business must maintain non-profit status under Section 501(c) of the United States Internal Revenue Code. See N.M. TAXATION AND REVENUE DEP’T, FYI-103 (2014), <http://realfile.tax.newmexico.gov/FYI-103%20-%20Information%20for%20Nonprofit%20Organizations.pdf>.

37. See § 7.34.4.8(I).

of 450 female plants, male plants, and seedlings.<sup>38</sup> Corporate producers may not produce in excess of current patient needs and they may not offer sales or promotions encouraging bulk purchases.<sup>39</sup> Distribution plans must be submitted to and approved by the NMDOH.<sup>40</sup> Producers are generally allowed to use approved couriers to distribute their product to the appropriate locations (e.g. to a patient directly, to another licensed non-profit facility, or to a laboratory for testing).<sup>41</sup> Corporate producers are required to have their cannabis product tested by an approved laboratory<sup>42</sup> for microbiological testing,<sup>43</sup> mycotoxin testing,<sup>44</sup> solvent residue testing (if produced through solvent extraction methods),<sup>45</sup> testing for quantity of THC and CBD,<sup>46</sup> and any other testing deemed appropriate by NMDOH.<sup>47</sup> Use of pesticide for producers is governed by the New Mexico Pesticide Control Act.<sup>48</sup>

The licensing scheme for non-profit producers requires a fair amount of capital. The application fee for producers is ten-thousand dollars with a nine-thousand-dollar refund if the application is denied.<sup>49</sup> A license for plants begins at thirty-thousand dollars for the first 150 plants and an additional ten-thousand dollars for every fifty plants after that (to a maximum of 450 plants).<sup>50</sup> The non-profit businesses need capital to operate, so many affiliate with for-profit management companies.<sup>51</sup> Some argue that New Mexico's non-profit requirement has become "window dressing" for an industry largely managed by for-profit management companies.<sup>52</sup>

As of the third quarter of 2016, 76,732 patients made purchases of medical marijuana.<sup>53</sup> There were over 11,000 plants in production that produced over a

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38. *See id.* § 7.34.4.8(A)(2).

39. *See id.*

40. *See id.* § 7.34.4.8(E).

41. *See id.*

42. *See id.* § 7.34.4.9.

43. *Id.* § 7.34.4.9(C)(1) (requiring testing for microbiological contaminants).

44. *Id.* § 7.34.4.9(C)(2) (requiring testing for mycotoxin).

45. *Id.* § 7.34.4.9(C)(3) (requiring solvent residue testing).

46. *Id.* § 7.34.4.9(C)(5) (requiring testing for quantity of THC). THC stands for tetrahydrocannabinol, which is the principal psychoactive constituent of cannabis. *See Drug and Human Performance Fact Sheets: Cannabis/Marijuana*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://one.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm> (last visited Feb. 19, 2017). CBD is cannabidiol which is a chemical with a wide scope of medical applications. *See Debra Borchart, The Cannabis Market That Could Grow 700% by 2020*, FORBES (Dec. 12, 2016, 12:52 PM), <http://www.forbes.com/sites/debraborchart/2016/12/12/the-cannabis-market-that-could-grow-700-by-2020/#7b12c7a471ed>.

47. § 7.34.4.9(C)(6).

48. *Id.* § 7.34.4.11.

49. *Id.* § 7.34.4.8(V)(1).

50. *Id.* § 7.34.4.8(V)(2).

51. *See* Olivier Uyttebrouck, *Budding Operation: NM's Nonprofit Medical Marijuana Takes 'Big Business' Turn*, ALBUQUERQUE J. (Feb. 13, 2016, 11:45 PM), <https://www.abqjournal.com/723600/no-true-nonprofits-in-pot-business.html>.

52. *Id.*

53. *See* Memorandum from Kenny Vigil, Med. Cannabis Program Dir., N.M. Dep't of Health, to Licensed Non-Profit Producers (Nov. 10, 2016), <https://nmhealth.org/publication/view/report/3135/>.

million units of medical marijuana.<sup>54</sup> Reportedly, producers also gave patients over 30,000 units free of charge.<sup>55</sup> Information about income and compensation was unavailable in the report for the third quarter of 2016.<sup>56</sup> In the second quarter of 2016, total income exceeded 11.5 million dollars.<sup>57</sup> The salary and other compensation (for non-profit employees, etc.) amounted to over three million dollars.<sup>58</sup> As of January 30, 2017, there are currently fifty-two licensed non-profit producers in New Mexico.<sup>59</sup>

### C. New Mexico Rules of Professional Conduct and Model Rules

The New Mexico Rules of Professional Conduct limit the ability of attorneys to serve the legal needs of medical marijuana businesses. New Mexico's Rule 16-102 states a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal."<sup>60</sup> The New Mexico rule differs from the model rules in that it emphasizes the importance of honesty to the tribunal.<sup>61</sup> Since possession, distribution, and production of marijuana are illegal under federal law,<sup>62</sup> attorneys must be careful not to "assist" or "counsel a client to engage" in such conduct.

Medical marijuana representation also implicates other rules of ethics. New Mexico Rule 16-803 requires that lawyers who know of misconduct (e.g. "assistance" of medical marijuana businesses) to report it to the New Mexico Disciplinary Board.<sup>63</sup> New Mexico attorneys may be disciplined for their assistance of medical marijuana businesses even if such assistance occurs outside New Mexico.<sup>64</sup> Attorneys must not violate or attempt to violate the rules of ethics.<sup>65</sup> Nor should attorneys engage in criminal conduct that reflects adversely on their ability to practice law or conduct that is "prejudicial to the administration of justice."<sup>66</sup> For example, interference with the federal enforcement objectives regarding medical marijuana could be considered "prejudicial to the administration of justice." Despite these complications, the New Mexico Rules of Professional Conduct emphasize that

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54. *See id.*

55. *See id.*

56. *See id.*

57. *See* Memorandum from Ken Groggel, Med. Cannabis Program Manager, N.M. Dep't of Health, to Licensed Non-Profit Producers (Aug 23, 2016), <https://nmhealth.org/publication/view/report/3081/>.

58. *See id.*

59. *See* N.M. DEP'T OF HEALTH, LICENSED NONPROFIT PRODUCERS (2017), <https://nmhealth.org/publication/view/general/2101/>.

60. *See* Rule 16-102(D) NMRA; *see also* MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2016).

61. *Compare* Rule 16-102(D) NMRA *with* r. 1.2(d).

62. *See* Controlled Substances Act, 21 U.S.C. §§ 841, 844 (2012).

63. *See* Rule 16-803 NMRA; *see also* MODEL RULES OF PROF'L CONDUCT r. 8.3(a) (AM. BAR ASS'N 2016).

64. *See* Rule 16-805 NMRA.

65. *See* Rule 16-804(A) NMRA; *see also* MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2016).

66. Rule 16-804(D) NMRA.

the ethical rules are “rules of reason.”<sup>67</sup> Given the complex state regulatory framework, the vast array of legal issues facing non-profit producers, and the rules of ethics, medical marijuana representation is a minefield for practicing attorneys. Despite the ethical minefield, there has not yet been a recorded case of attorney discipline for engaging in “assistance” of legal medical marijuana businesses.<sup>68</sup>

## PART II: A FRAMEWORK FOR ANALYZING THE MEDICAL MARIJUANA ETHICS CONUNDRUM

Practicing attorneys in New Mexico remain in a legal-ethics limbo. Medical marijuana businesses need representation, but the legal ethics are uncertain at best and prohibitive at worst. Different states have taken different approaches to the ethical conundrum of legal representation for medical marijuana businesses. Each different approach offers a key to building a more consistent framework for analyzing the medical marijuana ethics problem. More broadly, such a framework is useful for approaching the ethics of attorney representation in other areas of the law where state and federal law conflict.

### A. New Mexico Approach

Medical marijuana, while legal under state law,<sup>69</sup> is illegal under federal law.<sup>70</sup> An ethics advisory opinion<sup>71</sup> released in summer 2016 concluded that lawyers may not “assist” medical marijuana businesses, but lawyers may advise clients on the implications of federal law and state law.<sup>72</sup> The State Bar of New Mexico Ethics Advisory Committee (“the Committee”) examined a number of different approaches from other states for guidance.<sup>73</sup> The Committee interpreted the Arizona State Bar ethics opinion,<sup>74</sup> which allowed attorney assistance of medical marijuana businesses, to hinge upon the lack of federal enforcement, the lack of preemption of state law, and public policy concerns.<sup>75</sup> The Committee also examined the ethics opinion of the State Bar of Maine.<sup>76</sup> The Committee interpreted the Maine opinion to apply a strict reading of the rules—regardless of whether the federal law is enforced, it is still unethical for a lawyer to assist in conduct prohibited by federal law.<sup>77</sup>

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67. Scope NMRA.

68. See Wagemaker, *supra* note 3, at 391.

69. See N.M. STAT. ANN. §§ 26-2B-1 to -7 (2009) (Lynn and Erin Compassionate Use Act).

70. See Controlled Substances Act, 21 U.S.C. §§ 841, 844 (2012).

71. State Bar of N.M. Ethics Advisory Comm., Formal Op. 2016-01, <http://www.nmbar.org/nmbardocs/formembers/eao/2016-01.pdf>.

72. See *id.*

73. See *id.* (analyzing ethics opinions from Arizona and Maine).

74. State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 11-01 (2011), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

75. See N.M. Formal Op. 2016-01; see also Ariz. Op. 11-01; Memorandum from David W. Ogden, Deputy Att'y General, Dep't of Justice, to Selected U.S. Att'ys (Oct. 19, 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

76. See N.M. Formal Op. 2016-01; see also Me. Bd. of Overseers of the Bar Prof'l Ethics Comm., Op. 199 (2010), [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=110134](http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134).

77. See N.M. Formal Op. 2016-01.

The Committee sided with the reasoning of the Maine approach over the Arizona approach.<sup>78</sup> The Committee reasoned that the justifications of the Arizona opinion were insufficient to overcome the fundamental illegality of marijuana under federal law.<sup>79</sup> The Committee determined that lawyers may not “engage in” or “assist” medical marijuana businesses because their operations, which include the production and distribution of controlled substances,<sup>80</sup> violate federal law.<sup>81</sup> However, the Committee could not reach a conclusion as to the scope of “assistance.”<sup>82</sup> The Committee generally came to the agreement, without much analysis, that acts like negotiating contracts for the purchase of cannabis were impermissible “assistance.”<sup>83</sup> Other Committee members thought it might be permissible to form a business organization for a client, even if it was used to produce and distribute medical marijuana.<sup>84</sup> The Committee suggested that lawyers should decide how the word “assistance” applies to their situation, bearing in mind that the boundaries of such assistance may be tested by an ethics complaint.<sup>85</sup>

There are two flaws with the Committee opinion. First, the Committee offered an incomplete analysis. In accepting the reasoning of the Maine opinion, the Committee did not consider other perspectives. The analysis stopped at the determination that marijuana is still illegal under federal law and the rules of ethics do not allow facilitation of criminal conduct. The opinion did not explore the policy ramifications of the declaration, nor did it substantively consider alternate justifications. To make informed decisions about legal ethics, it is important to have a broad perspective. The forthcoming analysis will provide a broader perspective.

The second flaw in the Committee’s opinion is the failure to outline the contours of “assistance” under the rules of ethics. The New Mexico rules do not define the word “assistance” and the committee commentary does not further elaborate on the scope of “assistance” either.<sup>86</sup> The refusal to commit to a firmer scope of “assistance” leaves uncertainty for practicing lawyers. The Committee’s suggestion that the scope of “assistance” should be decided by attorneys or tested by an ethics complaint is an untenable proposition for attorneys who wish avoid disciplinary proceedings. These two flaws in the Committee’s opinion can be mended by a closer examination of the rules of ethics and the ethics opinions of other states.

## B. Approaches of Other States

There are two basic approaches that states have taken to the ethics conundrum presented by medical marijuana laws. One group of states, including Maine, Colorado, Ohio, and New Mexico, believe lawyers may not assist medical

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78. *See id.*

79. *See id.*

80. *See* Controlled Substances Act, 21 U.S.C. § 841 (2012).

81. *See* N.M. Formal Op. 2016-01.

82. *Id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See* Rule 16-100 NMRA; Rule 16-102(D) NMRA.

marijuana businesses outside of giving advice as to the legality or illegality of their conduct. Within these opinions there is a varying spectrum of what each state believes is permissible, but they are all in general agreement that lawyers may not assist medical marijuana businesses. Another group of states, including Arizona and New York, believes that lawyers are permitted to assist medical marijuana businesses pursuant to state law. The opinions of Arizona and Colorado are especially relevant to New Mexico as they are neighboring states and their determinations may affect legal entities in New Mexico.<sup>87</sup>

*(1) Assistance is Permitted (Arizona, New York, and Washington)*

The ethics advisory opinion of the Arizona State Bar determined that assistance of medical marijuana businesses, pursuant to state law, does not violate the Arizona Rules of Professional Conduct.<sup>88</sup> The opinion was based on three key findings. First, the opinion sidestepped concerns about lawyers that “counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”<sup>89</sup> by pointing out that current federal law enforcement practices do not pursue conduct that is in “clear and unambiguous compliance” with state law.<sup>90</sup> Second, the Arizona opinion relied heavily on public policy concerns. For example, the opinion stated, “[t]he maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. . . . Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law.”<sup>91</sup> Third, the opinion relied on principles of federalism. The Arizona Committee concluded that the opinion was contingent upon a lack of federal preemption and a lack of federal enforcement—a change in either one could change the conclusion.<sup>92</sup> The opinion also pointed out that Arizona ethics decisions have condemned lawyers who knowingly violate or assist in violating state law, but pointed out that there were no determinations concerning lawyer conduct in a conflict-of-laws situation.<sup>93</sup>

Other states have taken approaches similar to Arizona, although there are differences. The King County Bar Association (KCBA) in Washington state offered

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87. See, e.g., Peter St. Cyr, *Growing Pains: How Money Flows from a Nonprofit Cannabis Producer in Santa Fe to a For-Profit Arizona Company*, SANTA FE REP. (Apr. 6, 2016, 12:00 AM), <http://www.sfreporter.com/santafe/article-11802-growing-pains.html> (discussing one New Mexico cannabis producer’s business dealings with an Arizona for-profit company). Arizona and Colorado are particularly important for understanding the ethics problem because businesses may be able to obtain legal advice from out-of-state attorneys or through affiliated management companies, circumventing New Mexico legal ethics. Cf. Eric Mitchell Schumann, *Clearing the Smoke: The Ethics of Multistate Legal Practice for Recreational Marijuana Dispensaries*, 6 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 332, 357–58 (2016) (discussing the issue of attorneys being subject to discipline for violating rules of professional conduct in another jurisdiction).

88. See State Bar of Ariz. Comm. on the Rules of Prof’l Conduct, Op. 11-01 (2011), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

89. ARIZ. RULES OF PROF’L CONDUCT ER. 1.2(d) (2016).

90. Ariz. Op. 11-01 (quoting Memorandum from David W. Ogden to Selected U.S. Att’ys, *supra* note 75).

91. *Id.*

92. See *id.*

93. See *id.*

an ethics advisory opinion that differed from the Arizona opinion in several notable respects. The KCBA opinion, more than the Arizona opinion, based its rationale on principles of effectuating state law. The KCBA opinion noted the legal complexity of the new regulations and the need for lawyers to effectuate state action.<sup>94</sup> The opinion asserted that, “[i]n building this complex system, the voters of Washington could not have envisioned it working without attorneys.”<sup>95</sup> The reasoning of the KCBA opinion demonstrates the deference given not only to the state legislature, but also the voters who approved the regulation. The KCBA opinion also rejected the Arizona opinion’s reliance on the fact that the Arizona law had not been preempted.<sup>96</sup> The KCBA found the lack of preemption largely irrelevant because federal law still enjoys full force throughout Arizona regardless of state law—in other words, state law does not weaken federal law.<sup>97</sup> The KCBA also pointed out that attorney discipline is a state-based regime and should be interpreted to give force to state law.<sup>98</sup> The opinion argued that the state has “no legitimate interest in disciplining attorneys who operate within the confines of [the regulatory regime].”<sup>99</sup>

The New York State Bar Association added different dimensions to the analysis. The New York Bar concluded that lawyers may provide legal assistance beyond merely discussing the legality of the client’s conduct.<sup>100</sup> In its analysis, the New York opinion drew attention to Rule 8.4(b)<sup>101</sup> which states that a lawyer shall not “engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer.”<sup>102</sup> The New York opinion found that attorney conduct in furtherance of the state medical marijuana regime did not reflect adversely on the attorney’s honesty, trustworthiness, or fitness as a lawyer.<sup>103</sup> Unlike the other ethics opinions, the New York opinion made a distinction that the legal assistance in furtherance of the state’s medical marijuana act was not intended “to escape law enforcement by avoiding detection.”<sup>104</sup> Like the other opinions, the New York opinion emphasized the importance of effectuating state law,<sup>105</sup> that state ethics rules

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94. See King Cty. Bar Ass’n, KCBA Ethics Advisory Op. on I-502 & Rules of Prof’l Conduct (2013), [http://www.kcba.org/judicial/legislative/pdf/i502\\_ethics\\_advisory\\_opinion\\_october\\_2013.pdf](http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf).

95. *Id.*

96. *Id.* at n.17.

97. *Id.* This may be based on a misinterpretation of the Arizona opinion. The KCBA opinion seems to interpret the Arizona opinion to mean that the Arizona statute weakens federal law. The Arizona opinion asserts that if the Arizona law were invalidated or preempted there may be no legitimate basis for lawyers to assist medical marijuana producers. In other words, there would be no legitimate state law for lawyers to effectuate. See Ariz. Op. 11-01.

98. See KCBA Ethics Advisory Op. on I-502 & Rules of Prof’l Conduct.

99. *Id.*

100. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1024 (2014), <http://www.nysba.org/CustomTemplates/Content.aspx?id=52179>.

101. *Id.*

102. N.Y. RULES OF PROF’L CONDUCT r. 8.4(b) (2013); see also Rule 16-804(B) NMRA; MODEL RULES OF PROF’L CONDUCT r. 8.4(b) (AM. BAR ASS’N 2016).

103. See N.Y. Op. 1024 at n.8.

104. *Id.*

105. See *id.* (“Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy.”).

should be construed to promote effective interpretation of state law,<sup>106</sup> and that the federal lack of enforcement bears upon whether assistance is ethically permissible.<sup>107</sup>

(2) *Assistance is Not Permitted*

In 2010, the Maine Bar Association concluded that attorney assistance of medical marijuana businesses is ethically impermissible.<sup>108</sup> The opinion states that “the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not.”<sup>109</sup> The opinion did not substantively analyze the public policy arguments for allowing lawyers to assist medical marijuana businesses.<sup>110</sup> The opinion, on the contrary, suggested that clients may use the guise of state law for “more lucrative ventures.”<sup>111</sup> The Maine Bar Association opined differently in 2016. On May 4, 2016, the Maine Bar Association released another advisory ethics opinion that endorsed a different approach.<sup>112</sup> The commission stated that they revisited the opinion “to offer additional guidance to individuals and entities seeking legal advice to assist them in navigating the statutory and regulatory structure posed by the Maine legislation.”<sup>113</sup> The 2016 opinion considered a number of states that have carved exceptions in their rules of professional conduct for lawyers who assist medical marijuana businesses pursuant to state law.<sup>114</sup> Without much reasoning, the Maine Bar Association recommended an amendment to the Maine Rules of Professional Conduct to allow attorney assistance of medical marijuana businesses.<sup>115</sup> The 2016 opinion still included a caveat that the opinion may change if federal enforcement policy changes.<sup>116</sup>

Ohio has taken a hardline approach to the ethics of assisting medical marijuana businesses. The Ohio opinion’s analysis did not extend far beyond the fact that marijuana is illegal under federal law and lawyers may not knowingly assist illegal conduct.<sup>117</sup> The Ohio opinion emphasized that Rule 1.2<sup>118</sup> “embodies a lawyer’s important role in promoting compliance with the law by providing legal

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106. *See id.* (“In general, state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation.”).

107. *See id.* (“In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law . . .”).

108. Me. Bd. of Overseers of the Bar Prof’l Ethics Comm., Op. 199 (2010), [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=110134](http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134).

109. *Id.*

110. *See id.*

111. *Id.* This concern mirrors the concerns presented in the 2009 Department of Justice memorandum on medical marijuana enforcement. *See* Memorandum from David W. Ogden to Selected U.S. Att’ys, *supra* note 75.

112. *See* Me. Bd. of Overseers of the Bar Prof’l Ethics Comm., Op. 214 (2016), [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=683190](http://www.mebaroverseers.org/attorney_services/opinion.html?id=683190).

113. *Id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See* Supreme Court of Ohio Bd. of Prof’l Conduct, Op. 2016-6, [https://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2016/Op\\_16-006.pdf](https://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2016/Op_16-006.pdf).

118. OHIO RULES OF PROF’L CONDUCT r. 1.2(d)(1) (2016).

advice and assistance in structuring clients' conduct in accordance with the law."<sup>119</sup> The Ohio opinion laid out an extensive list of what constitutes impermissible assistance. This list included negotiating contracts, corporate entity formation, and even property transactions with medical marijuana businesses.<sup>120</sup> The opinion stated that the Supreme Court of Ohio may amend the rules to allow for the conduct.<sup>121</sup> In September 2016, the Ohio Rules of Professional Conduct were amended to include an exception for assisting medical marijuana businesses.<sup>122</sup>

The State Bar of Colorado issued an advisory ethics opinion in 2013 that discussed permissible activities as a "spectrum" of conduct.<sup>123</sup> The opinion stated that lawyers may assist clients in dealing with past activities and lawyers may advise clients as to the legal implications of their actions.<sup>124</sup> The opinion acknowledged that the plain language of the rule would forbid lawyers from assisting medical marijuana businesses with conduct illegal under federal law.<sup>125</sup> The Colorado opinion recognized the public policy benefits noting that "[l]aw-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs."<sup>126</sup> Nevertheless, the Colorado opinion noted that the plain language of the rule prohibited assistance.<sup>127</sup> Colorado eventually adopted an amendment to their rules of professional conduct that permits lawyer assistance of marijuana businesses.<sup>128</sup>

### C. Framework for Analyzing the Ethics Problem

This framework begins with the presumption that attorney ethics should be tailored to a specific state's public policy. Each state has its own code of professional conduct. State codes often differ, at least in some respect, from the model ABA rules.<sup>129</sup> Legal ethics is not a one-size-fits-all endeavor. Each state has its own history of attorney discipline that provides insight into the contours of what that state values in terms of attorney ethics.

Attorney discipline is a state-based system.<sup>130</sup> Regulation of lawyers has historically been state-based, and basic regulations (such as admittance to the bar)

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119. Ohio Op. 2016-6.

120. *See id.*

121. *See id.*

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

123. Colo. Bar Ass'n Ethics Comm., Formal Op. 125 (2013), [http://www.cba.cobar.org/tcl/tcl\\_articles.cfm?articleid=8370](http://www.cba.cobar.org/tcl/tcl_articles.cfm?articleid=8370).

124. *See id.*

125. *See id.*

126. *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

127. *See id.*

128. *See* COLO. RULES OF PROF'L CONDUCT r. 1.2 cmt. 14 (2016). The Colorado federal courts declined to adopt comment 14 and continue to emphasize that lawyers may not assist marijuana businesses. D.C.COLO.L.ATT'Y R. 2(b)(2) (2014).

129. *See, e.g.*, Rule 16-102(D) NMRA (differing from the Model Rules of Professional Conduct in its requirement to avoid counseling clients to engage in conduct that will mislead the tribunal).

130. *See* HAZARD, *supra* note 13 ("The development and legalization of rules of professional conduct . . . has been a story that was largely played out at the state level.").

have been state-controlled.<sup>131</sup> Federal courts and agencies necessarily play a “secondary role” in the regulation of lawyers.<sup>132</sup> Federal courts generally borrow from state codes of conduct and abide by state court guidelines for admission to the bar.<sup>133</sup> While federal courts have inherent power to discipline attorneys, courts generally borrow from state codes of conduct in making their determinations.<sup>134</sup> Given the state-based nature of attorney discipline, it is unusual that many states chose to defer to federal law to determine their application of attorney discipline.<sup>135</sup>

When state law conflicts with federal law, the states still have the power to choose how to apply their codes of ethics to attorneys. In the case of medical marijuana, the ethics opinions of different states have implicitly laid out several factors when interpreting their code of professional conduct: (1) the role of the attorney in the legal system; (2) level of conflict with federal law; (3) public policy concerns, including the practical need for attorney assistance to effectuate state law. Applying these factors is a more comprehensive and systematic approach for analyzing the ethics problem.

The first factor is the role of the attorney in the legal system. How a particular jurisdiction views the role of an attorney is crucial to interpreting the jurisdiction’s rules of professional conduct. The ethics opinions emphasized two different viewpoints on the role of an attorney. One viewpoint emphasized that attorneys must uphold the law.<sup>136</sup> This classic viewpoint aims to maintain public faith in lawyers and the legal system.<sup>137</sup> Another viewpoint asserts that the role of attorneys is to effectuate the laws of the state.<sup>138</sup> The goal here is to ensure public confidence in lawyers and the legal system by ensuring that attorneys help the public navigate the laws that they have created.<sup>139</sup> It is possible to hold both viewpoints, but acknowledge that one holds more importance than the other.<sup>140</sup> The ethics culture in

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131. *See id.*

132. *Id.*

133. *See id.*

134. *See id.*

135. Several states eventually amended their rules of professional conduct in response. *See, e.g.*, COLO. RULES OF PROF’L CONDUCT r. 1.2 cmt. 14 (2016). New Mexico presents a peculiar problem because the New Mexico Supreme Court rejected an amendment to the Rules of Professional Conduct that would have allowed attorney assistance of medical marijuana businesses pursuant to the Compassionate Use Act. *See* State Bar of N.M. Ethics Advisory Comm., Formal Op. 2016-01 n.1, <http://www.nmbar.org/nmbardocs/formembers/eao/2016-01.pdf>.

136. *See, e.g.*, Supreme Court of Ohio Bd. of Prof’l Conduct, Op. 2016-6, [https://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2016/Op\\_16-006.pdf](https://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2016/Op_16-006.pdf).

137. *See, e.g.*, *In re Key*, 2005-NMSC-014, ¶ 8, 113 P.3d 340 (“The public cannot be expected to have respect for our system of justice if we permit the officers of our courts to violate the very laws they are sworn to uphold and upon which they advise and counsel others to comply.” (quoting *In re Cox*, 1994-NMSC-054, ¶ 8, 874 P.2d 783)).

138. *See, e.g.*, State Bar of Ariz. Comm. on the Rules of Prof’l Conduct, Op. 11-01 (2011), <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.

139. *See, e.g.*, Colo. Bar Ass’n Ethics Comm., Formal Op. 125 (2013), [http://www.cba.cobar.org/tcl/tcl\\_articles.cfm?articleid=8370](http://www.cba.cobar.org/tcl/tcl_articles.cfm?articleid=8370) (arguing that the public must be able to turn to lawyers to understand the ever-shifting law).

140. *See, e.g.*, King Cty. Bar Ass’n., KCBA Ethics Advisory Op. on I-502 & Rules of Prof’l Conduct (2013), [http://www.kcba.org/judicial/legislative/pdf/i502\\_ethics\\_advisory\\_opinion\\_october\\_2013.pdf](http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf)

some jurisdictions may emphasize the importance of the rule of law, in which case deference must be given to the federal law and the Controlled Substance Act. However, if a jurisdiction finds the need for legal guidance more compelling than respecting the federal law may be less important. It is possible to promote both goals, but at some point they become mutually exclusive when it comes to the ethics of medical marijuana representation.

The second factor to consider is the level of conflict with federal law. Two fundamental goals of attorney ethics are to maintain public confidence in the legal system and to protect the public.<sup>141</sup> If attorneys are allowed to openly defy federal law, such actions may undermine public confidence in the rule of law. However, if there is little conflict with federal law then there may be minimal damage to public confidence in the legal system. Several of the ethics opinions implied that the reason they permitted assistance of medical marijuana businesses was because the actual conflict with federal law is minimal.<sup>142</sup> The Arizona opinion noted that there was no preemption of the state law—assistance of medical marijuana businesses was permissible because there is a legitimate state law, which lawyers can effectuate.<sup>143</sup> Unless federal policy changes, the federal government does not strictly enforce the law against medical marijuana businesses operating in the bounds of state law.<sup>144</sup> The Cole Memorandum noted that federal enforcement priorities concern violence in the marijuana business and large, interstate, for-profit operations.<sup>145</sup> Congress also passed a spending bill with an amendment that restricted the use of federal funds for enforcement of the federal ban on growing or selling marijuana in states that have legalized medical marijuana.<sup>146</sup> The position of the federal judiciary may vary, but in Colorado the district courts disapproved of assistance of medical marijuana businesses.<sup>147</sup> This information is all useful to consider when applying the second factor.

The third and final factor is public policy concerns. If the rules of attorney ethics create absurd scenarios, frustrate the public, or impede the growth of business, such outcomes certainly will not help the administration of justice or public confidence in the legal system. It has already been acknowledged that application of the ethics rules may limit access to attorneys.<sup>148</sup> People have already suffered adverse legal outcomes because of the conflict between state and federal law.<sup>149</sup> Attorney advice, or assistance, may have been able to better guide the parties. Disallowing attorney assistance of medical marijuana businesses may ultimately reflect

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(acknowledging that a plain reading of the rule of ethics forbids attorney assistance, but deciding to ultimately allow such assistance).

141. See *In re Key*, 2005-NMSC-014, ¶ 8, 113 P.3d 340 (quoting *In re Cox*, 1994-NMSC-054, ¶ 8); see also MODEL RULES OF PROF'L CONDUCT preamble (AM. BAR ASS'N 2016).

142. See, e.g., Ariz. Op. 11-01 (noting the current lack of federal enforcement and that the conclusion may differ if the status quo changed).

143. See *id.*

144. See Memorandum from James M. Cole to all U.S. Att'ys, *supra* note 18.

145. See *id.* Federal enforcement priorities under the Trump administration may not be much different. See Memorandum from Jefferson B. Sessions to Head of Dep't Component U.S. Atty's, *supra* note 17.

146. See Berman, *supra* note 21.

147. See D.C.COLO.LATT'Y R. 2(b)(2) (2014).

148. See Chemerinsky et al., *supra* note 1, at 97.

149. See *id.* at 96–97.

negatively on the administration of justice and faith in the legal system. It is at least another factor to consider when interpreting a jurisdiction's rules of ethics.

A particular jurisdiction's values can be inferred from their rules of ethics, disciplinary decisions, and other factors. The following section will apply this framework in the unique legal environment of New Mexico. In applying the framework, the analysis will consider New Mexico's disciplinary decisions, its rules of professional conduct, and other relevant evidence.

#### D. Application to New Mexico

##### (1) Role of the Attorney

The New Mexico Supreme Court clearly stated its view on the role of attorneys and attorney discipline in *In re Key*. The court stated, "the ultimate purpose of attorney discipline is the protection of the public."<sup>150</sup> The court also noted that:

The purpose of attorney discipline is not solely to protect clients from being harmed by their attorneys, but also to protect the profession and the administration of justice. The public cannot be expected to have respect for our system of justice if we permit the officers of our courts to violate the very laws they are sworn to uphold and upon which they advise and counsel others to comply.<sup>151</sup>

The New Mexico Creed of Professional Conduct notes that attorneys swear to "be mindful of [their] commitment to the public good" and "commit to the goals of the legal profession . . . [their] responsibilities to public service, improvement of administration of justice, [and] civic influence. . . ." <sup>152</sup>

Clearly, New Mexico exhibits a preference for the viewpoint that attorneys must uphold the law. The Creed of Professionalism shows that New Mexico places some value in the viewpoint that attorneys must effectuate the law. It is difficult to overlook the clear statement in *In re Key*—New Mexico clearly gives more weight to the viewpoint that attorneys must uphold the law.<sup>153</sup>

On the one hand, New Mexico courts imply that the very basis of the justice system is the rule of law and that attorneys must abide by the laws they are sworn to uphold. The underlying argument addresses public confidence in attorneys and the justice system. Unfortunately, in this case, the laws that many state attorneys are sworn to uphold are in conflict. Assisting businesses in compliance with state law could promote, rather than undermine, "the administration of justice." Assisting clients in conduct that violates federal law may run contrary to the administration of federal justice. To complicate matters, some attorneys may exclusively practice federal law in New Mexico (e.g. federal tax law). It would be nonsensical to allow attorneys who only practice under the federal bar to assist in violating federal law.

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150. *In re Key*, 2005-NMSC-014, ¶ 8, 113 P.3d 340.

151. *Id.* (quoting *In re Cox*, 1994-NMSC-054, ¶ 8, 874 P.2d 783).

152. *Creed of Professionalism*, STATE BAR OF N.M., [http://www.nmbar.org/Nmstatebar/For\\_Members/Creed\\_of\\_Professionalism.aspx](http://www.nmbar.org/Nmstatebar/For_Members/Creed_of_Professionalism.aspx) (last visited Feb. 28, 2017).

153. *Cf.* Rule 16-102(D) NMRA (demonstrating a value and respect for the rule of law by explicitly forbidding conduct that misleads the tribunal).

That would be a clear example of attorneys violating the laws they are sworn to uphold.

Either approach has implications for public confidence in the legal system. However, the New Mexico Supreme Court has expressed a clear preference for upholding the rule of law. That means all laws, including federal law.<sup>154</sup> This factor weighs in favor of not allowing attorneys to assist medical marijuana businesses.

*(2) Level of Conflict with Federal Law*

The New Mexico medical marijuana regulatory regime minimally conflicts with federal law. As noted earlier, the executive branch has redirected enforcement away from tightly-regulated state medical marijuana systems.<sup>155</sup> In addition, Congress has limited enforcement against medical marijuana businesses.<sup>156</sup> The Justice Department memoranda laid out enforcement objectives which included prevention of violence, restricting affiliated organized crime, and other objectives.<sup>157</sup> The 2013 memorandum specifically cautioned against large, for-profit marijuana businesses and suggested enforcement may occur against such entities.<sup>158</sup> The New Mexico scheme requires corporate marijuana producers to be non-profit entities.<sup>159</sup> In addition, the New Mexico system is tightly regulated.<sup>160</sup> New Mexico's system falls far away from violating the federal enforcement priorities. For-profit management companies,<sup>161</sup> and their affiliation with the New Mexico regulatory scheme, may begin to threaten federal enforcement priorities. For the most part the New Mexico system, and presumably lawyers who assist that system, may not directly conflict with federal enforcement priorities.

Attorney assistance of medical marijuana businesses may violate federal law, and thus violate the New Mexico rules of ethics.<sup>162</sup> Considering the facts mentioned above, it may be a technical violation of federal law. It is facially true that the rules of ethics do not distinguish between laws that are enforced and laws that are not enforced. But not all laws carry equal weight, and not all laws carry equal weight regarding attorney discipline.<sup>163</sup> For example, attorneys may "engage in" the illegal conduct of driving over the speed limit. While a consistent pattern of such disregard for the law may warrant discipline, such violations may go largely untouched. In contrast, an attorney assisting in tax fraud is a much more serious issue

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154. This inference is bolstered by the fact that the New Mexico Supreme Court rejected an amendment to the New Mexico Rules of Professional Conduct which would allow representation of marijuana businesses. See State Bar of N.M. Ethics Advisory Comm., Formal Op. 2016-01 n.1, <http://www.nmbar.org/nmbardocs/formembers/eao/2016-01.pdf>.

155. See Memorandum from James M. Cole to all U.S. Att'ys, *supra* note 18; Memorandum from David W. Ogden to Selected U.S. Att'ys, *supra* note 75.

156. See Berman, *supra* note 21.

157. See Memorandum from James M. Cole to all U.S. Att'ys, *supra* note 18.

158. See *id.*

159. See N.M. CODE R. § 7.34.4.8(A)(2) (2015).

160. See generally N.M. STAT. ANN. §§ 26-2B-1 to -7 (2007).

161. See generally Uyttebrouck, *supra* note 51 (describing the relationship between for-profit companies and medical marijuana producers).

162. See Rule 16-102(D) NMRA.

163. See Comment 2 to Rule 16-804 NMRA (punishing criminal acts which reflect only on an attorney's fitness to practice law).

that warrants more serious discipline.<sup>164</sup> The rules of ethics do distinguish seriousness of conduct for attorney discipline.<sup>165</sup> New Mexico Rule 16-804 draws a distinction between criminal misconduct and professional misconduct. Comment 2 on the rule states “[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”<sup>166</sup> The principles of Rule 16-804 can be applied to this situation.<sup>167</sup> Attorneys may be engaging in conduct that assists in violation of federal law, but that does not necessarily reflect adversely on an attorney’s fitness to practice law. The federal enforcement apathy does not go to the legality or illegality of the attorney assistance, but it does go to the seriousness of such conduct.

The New Mexico Supreme Court’s disciplinary opinions tend to admonish serious misconduct, especially concerning honesty and candor. New Mexico Rule 16-102(D) differs from the model rule in that it implores attorneys to avoid conduct that is misleading to the tribunal.<sup>168</sup> This emphasis is reflected in some of New Mexico’s disciplinary decisions. For example, in *In re Michele Estrada* the court admonished a lawyer that presented a forgery into evidence through lack of diligence.<sup>169</sup> The court emphasized the duty in New Mexico not to engage in conduct that misleads the court.<sup>170</sup> In the case of *In re Chavez* the court issued a public censure and suspension, admonishing the dishonesty of a lawyer who engaged in a pattern of misrepresentations to the court.<sup>171</sup> The court stated:

[a]ttorneys are officers of the court, and our system of justice works only if the courts can rely on attorneys to fulfill their duty of candor to the tribunal. Respondent must fulfill his obligation to exhibit the personal honesty and integrity expected of lawyers and to refrain from dishonesty and other conduct prejudicial to the administration of justice.<sup>172</sup>

Considering the New Mexico Supreme Court’s disciplinary decisions, the federal enforcement climate, and the New Mexico regulatory scheme, lawyer assistance of medical marijuana businesses may not be sufficiently serious to warrant discipline. Lawyers intend to assist clients with conduct that is legal under state law. This conduct generally would not involve assistance in avoiding federal criminal liability, but rather it would involve complying with the complex state regulation. As the New York ethics opinion notes, lawyers do not aim to conceal their conduct and

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164. See, e.g., *In re Key*, 2005-NMSC-014, ¶¶ 8–9, 113 P.3d 340.

165. See Comment 2 to Rule 16-804 NMRA.

166. *Id.*

167. But see N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1024 n.8 (2014), <http://www.nysba.org/CustomTemplates/Content.aspx?id=52179> (suggesting an analysis under Rule 8.4 is inapplicable).

168. Compare Rule 16-102(D) NMRA with MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (2016).

169. *In re Estrada*, 2006-NMSC-047, ¶¶ 2–3, 143 P.3d 731.

170. See *id.* ¶ 22.

171. *In re Chavez*, 2013-NMSC-008, ¶¶ 1, 8, 299 P.3d 403.

172. *Id.* ¶ 26 (citation omitted).

avoid federal law.<sup>173</sup> This type of conduct does not implicate dishonesty or avoidance of the law. It does not appear to be the serious type of conduct that the New Mexico Supreme Court typically admonishes.<sup>174</sup> This factor falls in favor of allowing attorneys to assist medical marijuana businesses. However, this conclusion may easily change if federal enforcement policy changes—in that case there may be a greater conflict between state practice and federal law.

### (3) Public Policy Concerns

The most compelling reason to allow lawyers in New Mexico to assist medical marijuana businesses is public policy concerns. The Compassionate Use Act is a complex legal instrument with an even more complex administrative scaffolding. It is unreasonable to ask legitimate businesses to navigate these legal conundrums without the assistance of an attorney. New Mexico's administrative system makes this argument particularly compelling. As per regulation, medical marijuana businesses must operate as non-profit entities.<sup>175</sup> There is a great public interest in allowing attorneys to assist non-profit businesses that provide medicine to over seventy-thousand patients<sup>176</sup> in New Mexico.

Medical marijuana businesses may find legal representation anyway.<sup>177</sup> Attorneys in New Mexico may affiliate with out-of-state attorneys who may ethically perform the work New Mexico attorneys are unable to perform. This could drive some legal business out of state. Some attorneys in New Mexico may assist clients regardless of the dubious ethics. There is still a question of disciplinary enforcement. Although the opinion is new, there have been no recorded cases in New Mexico of disciplinary proceedings based on assisting medical marijuana businesses. In fact, across the nation there have been no recorded cases of attorney discipline for attorneys assisting medical marijuana businesses pursuant to state law.<sup>178</sup>

There is a significant potential for abuse in the reporting process. Medical marijuana businesses touch upon property law, administrative law, tax law, business transactions, contract law, and much more. Each attorney has the duty to report if another attorney is violating the rules of professional conduct by “assisting” medical marijuana businesses.<sup>179</sup> Attorneys may also be reported for failing to report misconduct.<sup>180</sup> If out-of-state attorneys assist medical marijuana businesses in complying with New Mexico law there could be accusations of unauthorized practice of law.<sup>181</sup> Depending upon an attorney's level of involvement with medical

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173. See N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1024 (2014), <http://www.nysba.org/CustomTemplates/Content.aspx?id=52179>.

174. This analysis is complicated by the fact that the New Mexico Supreme Court did not adopt a proposed rule that would carve an exception in the rules of ethics for assistance of medical marijuana businesses pursuant to state law. See State Bar of N.M. Ethics Advisory Comm., Formal Op. 2016-01 n.1, [http://www.nmbar.org/NmbarDocs/PubRes/BB/2016/BB\\_2016-08-10.pdf](http://www.nmbar.org/NmbarDocs/PubRes/BB/2016/BB_2016-08-10.pdf).

175. See N.M. CODE R. § 7.34.4.8(A)(2) (2015).

176. See Memorandum from Kenny Vigil to Licensed Non-Profit Producers, *supra* note 53.

177. See Schumann, *supra* note 87, at 357–58.

178. *Id.* at 355.

179. *Cf.* Rule 16-803(A) NMRA.

180. See Comment 3 to Rule 16-803(A) NMRA.

181. See Schumann, *supra* note 87, at 357–58.

marijuana businesses, there also could be accusations that an attorney's conduct is "prejudicial to the administration of justice" in violation of Rule 16-804.<sup>182</sup> There is simultaneously a potential lack enforcement problem and the prospect of overzealous enforcement.

Allowing assistance of medical marijuana businesses may spark its own public policy concerns. Lawyers in New Mexico who primarily practice federal law cannot be expected continually violate law in their sole area of practice. In Colorado, the federal district courts did not adopt the amendment to the Colorado Rules of Professional Conduct that allowed legal assistance of medical marijuana businesses.<sup>183</sup> Such conflict may undermine public confidence in the legal system. This public policy concern has the potential to affect any lawyer who assists medical marijuana businesses in both state courts and federal courts.<sup>184</sup>

The third factor of public policy concerns also falls in favor of New Mexico permitting attorney assistance of medical marijuana businesses. The New Mexico scheme is complex and it does not violate federal enforcement objectives. There is significant policy interest in assisting medical marijuana businesses in providing medicine for their patients. There are concerns regarding the encroaching for-profit businesses and the potential conflict with the federal district court. However, these concerns do not defeat the significant policy interest of effectuating New Mexico's state law.

### CONCLUSION

When state and federal law conflict, states must decide how their system of ethics will approach the problem. The best way for states to do this is to determine how they view the role of attorneys, the level of conflict between state law and federal law, and the overriding public policy concerns that inevitably arise from each course of action. This systematic examination of ethics values and policy values provides a coherent and consistent approach to the ethics conundrum. In the case of New Mexico, the factors indicate that New Mexico should reconsider its current approach. New Mexico values attorneys upholding the rule of law, including federal drug law. However, New Mexico's regulatory system for medical marijuana minimally conflicts with federal law and there are substantial public policy considerations in favor of allowing attorneys to assist medical marijuana businesses. New Mexico should take a second look at its ethics advisory opinion, and it should reconsider its current approach to the ethical conundrum.

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182. See Rule 16-804(D) NMRA.

183. See D.C.COLO.L.ATT'Y R. 2(b)(2) (2014).

184. Commentators have suggested a cooperative federalism solution that would involve federal guidelines for state regulatory schemes in exchange for immunity from federal enforcement. See generally Chemerinsky et al., *supra* note 1. An analogous solution in the field of ethics may be worked out between federal district courts and state regulators.