COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On May 3, 2013
(Thirty-fifth Meeting of the Full Committee)

The thirty-fifth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:05 a.m. on Friday, May 3, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Judicial Center.

Present in person at the meeting, in addition to Marcy G. Glenn and Justices Nathan B. Coats and Monica M. Márquez, were Michael H. Berger, Nancy L. Cohen, James C. Coyle, Thomas E. Downey, Jr., John M. Haried, David C. Little, Christine A. Markman, Cecil E. Morris, Jr., Neeti Pawar, Judge Ruthanne Polidori, H. Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, James S. Sudler III, Anthony van Westrum, Eli Wald, Judge John R. Webb. Present by conference telephone were Federico C. Alvarez, Gary B. Blum, David W. Stark, Boston H. Stanton, Jr., and E. Tuck Young. Excused from attendance were Cynthia F. Covell and Lisa M. Wayne. Also absent were Helen E. Berkman and Judge William R. Lucero.

Also present was Judge Daniel M. Taubman, of the Colorado Court of Appeals, representing the Colorado Bar Association Ethics Committee as its chairman, and Larry W. Berkowitz, another member of that ethics committee.

I. *Meeting Materials; Minutes of February 1, 2013 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-fourth meeting of the Committee, held on February 1, 2013. Those minutes were approved as submitted.

II. *ABA Model Rules Changes.*

At the Chair's request, Michael H. Berger reported that the subcommittee considering recent changes made by the American Bar Association to its model rules of professional conduct had met four times and had concluded its work; he was in the process of preparing the subcommittee's report to the whole Committee. He commented that the subcommittee would recommend that the Committee adopt most of the ABA's changes, although the subcommittee would "tweak" a few of them. Two of the ABA's changes would not be recommended for adoption in Colorado. Berger noted that the most controversial of the changes will be for a complete revamping of Rule 4.4's requirements regarding inadvertently-sent communications.

The Chair indicated that, at the Committee's next meeting, the report of the subcommittee considering revisions to Rule 1.15 will have priority over the report of the subcommittee considering the ABA changes.

III. *Amendment of Rule 1.15.*

At the Chair's request, James S. Sudler III reported that the subcommittee considering revisions to Rule 1.15, including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts, had made great progress. He forecast that just one more meeting of the subcommittee would be needed to complete his work, and he hoped that the subcommittee would have a report on its work for a July 2013 meeting of the whole Committee.

IV. *Consideration of Rules Changes to Recognize Colorado Changes Regarding Marijuana Sale and Usage.*

At the Chair's request, Judge John R. Webb reported for the Amendment 64 subcommittee,[1] the subcommittee considering what, if any, changes might be made to the Rules of Professional Conduct to reflect that the Colorado Constitution has been changed to permit both medical[2] and recreational[3] use of marijuana. Webb reminded the Committee that the subcommittee's report had been included in the materials that the Chair had provided to the Committee in advance of this meeting.

The subcommittee included Ronald Nemirow, who is a member of the ethics committee of the Colorado Bar Association but not of the Committee. Nemirow was not able to attend this meeting of the Committee, but Webb introduced Judge Daniel M. Taubman, who, as the current chair of that ethics committee, was in attendance at this meeting to give to the Committee the view of that ethics committee on the need for modifications to the professional conduct rules in recognition of the modification of Colorado law regarding marijuana use and commerce.

Webb reported that the Office of Attorney Regulation Counsel had chosen to provide its own memorandum to the Committee,[4] in which it opposed the recommendations that the subcommittee proposes. The subcommittee received that memorandum only shortly in advance of this meeting of the Committee, but it was received in time for mention in the subcommittee's report; Webb indicated it would be referred to in the course of his report, for added perspective.

Webb pointed out the fundamental truth that any activity permitted by Colorado law with respect to marijuana use and commerce remains unlawful under Federal law. That presents two dilemmas: First, personal marijuana use by a lawyer, whether medicinally or recreationally, might be deemed to be violative of Rule 8.4(b), which provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Second, representing clients with respect to marijuana activities, whether as to commerce or personal use, might be deemed to constitute a violation of Rule 1.2(d) — "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal . . . ."

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1. As stated in the minutes of the Thirty-Fourth Meeting of the Committee, on February 1, 2013, the Committee "determined to form a subcommittee to consider such issues relating to the legalization of marijuana in Colorado as the subcommittee chooses to consider."

2. Colorado Constitution, Art. 18, § 14, added by initiative November 7, 2000, effective December 28, 2000.

3. Colorado Constitution, Art. 18, § 16, added by initiative November 6, 2012, effective upon the proclamation of the governor, December 10, 2012.

4. The memorandum of the Office of Attorney Regulation Counsel is contained at p. 102 of the materials that were provided to the Committee in advance of this meeting.

The existence of these two dilemmas creates what Webb characterized as a "chilling effect" on lawyers' conduct. The extent of that effect is unmeasurable, but lawyers are by nature cautious and will surely consider their risk of professional discipline before using marijuana themselves, notwithstanding that all persons aged twenty-one years or older may now use marijuana in accordance with the 2012 amendment of the Colorado Constitution. The mere issuance of the OARC's memorandum in opposition to the subcommittee's proposals will certainly chill lawyers' willingness to give counsel and advice to clients regarding marijuana use and commerce, Webb said.

The subcommittee has made two recommendations. One focuses on the issue of personal marijuana use by lawyers — the Rule 8.4(d) issue. Webb note that the OARC's memorandum states its disapproval of such use but maintains that the OARC will not use its authority to discipline for such use. Webb found that position to be puzzling.

The subcommittee's proposal regarding personal use of marijuana is found on page 12 of its report. The proposal is not to amend the text of Rule 8.4 but to add a Comment [2A] to the rule, to read as follows:

> [2A] Conduct of a lawyer that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. This comment specifically addresses two constitutional amendments: Article XVIII. Miscellaneous,§ 14. Medical use of marijuana for persons suffering from debilitating medical conditions, and Article XVIII. Miscellaneous,§ 16. Personal use and regulation of marijuana. The phrase "solely because" clarifies that a lawyer's use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. See Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

That comment, Webb noted, utilizes the existing terminology — the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects — of Rule 8.4(b), which already recognizes that some criminal offenses *do not* reflect adversely on a lawyer's fitness to practice law.

Webb pointed out that the proposed comment reflects the view of the CBA Ethics Committee, as expressed in its Formal Opinion № 124 (issued April 23, 2012, before the adoption of the second constitutional amendment) regarding a lawyer's personal use of marijuana for medical purposes, as permitted by the amendment to the Colorado Constitution in 2000. And Webb noted that the OARC's memorandum indicates that the OARC finds that opinion "well-reasoned." The subcommittee believes that its recommendation is in line with the CBA committee's opinion.

Webb explained that — by its recognition that a lawyer's engaging in conduct which the Colorado Constitution makes lawful ["permitted," in the words of the proposed comment] or makes not subject to Colorado prosecution does not adversely reflect on a lawyer's fitness — the subcommittee's proposed Comment [2A] to Rule 8.4 resolves the "fitness" issue that is raised by a lawyer's conduct involving marijuana that is thus protected. But there are two caveats contained in the comment, he noted: The "solely because" caveat is an acknowledgment that the lawyer's use of marijuana may lead to other conduct that itself implicates other rules, such as Rule 1.1's requirement of competency or Rule 1.2's requirement of diligence, in a representation. The "standing alone" caveat, as explained in proposed Comment [2] to proposed Rule 8.6 [discussed below], is a warning that a lawyer's conduct involving marijuana may be combined with other conduct that is not protected by the Colorado Constitution and is otherwise violative of law.

In addition to the subcommittee's proposal for the addition of Comment [2A] to Rule 8.4 is its proposal for a new rule, Rule 8.6. Webb noted that the subcommittee had reviewed the very scholarly work of Prof. Eli Wald,[5] in which "tweaking" of Rule 1.2 is recommended; but the subcommittee determined instead to propose the addition of Rule 8.6, which is similar in structure to proposed Comment [2A] to Rule 8.4 but covers not only the lawyer's personal conduct but also the lawyer's counseling or assisting a client regarding the client's conduct. As proposed in the subcommittee's report to the Committee, Rule 8.6 would read—

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

That new rule would be accompanied by two comments, one of which would parallel proposed Comment [2A] to Rule 8.4 in explaining the derivation of the rule from the marijuana amendments to the Colorado Constitution; that comment would read—

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

The second proposed comment to proposed Rule 8.6 would define the meaning of "standing alone" [which phrase is also used in proposed Comment [2A] to Rule 8.4 and to which Webb had previously referred to in his discussion of the proposed changes to Rule 8.4]. But Webb pointed out that a member of the Committee, who had not been a member of the subcommittee, had suggested, shortly before this meeting, that the language of the second comment match that of proposed Rule 8.6 itself — using, that is, the phrase "counsels or assists a client to engage in" in place of the phrase "advice to clients" that was contained in the subcommittee's original report. Accordingly, just before this meeting, the subcommittee had agreed that its proposed second comment to proposed Rule 8.6 would read—

> [2] The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer (1) personally engages in, or (2) counsels or assists a client to engage in, conduct that is permitted by the Colorado constitution and which also relates to conduct that contravenes federal laws other than those prohibiting possession or cultivation of marijuana.

—and the subcommittee had supplemented its report to reflect that change.

Webb characterized clause (2) of proposed Comment [2A] as being a cleaner indication of what is left open to discipline by the OARC when a lawyer's conduct includes that which is permitted by the Colorado Constitution but, at the same time, violates Federal law *other* than Federal law criminalizing the described marijuana activity — "possession or cultivation of marijuana."

Webb told the Committee that the OARC advised the subcommittee, at the outset of its work, that the OARC would take a contrary view to that which ultimately prevailed on the subcommittee [and those views were reflected in the OARC's memorandum to the Committee].

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5. Sam Kamin and Eli Wald, "Marijuana Lawyers: Outlaws or Crusaders?," Legal Studies Research Paper Nº 12-31, University of Denver Sturm College of Law. The paper is contained in the materials provided to the Committee in advance of the Thirty-fifth Meeting on May 5, 2013, beginning at p. 44 of the materials, and is available at http://ssrn.com/abstract=2131563. (Prof. Wald is a member of the Committee.)

At the Chair's request, James S. Sudler, who is both a member of the Committee and Chief Deputy Regulation Counsel for Colorado, responded to Webb's presentation of the subcommittee's report.

Sudler referred the members to page 102 of the meeting materials for a copy of the April 26, 2013. OARC memorandum. He began his comments by stating that the OARC has not prosecuted any case involving a lawyer's marijuana-related conduct that would be permitted by the Colorado Constitution; he pointed to the third page of the OARC's memorandum, in which it stated—

> 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. 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.

Sudler said the OARC does not consider personal use of small amounts of marijuana to be a fitness issue within the meaning of Rule 8.4(b); personal use simply has not attracted much attention, although "trafficking" has. Sudler added that, as the immediate-past Attorney Regulation Counsel, John S. Gleason, had said, the OARC would "follow the guidance of the People" as to a lawyer's personal use of marijuana.

But, Sudler added, the subcommittee's proposals would permit a lawyer not only to use marijuana but also to cultivate and sell marijuana. That was a much more substantial issue, one that is not fleshed out but is left largely unattended to in the subcommittee's proposals. The OARC questions whether a lawyer should be freed from discipline for that kind of activity, though it is proscribed by Federal law.

Sudler added that the OARC addresses each disciplinary case on its own terms; there is no "matrix" that is applied to its cases. He noted that this case-by-case approach was recently affirmed by the Colorado Supreme Court in *In re Attorney F*, in which the Court said, "As we have previously observed, 'individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases.'"[6]

Sudler referred to a recent opinion from the Connecticut Bar Association[7] that concluded that, when a lawyer considers giving advice to a client about how to comply with that state's medical marijuana licensing regulations, she must determine, under Rule 1.2(d), whether the particular legal service she would render would rise to the level of assistance in violating Federal law; the opinion notes 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 draw the line between permissible advice to clients about the Connecticut medical marijuana act and impermissible assistance to clients in conduct that violates Federal law. But, as Sudler put it, the problem is "what happens after that." He added that Prof. Wald dealt with that matter in great detail in the article to which reference had previously been made,[8] but, Sudler said, the professor's proposals do not work — the proposed distinction between knowing assistance and intentional assistance is unworkable. Referring again to *In re Attorney F*, Sudler said that, because the OARC proceeds case by case, substantial violations of the Federal marijuana laws

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6. In the Matter of Attorney F, 285 P.3d 322, 327 (Colo. 2012).

7. Connecticut Bar Ass'n Prof. Ethics Committee, Informal Opin. 2013-02 (2013).

8. *See* n. 4.

may still present disciplinary problems, and the OARC does not believe that the Court should adopt a rule that precludes that case-by-case approach.

But, Sudler concluded, if the Court does adopt something such as has been proposed by the subcommittee, the OARC will comply with the changed rules in its enforcement activities. It is, he said, a very vague situation.

The Chair asked Michael Berger, who was a member of the subcommittee, to make additional comments.

Berger responded to the Chair's request by saying that the subcommittee had carefully considered the OARC's views and respectfully rejected them. He characterized the essence of the OARC position to be that its prosecutorial discretion would be curtailed by adoption of the subcommittee's proposals. That, he said, would be true, but only to a very limited extent. The subcommittee considered, he said, the lawyer whose use of marijuana — for medical or recreational purposes — leads to incompetent representation or a failure of diligence. Obviously, he said, the OARC needs to be empowered to investigate and prosecute such a case, and the subcommittee's proposals would permit it to do so.

Berger characterized the subcommittee's proposals as a recognition that the constitutional amendments are expressions of the will of the people: The subcommittee's proposals merely provide that, if all the lawyer does is use marijuana in conformity with Colorado law — without, as Berger put it, "collateral consequences" — then the lawyer will not be subject to discipline. But in all other circumstances — Berger mentioned money laundering as an example, as does the subcommittee in its report[9] — the entire prosecutorial arsenal remains available to the OARC.

Berger pointed out that discretion is certainly necessary in any prosecutorial system, but that does not, he said, mean that all discretion is good. Discretion "at the margins" is not consistent with the rule of law; prosecutors must not be permitted to establish the law; he referred the members to the discussion of that point in the subcommittee's report.[10] Continuing, Berger said that no one would suggest that a prosecutor can use his discretion to define what is unlawful; and yet that, the subcommittee thinks, is what the OARC is seeking to do, notwithstanding the recent amendments to the Colorado Constitution. Yes, he said, there remains the large problem vis-à-vis the continued Federal criminalization of marijuana use, but there is nothing that this Committee, the OARC, or the Colorado Supreme Court can do about that. But one problem can be solved by rule changes, changes that would tell Colorado lawyers that, if they comply with the State Constitution and implementing law, the Colorado system will not come after them for that, for that which is specifically allowed by Colorado law.

For those reasons, Berger said, the majority on the subcommittee urged that the Committee adopt the majority's report and proposals.

Berger added: There are two positions expressed in the OARC memorandum to the Committee. One is, "We will adhere to the will of the people, as expressed in the constitutional amendments. " But,

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9. Subcommittee report, p. 8.

10. "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." Subcommittee Report, p. 8, citing, in n. 10, 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.").

any comfort that you might take from that position will be dissipated by the other position of the OARC, expressed in its memorandum, that its enforcement efforts must proceed case by case.[11]

The Chair then asked Judge Taubman to present the views of the Colorado Bar Association Ethics Committee.

Taubman began by pointing out that he was the current chair of that Ethics Committee and noting that at least eight prior chairs of that committee were present as members of the Supreme Court's Committee. He said that he would outline the deliberations of the CBA committee on marijuana issues for lawyers, particularly the issues presented under Rule 1.2(d) for lawyers giving legal advice about marijuana. Those are, he said, among the most difficult issues that the ethics committee has considered in the twenty years he has been a member of the committee.

The ethics committee was presented with at least four views: There was the view expressed in Prof. Wald's article,[12] concluding that a lawyer may, under the current Rules, advise about marijuana usage without violating Rule 1.2(b). There is the "more restrictive" approach advocated by Alexander R. Rothrock in his 2012 article on advising medical marijuana dispensaries.[13] Both of those articles, by esteemed members of the CBA Ethics Committee and of this Committee, are very well written, Taubman noted, and together they reflect the difficulty in finding agreement on the subject. Yet others say that Rule 1.2(d) will preclude a lawyer's representation of a client in virtually any marijuana matter. And the fourth view is that it is okay to provide representation involving only prior activity but that the possibility of providing representation as to future activity is limited at best — for example, representation in defense of past violations of a building lease by reason of marijuana sales would be permitted to the lawyer but negotiation of a new lease for a dispensary would be violative of Rule 1.2(d), for it would be assisting a client in conduct the lawyer knows is criminal under Federal law.

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11. The memorandum states—

> 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.

OARC memorandum to Committee, 4/26/13, p. 5 (p. 106 of materials provided to the members for this meeting). And, at memorandum p. 6:

> Some lawyers might be heavily involved in transactions which violate federal law. Once again, it is difficult to state categorically that attorneys involved in such situations would always be subject to discipline. The facts of each case are critical.

12. *See* n. 4.

13. Alec Rothrock, Is Assisting Medical Marijuana Dispensaries Hazardous to A Lawyer's Professional Health?, 89 DENV. U. L. REV. 1047 (2012) (attachment 6 to the subcommittee's report, at p. 90 of the meeting materials). Rothrock concludes, with respect to advising marijuana dispensaries, as follows:

> It is readily apparent that drawing lines between providing information, on one hand, and providing counseling or assistance, on the other, is largely a self-defeating exercise. There are a good many public policy reasons why Rule 1.2(d) should not smother lawyer assistance to clients in the medical marijuana industry, but these reasons do not change the plain wording of Rule 1.2(d). And, of course, Colorado Rule of Professional Conduct 1.2(d) is not interpreted one way for medical marijuana violations of federal law and another way for all other crimes. Lawyers who represent medical marijuana dispensaries in a business setting almost cannot help but violate the rule.

Id., at 1058.

The CBA Ethics Committee's members gave overwhelming approval for the submission of a letter by Taubman, as its chair, to the Committee urging that the Committee recommend the adoption of a rule that provided that an attorney would not be subject to discipline for providing advice to a client regarding conduct that is lawful under Colorado law.

Taubman said that, when it began its deliberations, the ethics committee had assumed that the issues would center around advising clients participating within the marijuana industry, such as leasing dispensary space. But over time, the committee came to realize that the issues are of broader scope. He cited as an example the recent Colorado court of appeals case concerning whether an employer might discharge an employee for marijuana use notwithstanding the decriminalization of such use under Colorado law.[14]

One arena in particular drew the ethics committee's interest, that of family law. Rule 1.2(d) provides, Taubman pointed out, that, while a lawyer may not "counsel or assist a client to engage in activity the lawyer knows to be criminal, the 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." So, what does this mean? How is it to be interpreted, say, in the context of a child custody issue in a dissolution of marriage case when one spouse holds a license to use marijuana for medical purposes? Multiply the complexity fifty-fold, Taubman said, when the marijuana usage in question is recreational. If the lawyer may not advise the client on that particular issue, may she represent the client in *any* aspect of the dissolution? Is reasonable unbundling of the lawyer's services possible?[15] If the lawyer may discuss the legal consequences, but may not "counsel or assist" in criminal activity, may the lawyer say, "But you know that the use of marijuana remains illegal under Federal law" and absolve his conundrum under Rule 1.2(d)? But the client already knows that his conduct remains illegal under Federal law. Does the lawyer's statement free the lawyer to go further and represent the client in the negotiation of the client's use of marijuana during child visitation or in some stated period before visitation begins? What if one spouse says there shall no use during visitation, the other asks for the right to use marijuana up to twelve hours before visitation begins, and the first spouse insists on a twenty-four hour no-use period before visitation? Is the lawyer now well beyond discussing consequences and into assisting in activity that would violate Federal law? Matters would be much clearer if the Rules provided guidance.

Taubman noted two comments that had been made by other judges. One of the judges serving on the CBA Ethics Committee was part of a small minority of that committee's members who were opposed to the CBA Ethics Committee issuing its Opinion № 124 regarding medical marijuana; she felt that the ethics committee could not speak effectively until Rule 1.2(d) was changed. Another judge and

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14. Coats v. Dish Network, L.L.C., 2013 COA 62, 2013 WL 1767846 (Colo.App. 2013):

> Thus, because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law, . . ., for an activity to be "lawful" in Colorado [within the meaning of the statute making it an unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises during nonworking hours], it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be "lawful" under the ordinary meaning of that term. Therefore, applying the plain and ordinary meaning, the term "lawful activity" . . . means that the activity—here, plaintiff's medical marijuana use—must comply with both state and federal law.

15. Rule 1.2(c):

> (c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

member of the ethics committee, Taubman recalled, offered this example of a real situation during the ethics committee deliberation about a further opinion dealing with recreational use of marijuana: The judge had been sitting on a criminal case; after the case was resolved, the prosecutor and defendant, in open court, discussed what might be done to avoid future prosecution; did this, he had asked the ethics committee, constitute a violation of the Rules? In short, Taubman said, judges across the state are facing these questions on a regular basis.

So, Rule changes are needed to address these problems, Taubman said. Other states have addressed at least the medical marijuana context and have come up with different answers under existing Rule 1.2(d), trying to put a square peg into a round hole, trying to solve a problem using a rule that simply was not crafted in contemplation of a dichotomy between state and Federal law. The Colorado constitutional amendments are "an experiment in democracy"; and, without modification of the Rules, "the Court risks leaving the conduct of that experiment to proceed without the assistance of Colorado lawyers." Those are, Taubman said, pertinent descriptions of the problem; he urged the Committee to propose Rule changes to the Court.

Following Taubman's remarks, the Chair said that she did not wish to cut off debate but wanted to approach the discussion in stages, the first being the determination of whether or not the members felt disposed to adopting *any* Rule changes, holding off for the moment any discussion of what those changes might be.

A member who was also a member of the CBA Ethics Committee said that she had been struck, during the ethics committee's discussions, with how many of its members were concerned about whether they could give advice to clients about marijuana usage or participation in the marijuana industry. Taubman had dealt with those issues as they might arise in a domestic relations practice, but they clearly are not limited to that context. Saying "I'm not going to advise you about that" leaves the citizenry having to figure out what to do without advice of counsel, because lawyers decline to advise in the face of disciplinary risk.

This member has a number of lawyers as her clients, lawyers who have asked whether they can even advise about medical marijuana usage. The best that can be said is, "You may get in trouble," but that is not helpful. After listening to the debate in the ethics committee meetings and reading the available literature, this member has concluded that lawyers need affirmation that they will not be disciplined for giving advice about activities that now are lawful under Colorado law. Surely the Federal authorities may yet pursue aiding and abetting charges against lawyers, but that is a different problem from the problem of licensure discipline; lawyers will have to figure that problem out separately. But, as to the discipline issue, Colorado lawyers need prompt assurance that they will not face discipline for advising clients about activities that are lawful under Colorado law; otherwise, citizens will be left to proceed on their own without representation.

James Coyle, who is Colorado Attorney Regulation Counsel and a member of the Committee, said that he appreciated all the work that had been done so far in this uncharted area. It has not been easy work. And, he said, he understands the concerns about the uncertainties about the likelihood of discipline, as had been expressed in the subcommittee's report. Clearly lawyers feel vulnerable. But this is not an issue about whether the OARC has unbridled discretion in prosecution; rather, it is a question of what message should be sent to the citizens of the state. Would this Committee be setting a position that the Court would be comfortable with by adoption of the subcommittee's proposals? Is it good policy to give this message to the public? The legal profession is a self-policing profession, as is stated in the

Preamble to the Rules.[16] Would the Committee really wish to change the Rules to excuse lawyers from legal limitations on their personal use of marijuana?

Coyle added that the changes proposed by the subcommittee would need to be accompanied by changes to C.R.C.P. Rule 251.1(a)[17]: Lawyers are charged with supporting the Constitution of the United States and with obedience to the laws. Coyle acknowledged that "we are in a state of flux," but the changes desired by the subcommittee would require a modification of C.R.C.P. 251.1 to say it is okay, nevertheless, for lawyers to violate Federal law. And other provisions of the Preamble to the Rules of Professional Conduct would also have to be changed, such as that which commands a respect for the rule of law and the maintenance of authority.[18] These kinds of additional changes would be required if those proposed by the subcommittee were adopted; the OARC does not, Coyle said, believe it is necessary to make the changes sought by the subcommittee.

Coyle admitted that he was not a constitutional law lawyer, but he said that all of these issues will come before the Court, and he asked whether the Committee was ready to constrict the Court's ability to deal with those cases as they arise, by altering these rules. Lawyers are a self-policing profession; what would the impact of the profession's changing these rule to sanction violations of Federal law by lawyers have on members of other professions?

A member responded to Coyle's comments by saying that, the way the member saw it, the proposal does not say that *any* conduct of a lawyer should be beyond the reach of discipline but only conduct falling within two particular categories: recreational or medical marijuana usage in conformity with Colorado law. But the most important aspect of the Rules of Professional Conduct are those permitting a lawyer to give advice to clients about conduct that is permitted by the law, in this case by

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16. Paragraph [10] of the Preamble to the Colorado Rules of Professional Conduct states—

> [10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

And—

> [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

17. Rule 251.1, C.R.C.P., states—

> (a) Statement of Policy. All members of the Bar of Colorado, having taken an oath to support the Constitution and laws of this state and of the United States, are charged with obedience to those laws at all times. As officers of the Supreme Court of Colorado, attorneys must observe the highest standards of professional conduct. A license to practice law is a proclamation by this Court that its holder is a person to whom members of the public may entrust their legal affairs with confidence; that the attorney will be true to that trust; that the attorney will hold inviolate the confidences of clients; and that the attorney will competently fulfill the responsibilities owed to clients and to the courts.

18. Paragraph [6] of the Preamble to the Colorado Rules of Professional Conduct states, in part—

> In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Colorado law. The proposal would just clarify the import of the pertinent rules, not really change them. Recognizing the existing principle that some crimes do not indicate a lawyer's unfitness to be a lawyer, Rule 8.4 would be clarified to say that a lawyer's use of marijuana within the bounds of Colorado law, though remaining criminal under Federal law, would be such a crime, one that did not indicate that the lawyer was unfit. That concept — that some crimes don't indicate unfitness — is not a new concept.

Another member, though, spoke to admit that, while she might be old-fashioned, she felt this battle was being fought in the wrong forum. Lawyers are used to preaching, if you don't like the law, change it. Many don't like the Federal laws that criminalize marijuana usage. But why ask this Committee to change a rule that will not change the Federal law? It would be better to ask the Federal representatives to change the Federal law so that the lawyer would not be in violation of it by engaging in the conduct that these proposals would exempt from discipline. She likened the situation to the prior prohibition of alcohol usage: It is ridiculous, with our firepower, not to pursue a change of the Federal laws, she said. But it would be ludicrous for us to set up a newspaper headline reading, "Colorado Supreme Court Says Okay for Colorado Lawyers to Violate Federal Law."

Another member spoke, saying it had not been his intention to speak but that he found himself prompted to do so by the comments of the member who had been struck with how many of the members of the bar association's ethics committee were concerned about whether they could give advice to clients about marijuana usage or participation in the marijuana industry. This member said that he had occasion to defend a lawyer, in a malpractice case, who had set up a corporation to dispense medical marijuana. He had asked himself, "Since I am defending a lawyer for conduct that is not permitted under Federal law, will I now have to advise the OARC of my client's violation of the law by reason of representation of another in connection with the medical marijuana business?" That is, this member said, the questions arise not just for the lawyer dealing with a client who is active in the marijuana industry but also for those involved in the peripheries of that primary activity — such as with respect to licensure issues, financing, all of the activities that go on in connection with any industry. All of that affects the decision that this Committee is going to make. This is, the member said, an insoluble dilemma right now, one that we cannot resolve to the complete satisfaction of all who are concerned, because of the dichotomy between the Colorado and Federal laws. We are going to do, this member predicted, what the member who previously spoke had suggested: We are going to provide a nice headline about lawyers, and we are going to have to accept that fact. But, he continued, we need to do that. In order to serve the bar, we need to say that, yes, a lawyer can violate Federal law regarding marijuana as long as his conduct in in accord with Colorado law. The people have a right to counsel, and it is not right to say that such counsel must be denied because another jurisdiction criminalizes certain aspects of the conduct for which counsel is sought.

A member who had been attending the meeting by telephone spoke to say that he needed to leave the conversation but wanted to register his support for the subcommittee's proposals and to state that he thought the position taken by the OARC was misguided.

A member who had not previously spoken suggested — tongue in cheek, he said — that the problem could be solved by a Colorado decision that its law preempts Federal law. But he added that his goal was to see if there were some other way to resolve the problem. In his view, Colorado continues to see amendments being made to its constitution that have no business being there. What, he asked, would we do if the constitution were amended to provide that any person may carry an automatic weapon, creating another conflict between Colorado and Federal law? We, as the drafters of the rules governing lawyers, are in a challenging era because of what can get into the Colorado Constitution, changes that can create similar, and difficult, issues of state and Federal conflict. We'll soon be back at the table trying to figure out what to do in the next such case. In this member's view, the subcommittee's suggested

course of action was premature; Coyle, for the OARC, is correct; and the proper course is simply to let some disciplinary cases go before the courts.

This member continued: If the Committee chooses to go forward, the changes should be clearly limited to the marijuana context, so that they do not extend to whatever matter the citizens may next choose to add to the Colorado Constitution. As proposed, the subcommittee's rule changes would blanketedly say that, if it's in the Colorado Constitution, it passes the disciplinary hurdle; there is, the member said, no way to predict what would end up there, and we will eventually find ourselves saying, "What did we do by opening the door to all that?" The Committee should make sure that the changes are narrowly crafted to deal only with the marijuana context now, so that future, presently-unknown effects are minimized.

Another member acknowledged that the Colorado constitutional amendments de-linking Colorado treatment of marijuana from the Federal regime has created a huge problem, one that is the product of the Supremacy Clause of the Federal Constitution. The subcommittee's course, with this particular issue of marijuana, would be to "give lawyers a pass." But what precedent would that set for the next such issue, be it guns, fracking, or the like? Is the right way to solve the conundrum to say that it is permissible to violate Federal law if the conduct, whatever the conduct, is permitted by Colorado law — that it is okay to violate Federal law?

A member said that he was struck by the position taken in the OARC's memorandum to the Committee — that the proposed changes are premature and are not needed at this time, not right now. Things are changing, as a member had said earlier. And there is the Federal law. This member was concerned that lawyers should always be able to fulfill their roles as advisors about the law, but he was equally concerned about advising clients about conduct that violated Federal law. He asked, "Is it time to step in now?" He knew that there was concern among the private bar, concern about potential discipline. But he asked, "Is this the time to make changes?"

A member who had given the matter scholarly attention then spoke. First, he said, it is incorrect to say that subcommittee's report would permit lawyers to violate any law. To a question about how that applied to condoning a lawyer's personal use of marijuana, the member replied that such use would be implicated by the Rules only if it impacted something such as competence or diligence. But nothing in the proposals green-lighted violations of the law. The pertinent topic is the giving of advice to clients about the law, not about personal usage, and the Committee should not get confused about that.

Second, the member said, as others had pointed out, the entire thrust of the Rules is professional conduct. The role of lawyers is to give clients access to the rule of law and to give them legal advice. We need to have lawyers involved in the democratic process. Yes, as Coyle had said, lawyers also have a role to play in upholding the rule of law; but the primary constituency of lawyers is clients.

Finally, the member said, one must keep the context in mind. The subcommittee's proposals are very modest, narrowly tailored, changes. He understood what previous comments had raised — that the subcommittee's proposals might have automatic application to other, future deviations of the Colorado Constitution from Federal law. But, he said, the proposals actually just deal with the giving of advice under the strictures of Rule 1.2(d) and do not open the door to a vast array of issues. These represent a compromise, in a conceptually narrow arena that is of interest to some of our fellow lawyers.

A guest at the meeting responded to the previous suggestion that the proposed changes would be premature by pointing out that the constitutional amendment permitting medical marijuana was adopted in 2000, becoming effective at the end of that year, and has been implemented by extensive statutory and regulatory enactments. Already the Colorado Court of Appeals has seen a substantial number of cases,

each of which has involved representation by lawyers. If action is not taken by the Committee and the Court to change the Rules in this regard, lawyers will continue to represent clients on marijuana issues unless and until the OARC decides to pursue preclusive disciplinary action — or, as has been suggested at this meeting, lawyers will become chilled and leave issues to *pro se* litigants. In short, enough time has lapsed to indicate that, short of some OARC disciplinary action, the issue of whether a lawyer can safely advise about Colorado's marijuana laws is not like to get to the Court for resolution.

Continuing, the guest turned to the question of adverse publicity if the Court were to adopt the proposed rules. The nature of the resulting publicity, he suggested, would largely depend on what this Committee, the Court, and the bar did to inform the public about the issues. Throughout time, lawyers have been involved in unpopular causes — terrorists, he noted, have a right to counsel. That lawyers do things that are not popular is not unusual. Lawyers practicing under the rules as they would be changed by these proposals, he said, would not encourage clients to break the law; in fact, they would be assisting clients to comply with Colorado law.

A member who had not previously spoken said, with respect to prosecutorial discretion, that some may have a misunderstanding of the issue. Prosecutorial discretion is the discretion to choose *not* to prosecute, notwithstanding that the conduct may have been a crime. Further, the OARC cannot pursue any disciplinary case without the approval of its advisory committee, a committee that this member said was not a rubber stamp. To suggest that the OARC always gets what it wants would be inaccurate. The advisory committee provides oversight of the entire disciplinary system, including oversight of Attorney Regulation Counsel and the presiding disciplinary judge. So, this member said, the Committee should rely on the system, including the prosecutorial discretion that may be wielded by Regulation Counsel and the advisory committee, with respect to the developing area of marijuana law, at least at this time. Adoption of the subcommittee's proposals would be premature. Things are in a state of flux. The legislature is, he noted, concerned about the taxation of the new industry. The earlier suggestion was correct; this Committee should be asking United States Attorney General Eric Holder and the Federal Government to resolve the dilemma. This is the wrong time to ask the Colorado Supreme Court for a resolution.

In response to a member's question, Webb confirmed that no other state has made any change to its professional conduct rules, notwithstanding that eighteen states now permit the use of medical marijuana.

The member who had asked the question about changes in other states' rules said that she did not agree with the prior characterization of the issues as not being about violation of Federal law. As she saw it, the issues clearly include that problem; indeed, the proposals for the addition of a comment to Rule 8.4 is premised on the fact that marijuana use violates Federal law.

The Chair noted that, the way the discussion was set up, the Committee would vote on whether to take up the substance of the subcommittee' proposals or determine not to do so. She asked whether there was a third course of action, one that would permit a lawyer to give advice about marijuana issues but would still provide for discipline for a lawyer's personal use of marijuana. That course, she admitted, might not solve anyone's concerns, from whatever vantage point. Changes of that kind would not permit a lawyer's personal use but would permit the giving of legal advice. Certainly they would not assuage the concerns of those members who advocated taking no action at this time.

A member spoke, noting that the Committee had heard many observations about the issues and that he did not, himself, support the subcommittee's proposals. He did not believe the proposals were good policy, for they put the Colorado Supreme Court in a "terrible position," endorsing a principle that lawyers will not be subject to discipline for assisting clients in the violation of Federal law.

Unfortunately — or not — he said, an ethics committee opinion is not one that has the imprimatur of a court agency. The prior observations that lawyers are starving for guidance are excellent. Can lawyers help clients who want to get involved in the marijuana industry? This Committee does not issue advisory opinions; that is done by the Colorado Bar Association Ethics Committee. Although the ethics committee's opinions are not binding on the OARC or any court, they have been a great source of guidance to lawyers on many issues. Such an opinion is what is needed now, the member suggested. There is much misunderstanding about what Rule 1.2(d) says. He pointed out that the provision expressly permits a lawyer to advise about the legal consequences of a proposed course of conduct: "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." He would not oppose the addition of a comment to Rule 1.2(d) that would expand on the black-letter principle as it applies to counseling with regard to marijuana issues. There is lots, the member said, that is permitted under Rule 1.2(d). But, the member continued, as to a lawyer who counsels or assists a client to go forward and commit a Federal crime, we should not have a rule that condones that activity. We are not in a position to condone such activity or to disapprove of Federal law criminalizing the conduct.

The member added that, contrary to a prior suggestion that the adoption of the subcommittee's proposal would insulate a lawyer from OARC investigation, the proposed changes — particularly the "standing alone" language that would be contained both in proposed Rule 8.6 and in proposed Comment [2A] to Rule 8.4 — would seem, instead, to invite more investigations. The member concluded by stating that he was opposed to the subcommittee's proposals "at this time."

Another member said she felt differently than Coyle did about the message that adoption of the subcommittee's proposals would send. She saw adoption of the proposals as a message that the Court recognized that there is a booming new industry in Colorado, one which raises countless issues — employment, commercial, etc. — that needed resolution, and that the legal profession would be in the forefront to resolving those issues. To be in that position, she said, would be to show that we were not putting our heads in the sand. The message, she felt, was a fantastic message about the profession, and the time to state it was now.

Following a fifteen minute break, the Committee returned to its consideration of the subcommittee's proposals for adoption of rules and comments in response to the amendments to the Colorado Constitution permitting medical and recreational use of marijuana.

A member who had not previously spoken began his comments by saying that the subcommittee had done a terrific job, and he joined in the comments of prior speakers who supported the subcommittee's proposals. Noting the observation that the law regarding marijuana usage is in flux, this member pointed out that the law is always in flux; given that condition, he asked, can the rules of ethics be inflexible? The Colorado electorate has adopted constitutional amendments permitting marijuana use and initiating a new industry, lawful under Colorado law. Are Colorado citizens to be unable to get the advice of lawyers about that law? That would be preposterous, the member said. Advising is a lawyer's role. Now the highest frame of Colorado law, the Colorado Constitution, permits this activity. It would be peculiar to say that lawyers may not advise about the ensuing issues. To say that would be to abrogate Colorado's position in a federal system. Can we acknowledge movement at the state level but say that lawyers may not advise? Already, the Colorado Bar Association's affiliates are providing continuing legal education programs on issues of marijuana law; are they aiding and abetting the violation of Federal law? We have previously seen important Rules changes in the areas of client confidentiality to accommodate conflict checks in inter-firm lawyer moves. More importantly now, we need to protect the body of the law. Those who changed that body of law by amending the Colorado Constitution are entitled to receive our advice about the changed law. Mention had previously been made of the lawyer's role during the era in which important civil rights laws were adopted; in the days in which pressure grew

for those changes, lawyers advised people who were burning their draft cards; similar lawyer involvement was seen in the overturning of miscegenation laws by the *Loving* case. Lawyers sat in protest on civil rights matters. Now there is another movement, and we cannot tell what its trajectory is. The rules governing lawyers' professional conduct should accommodate the bar's participation in this current movement, too.

Taubman told the Committee that, during the break, the Chair had asked him specifically to respond to a previous comment by a member that the battle was being fought in the wrong forum. He said he disagreed with that assessment. Clearly, if the Federal law criminalizing marijuana usage were changed, that would obviate the need for changes such as the subcommittee has proposed. But there are two different issues. This is not a question of changing Federal law to permit people to use marijuana. Instead, we are considering whether lawyers should be able to represent clients in their use of, or their commercial dealings in, marijuana. Even if one agrees in principle with the Federal proscription of marijuana usage, one can recognize the need for lawyers to give advice about the entire legal framework.

Another member said he found the discussion to be "impassioned." How would a rules change look? It bothered him very little, he said, that the Court would adopt a modification to the Rules of Professional Conduct to address the issues of marijuana law practice. He added that, when he first heard of this topic it seemed to be directed toward punitive laws targeting minorities. He had, he said, no problem being "unpopular" in this case. As lawyers, we can look at the legal situation and conclude, that there are two laws here and we don't permit you to pick one or the other. It is often the case, for instance, that an issue may be directed to the Public Utilities Commission or to the Legislature; we deal with such situations all the time, picking the rules — or the forum — that we are most comfortable using for a resolution of a problem. It is in such a case of duality that the people need lawyers. So what if things are evolving. If a rule dealing with marijuana law practice is going to be useful, it is now, while things are in flux.

The Chair indicated that she would like to proceed with a straw vote, but first she asked Webb to respond to the discussion that had occurred.

Webb said that he had five points to make:

1. The discussion had covered the matter of prosecutorial discretion and the need for checks and balances on the OARC.

2. The discussion had heard claims that the proposed changes were premature and the matter should be left to resolution by the Supreme Court on a case-by-case basis. But he could not envision any flow of cases to that Court that would resolve the issues surrounding the fact that the conduct to be advised about is both lawful and unlawful under the two separate legal regimes.

3. Only two out of fifty states have thus far approved the recreational use of marijuana; there is no groundswell that would prompt a quick, resolving, action by Congress.

4. As to whether marijuana usage, medical or recreational, violates Federal law can be left to the United States Attorney to deal with. The subcommittee's proposals deal with only one matter, giving lawyers immunity from loss of license if their conduct comports with the Rules as they would be changed by adoption of the subcommittee's proposals

5. He would hope that this Committee would not make its decisions whether to propose to the Court that changes be made to the Rules of Professional Conduct by looking to

headlines or spin doctors. We can leave it to the Court to make the required policy decisions.

6. (And a sixth point.) The subcommittee's proposed changes are a matter of public interest. More Coloradans voted in favor of Amendment 64, the recreational-marijuana-usage amendment of 2012, than voted for the presidential winner in Colorado. And all of the electorate had been informed, by the "Blue Book," that the use of marijuana would remain illegal under Federal law.

Webb concluded by saying that he hoped the Committee would get beyond the initial issue of whether to consider any changes and would move on to a consideration of the substance of the proposed changes.

The Chair proposed a straw vote on these alternatives: (1) Adopt the subcommittee's proposals. (2) adopt the OARC'S approach and propose no changes to the Rules. (3) Take some middle ground providing for disciplinary insulation for giving advice about marijuana but prohibiting a lawyer's personal use of marijuana.

To the Chair's proposal, a member objected that the first two alternatives were "binary": If either the first or second alternative prevailed, then there would be no occasion to consider the third alternative. To that, two members suggested that the first vote be taken on Alternative (2), doing nothing. If that vote failed, then the Committee could vote upon whether to proceed with Alternative (1) or Alternative (3). To that, the Chair objected that she could see herself voting for Alternative (3) and for neither Alternative (1) or Alternative (2); that prompted another member to say that, if Alternative (2) prevailed, he would want to vote for Alternative (3).

To all of that, Webb noted that the essential first choice was either to do something or to do nothing. And to that, the members responded in chorus that they wished to do something.

A member then asked whether the Committee wanted to adopt the proposed comment to Rule 8.4? Did they want to adopt proposed Rule 8.6? With or without tinkering? And to that, another member pointed out that the Committee had not yet decided whether to take the whole package as proposed by the subcommittee. And to that, the Chair said her point had been made: Could the Committee determine to permit a lawyer to give advice about marijuana law while still subjecting the lawyer to discipline for personal use of marijuana?

A member asked the Chair why she would want to draw the line between advising and using; if it were public relations she was worried about, he said, his answer would be, who cares?

But the Chair said she saw a policy need for the Rules to permit lawyers to do their job, to provide legal services. But it was a different policy question as to whether lawyers themselves can engage in activity which is directly violative of Federal law. She proposed being "surgical" and dealing with those policy matters. The member who had asked why the Chair would want to draw the line as she was proposing quipped that she had answered his question — but not satisfactorily.

In answer to a member's question whether the Chair's proposal would permit a lawyer to advise a client about how to set up a pot shop but would subject the lawyer to discipline if the lawyer owned a pot shop himself, the Chair replied affirmatively, adding that she saw that as a reasonable compromise, permitting the lawyer to advise but prohibiting active conduct that was violative of Federal law.

A member suggested that the Chair's position would be a reversal of the position taken by the CBA Ethics Committee in its medical marijuana opinion, Opinion Nº 124; that opinion had concluded

that a lawyer's personal use of medical marijuana in compliance with the first amendment to the Colorado Constitution would not adversely reflect on the lawyer's fitness for purposes of Rule 8.4(b). He doubted whether the Committee would want to undermine Opinion Nº 124 as, he believed, the Chair's proposal would do.

To that, the Chair responded that she saw no inconsistency. The ethics committee had crafted Opinion Nº 124 as it did in order to avoid issuing an opinion on the question of whether a lawyer could advise another about medical marijuana use given the constrictions of Rule 1.2(d); the committee had seen an opening to, at least, deal with the personal-use issue as a matter of fitness under Rule 8.4(b). That position, she said, could survive if we simply added a clarifying amendment. the Chair's explanation did not satisfy the member who had worried about undermining Ethics Opinion Nº 124.

But the Chair's comments prompted another member to say that, if necessary, he would accept a comment under Rule 8.4(b) that would clarify that personal use of marijuana in compliance with Colorado law would not by itself adversely reflect on a lawyer's fitness for purposes of Rule 8.4(b). He would also support some explanation under Rule 1.2 regarding a distinction between what is prohibited by that rule — counseling or assisting a client in the violation of law — and what is permitted — representation in a criminal case in defense of prior conduct, "as has been done for hundreds of years."

To that comment, the lawyer who had commented, early in the discussion, with how she been struck with how many lawyers were concerned about whether they could give advice about marijuana usage asked whether a lawyer's representation of a participant in the marijuana "grow" business in the negotiation of a lease for that purpose would be providing advice or giving assistance to a crime. The member who had last previously spoken said he would consider such lease negotiation to be prohibited counseling or assistance.

A member who had participated substantially in the Committee's discussion before it took its break said that he acknowledged the substance of the Chair's point that the primary role of the lawyer is to give advice about the law. That is why there is a legal profession, and that is why only lawyers are permitted to give advice about the law; these are essential bases for the Rules of Professional Conduct. The policy underpinnings about that role of the lawyer do not give a basis for condoning a lawyer's personal use of marijuana in violation of Federal law. Yet the fitness issue does serve as a basis for Opinion Nº 124 of the CBA Ethics Committee; that issue has not been entirely ignored. The Federal prosecutors can still file charges against a lawyer for her personal use of marijuana; the ethics committee would simply guide the OARC to a conclusion that the Federal crime did not, of itself, call into question the lawyer's fitness to represent clients. That's all that would need to be said: Personal use of marijuana in compliance with Colorado law is not a "fitness" issue. Why state that formally in a rule or a comment? Because it would clarify the answer. But it would not be critical to do that.

A member asked whether a lawyer should be subject to discipline for setting up his own grow or sale business. If he can advise others in that regard, why should he not be permitted to do it himself?

The member who had last previously spoken responded that there is a difference: Personal use, in conformity with Colorado law but in violation of Federal law does not implicate fitness. But personal participation in the substantial activity of commercial engagement, in a criminal business enterprise, would, it could be argued, implicate fitness.

The Chair said that she was surprised by that last response. The member who had made that response said he thought we needed to run the question of personal involvement in the industry to ground and then see whether the subcommittee's proposals were appropriate as applied to that activity. He believed that a reference to "noncommercial, private" usage might be a simple way of distinguishing the

two kinds of personal activity and thereby excluding entrepreneurial, commercial activity from that which would be condoned by the rules changes. But, he said, that was the tail of the dog; the Committee should concentrate on the question of giving advice to the marijuana industry.

A member moved the adoption of the subcommittee's report, subject only to "linguistic revision"; the motion was seconded. But, in response to that motion, another member said he thought it unworkable to first say that the report was approved and then to commence on retooling of the proposals. He was not, himself, ready to give a broad approval to the subcommittee's work.

The movant said he would change his motion to one for a straw vote on the subcommittee's report. The Chair noted that that course would leave open the issue, focused on late in the preceding discussion, of a lawyer's personal involvement in commercial marijuana activities.

Webb suggested that the Committee first vote on the subcommittee's proposal to add Rule 8.6—

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

In answer to another member's question, Webb agreed that this provision would permit a lawyer not only to use marijuana in conformity with Colorado law but also to engage in commercial marijuana activities in conformity with that law. But, he said, the language could be changed to preclude commercial activities. As the Chair then put it, the vote would be between Rule 8.6 as proposed by the subcommittee and Rule 8.6 as amended to permit only personal use and not personal commerce.

A member posed this situation: A Colorado lawyer negotiates, on behalf of a Colorado client, with a California grower for a marijuana supply. If the Federal prosecutors secured a conviction of the client, the lawyer would be exposed to a Federal charge of aiding and abetting the crime. Webb responded to the example by answering that, if the lawyer's activities in the course of the representation were in accord with Colorado law, Rule 8.6 as proposed would preclude discipline.

The Chair expressed her confusion: She had thought that the vote would go only to the question of whether a lawyer should be permitted to engage in personal marijuana use in conformity with Colorado law, not the question of whether he can give advice to others about marijuana activities. That is, she had thought the purpose of the vote was to decide whether the Committee like "the middle ground."

Another member said she thought the first decision should be whether to condone the giving of advice — or assistance — to clients with respect to their activities. Then the Committee could turn to the lawyer's personal activities, whether merely using or also engaging in commercial activities.

A member suggested, as a way of setting up that vote, that the text of Rule 8.6 be considered as if it had been changed to delete the words "for engaging in conduct, or" and instead read as follows:

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline **~~for engaging in conduct, or~~** for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

That vote was taken and that version of Rule 8.6 was approved by the Committee.

But a member questioned the meaning of the vote, noting that the Committee had not thereby voted to prohibit either a lawyer's personal use of marijuana or his personal involvement in commercial marijuana activities. Webb agreed with that and said it would create more problems than were solved if the proposed rule were left in this condition and there were no change in Comment [2A] to Rule 8.4. He suggested that an easy fix to proposed Comment [2A] to Rule 8.4 would be to refer there to "personal, noncommercial" use. The comment, modified in accord with that proposal, would read—

> [2A] Conduct of a lawyer that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. This comment specifically addresses two constitutional amendments: Article XVIII. Miscellaneous,§ 14. Medical use of marijuana for persons suffering from debilitating medical conditions, and Article XVIII. Miscellaneous,§ 16. Personal use and regulation of marijuana. The phrase "solely because" clarifies that a lawyer's ***personal, noncommercial*** use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. See Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

A member, who had been opposed to the subcommittee's report in its entirety, suggested that the entire matter be returned to the subcommittee for further work. Another member agreed, commenting that the Committee was now uncertain as to how the provisions would actually read, and the subcommittee should be given an opportunity to clarify matters.

Another member noted that, by the vote, the Committee had indicated that proposed Rule 8.6 was acceptable without the words "for engaging in conduct, or," leaving aside the question of whether the original proposal, *with* those words, was also acceptable.

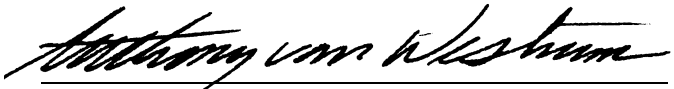
Webb said that, if the direction of the Committee was to make a distinction between a lawyer's personal use of marijuana (permitted) and his personal involvement in commercial marijuana activities (disciplinable), that could be done.

Upon a vote, the Committee determined to return the matter to the subcommittee to develop alternatives on how to deal with a lawyer's personal use of marijuana and a lawyer's personal involvement in commercial marijuana activities.

V. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:50 a.m. The next scheduled meeting of the Committee will be on Friday, July 26, 2013, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These minutes are as approved by the Committee at its Thirty-sixth Meeting, on July 26, 2013.]