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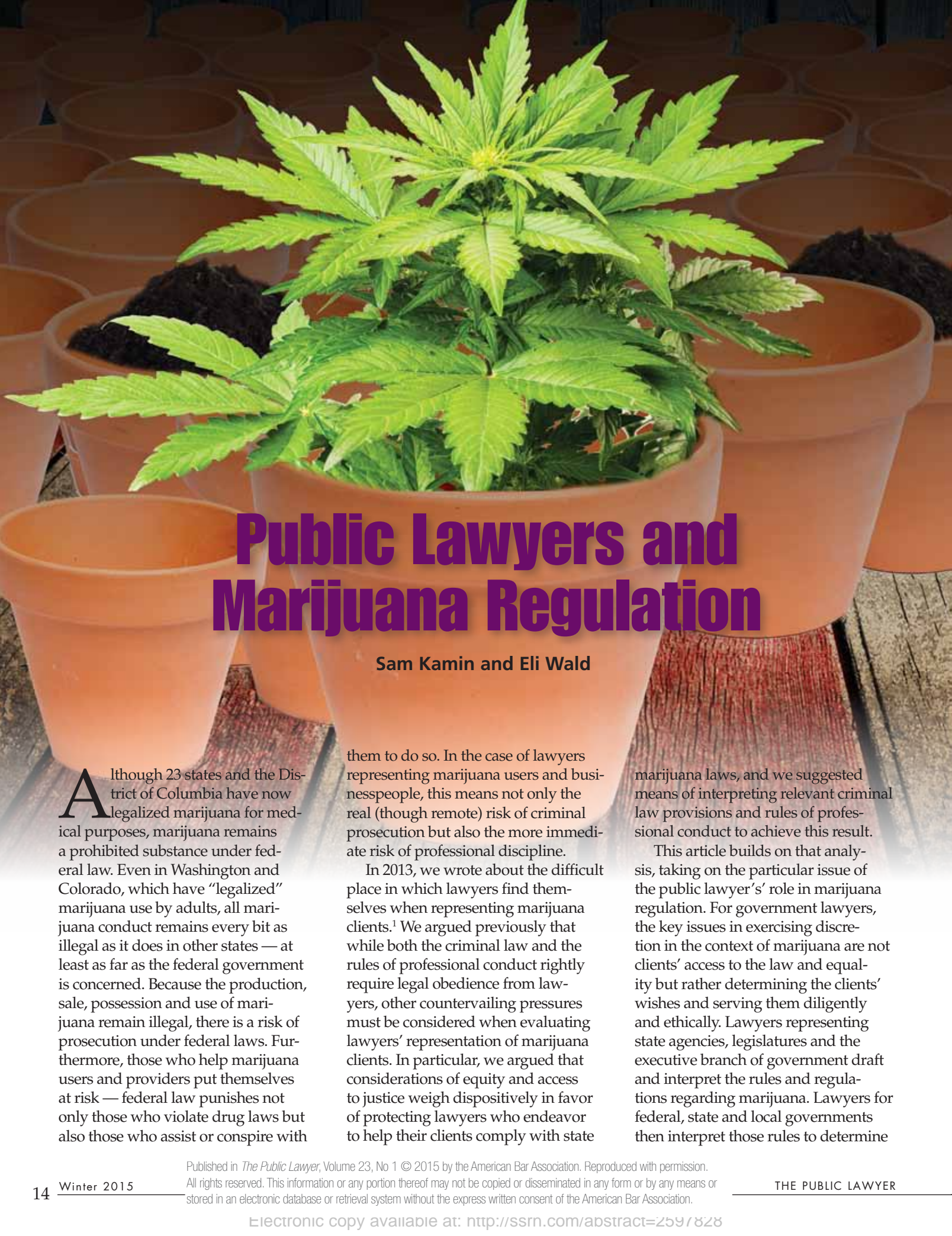


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Public Lawyers and Marijuana Regulation

Sam Kamin and Eli Wald

Although 23 states and the District of Columbia have now legalized marijuana for medical purposes, marijuana remains a prohibited substance under federal law. Even in Washington and Colorado, which have “legalized” marijuana use by adults, all marijuana conduct remains every bit as illegal as it does in other states — at least as far as the federal government is concerned. Because the production, sale, possession and use of marijuana remain illegal, there is a risk of prosecution under federal laws. Furthermore, those who help marijuana users and providers put themselves at risk — federal law punishes not only those who violate drug laws but also those who assist or conspire with

them to do so. In the case of lawyers representing marijuana users and businesspeople, this means not only the real (though remote) risk of criminal prosecution but also the more immediate risk of professional discipline.

In 2013, we wrote about the difficult place in which lawyers find themselves when representing marijuana clients.¹ We argued previously that while both the criminal law and the rules of professional conduct rightly require legal obedience from lawyers, other countervailing pressures must be considered when evaluating lawyers’ representation of marijuana clients. In particular, we argued that considerations of equity and access to justice weigh dispositively in favor of protecting lawyers who endeavor to help their clients comply with state

marijuana laws, and we suggested means of interpreting relevant criminal law provisions and rules of professional conduct to achieve this result.

This article builds on that analysis, taking on the particular issue of the public lawyer’s role in marijuana regulation. For government lawyers, the key issues in exercising discretion in the context of marijuana are not clients’ access to the law and equality but rather determining the clients’ wishes and serving them diligently and ethically. Lawyers representing state agencies, legislatures and the executive branch of government draft and interpret the rules and regulations regarding marijuana. Lawyers for federal, state and local governments then interpret those rules to determine

the obligations and responsibilities of those they represent and to help their clients meet those obligations and carry out their required tasks. Both state and federal prosecutors are charged with determining what conduct remains illegal under the new rules and, perhaps more importantly, with exercising discretion regarding whom to prosecute and to what extent.

Today's State of Marijuana Law and Rules of Professional Conduct²

Any conversation about the legal status of marijuana must reiterate that marijuana is not “legal” anywhere in the United States. While an ever-growing number of states have curtailed, amended or otherwise weakened their own marijuana prohibitions, the federal government has not. Marijuana remains a Schedule I narcotic, a drug whose manufacture, distribution and

possession remain serious felonies punishable by long terms of imprisonment. The U.S. Supreme Court has upheld the power of the federal government to regulate marijuana³ and has held that compliance with state law is not a defense in a prosecution under federal criminal provisions.⁴

For private lawyers representing clients in the marijuana industry, this means exposure to criminal liability for aiding and abetting their clients' marijuana conduct and discipline for counseling or assisting that conduct. We have proposed that both of these concerns ought to be addressed in favor of permitting attorney advice regarding marijuana conduct in order to ensure clients' access to law, lawyers and legal advice. Our proposed approach seems to have been embraced. To the best of our knowledge, no lawyer has been prosecuted for aiding and abetting a client's marijuana activity except in circumstances where lawyers were alleged to have formed an intent to assist clients above and beyond simply representing them qua lawyers. And we are aware of no attempt by a state ethics board to discipline lawyers for assisting clients' marijuana activity.

Indeed, some jurisdictions have revised their rules of professional conduct to explicitly allow lawyers to represent clients in the marijuana industry.⁵ In Colorado, for example, Rule 1.2(d) continues to state that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. ...”⁶ However, after much debate, the Colorado Supreme Court added Comment 14 to Rule 1.2, which states that a lawyer may assist a client in conduct that the lawyer reasonably believes is permitted by the state's marijuana laws.⁷ While our approach — construing the term *assist* in Rule 1.2(d) to require a true intent — was not adopted by the court, the same result is ultimately achieved. Either approach gives clients greater access to lawyers and legal advice while putting to rest lawyers' fear of discipline for giving that advice.

As civil servants, many have likely

taken an oath to uphold the laws and Constitution of the United States as well as those of their own jurisdiction. Thus, if they play a role in facilitating marijuana use — either by regulating it, collecting the tax revenues from it, or helping create rules to govern the (still illegal) manufacture and sale of it — they may find their professional role in conflict with their oath.

The Role of Public Lawyers in Marijuana Regulation and Decriminalization

Our approach to the regulation of private lawyers — permitting the representation of marijuana clients seeking to conform to state law as long as the lawyer does not form the intent to assist in a client's criminal activity — applies to public lawyers as well.

Public lawyers will rarely, if ever, be perceived as having the intent to encourage criminal conduct on the part of their clients. Unlike private lawyers who choose to take on marijuana practitioners and users as clients, the public lawyer generally does not choose clients or the issues they raise. If the regulation of marijuana becomes one of the topics assigned to public lawyers, they must simply add that expertise to their portfolio. Relatedly, public lawyers' well-being does not rise and fall on the financial success of their clients. As a result, public lawyers are rightly perceived as having goals independent of those whom they represent.

Perhaps more fundamentally, it is rarely true that the government lawyer's client is violating federal law, even if the client is involved in one way or another in the regulation of a legal marijuana market. To see this more clearly, consider an actual lawsuit brought on behalf of the city of Garden Grove in California.⁸ A law enforcement official had wrongly confiscated medical marijuana belonging to Felix Kha and was ordered by the trial court to return Kha's medicine to him. The city sued to enjoin the order, arguing that doing so would make the officer and the city complicit in the distribution of a controlled substance and in aiding and abetting Kha's

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possession of that substance. The California courts rejected this contention, noting that the city could not be seen as possessing the requisite intent to violate federal law:

To be liable as an aider and abettor, a defendant must not only know of the unlawful purpose of the perpetrator, he must also have the specific intent to commit, encourage or facilitate the commission of the offense. Stated differently, the defendant must associate himself with the venture and participate in it as in something that he wishes to bring about and seek by his actions to make it succeed. Even though Kha would be in violation of federal law by possessing marijuana, it is rather obvious the City has no intention to facilitate such a breach. Its challenge to the superior courts [*sic*] order is clear proof of that, and in future cases the existence of case law compelling it will resolve this issue.⁹

Here, the court was writing about the culpability of lay employees; but for the lawyer working on behalf of a public entity, the case is more starkly clear. The public entity that the lawyer represents is not seeking to aid and abet the use of marijuana by those that it regulates, and the lawyer who helps the state achieve its goals is a further step removed from such intent.

Furthermore, while many of the access to justice and fairness concerns that motivate our conclusion with regard to private lawyers do not apply when considering the conduct of public lawyers, it would certainly be perverse to allow private marijuana parties to be represented by counsel but to deny the government that benefit. Complex regulatory apparatuses require the participation of attorneys not merely on the side of the regulated but on the side of the regulator as well. In this sense, the interest in equal access to justice also argues in favor of permitting public lawyers to engage in this representation.

How Public Lawyers Can Represent their Clients Effectively and Ethically

While the concerns of private lawyers center upon *whether* they can represent marijuana clients without violating criminal law and the rules of professional conduct, public lawyering in this area primarily raises questions of *how* to represent the client effectively and ethically. Specifically, public lawyers confront two unique and intertwined challenges when compared to private lawyers: (1) determining the appropriate allocation of authority/communication between lawyer and client and (2) exercising professional judgment.

Private lawyers representing clients in the marijuana industry know or can easily ascertain their clients' objectives. A typical client might, for example, seek a lawyer's help in obtaining a license to own and operate a dispensary. And if questions arise during the representation — regarding the cost of the license, disclosures that would have to be made to the government agency in order to obtain the license, other business interests that might be jeopardized by licensure, etc. — the lawyer can usually consult with the client and obtain guidance regarding how to proceed.

In contrast, government lawyers engaged in marijuana regulation sometimes find themselves in a challenging situation in which the objectives of the client are unclear and ascertaining them may not be possible. A few examples illustrate the point.

Issue: Enforcement and Changing Public Opinion

Consider a state attorney general (AG) deciding whether to enforce the state's criminal laws in a jurisdiction that has not legalized medical marijuana but has a large underground marijuana industry. On the one hand, the AG has a duty to enforce the state's laws as written, and doing so generally serves the interests of the people (the AG's client). An AG taking such a position would strictly enforce her state's criminal laws, legitimately reasoning that if the people wish to amend

their laws to legalize or decriminalize marijuana, then they ought to do so but that until such time she will enforce the state's existing laws as written. On the other hand, laws sometimes linger on the books long after the electorate has lost enthusiasm for them (sodomy laws, for example). In that case, an AG might legitimately exercise her prosecutorial discretion and professional judgment and either refuse to enforce those laws as written or else be very selective about which cases to prosecute under such a statute. Even in states that have amended their marijuana laws to permit certain marijuana use, difficult questions remain regarding how literally law enforcement should enforce those criminal laws that remain on the books.¹⁰ Absent a specific statutory answer, how should a prosecutor react to changing public opinion with regard to marijuana-related conduct?

Issue: Consultation with Highest Authority

ABA Model Rule of Professional Conduct 1.13 defines and details communications with an organizational client, including an electorate.¹¹ It essentially guides the AG to consult with the highest authority that is authorized to speak on behalf of the people — in most cases, the governor of the state. Practically speaking, however, a governor may not wish to decide the issue and may leave it to the AG's discretion. Furthermore, an AG seeking in good faith to determine the will of the people should be mindful of the fact that a governor may be as concerned with her political fortune and appeasing her political constituency as she is with ascertaining the true will of the people. Moreover, even if the governor is willing to offer guidance about the will of the people, it is sometimes appropriate for an AG (or any other lawyer) to not follow or participate in the implementation of certain policies because they are illegal, immoral or dangerous. Put differently, an AG should not reflexively take the position that "my constituents/clients wanted work done in this area so I did it" without independently assessing the legality and morality of the underlying policies.

The role of lawyers in drafting the “Torture Memo” and in otherwise approving the wartime practices of the Bush administration serve as a cautionary tale for a public lawyer who would blindly follow the requests of her client.¹² Communication with the client and determining the client’s wishes with regard to a particular policy outcome is a necessary but not a sufficient requirement of public lawyers practicing ethically in this context.

Issue: Marijuana Law Reform and Agency Funding

Furthermore, consider a lawyer in a jurisdiction that has legalized medical marijuana who represents a state agency that receives significant federal funding. Should the lawyer advise her client to proceed with marijuana law reform even if such participation may jeopardize the agency’s federal funding? It seems to us that the attorney’s obligation, at a minimum, is to inform her agency and the public of the possible negative consequences of pursuing marijuana law reform and to work diligently on behalf of her clients whether they determine that the policy decision is worth the risk or not. Of course, the question remains of how the attorney should go about informing her client of the risks and determining the client’s views on the subject.

Conclusion

Marijuana regulation is not a niche area of government regulation; it will influence the practice of virtually every public lawyer in the years to come. Public lawyers must understand the changes in marijuana law and the implications for government clients. Given the pervasiveness of the modern regulatory state, the situation is no easier — and, in many ways, it is more complicated — for public lawyers than it is for private ones.

To be sure, public lawyers face myriad practice challenges with respect to marijuana law reform, and we do not pretend that we have resolved all of the issues that are sure to arise. The legal status of many actors is

uncertain whenever state law permits conduct that is expressly forbidden by the federal government. We hope that public lawyers will be alert to the risks involved in participating in marijuana regulation so that they can think carefully about their obligations when these issues arise. ■

Endnotes

1. See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders*, 91 OR. L. REV. 869 (2013).

2. For longer versions of this background, see, e.g., Sam Kamin, *Lessons Learned from the Governor’s Task Force to Implement Amendment 64*, 91 OR. L. REV. 1337 (2013); Sam Kamin et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. (forthcoming 2014).

3. See *Gonzales v. Raich*, 541 U.S. 1 (2005) (rejecting a commerce clause challenge to the federal government’s regulation of marijuana).

4. *United States v. OCBC*, 532 U.S. 483 (2001) (holding that a defendant in a federal prosecution could not introduce evidence that her conduct was in compliance with state law).

5. At least one state has read its ethics rule to ban such representation, however. See, e.g., Me. Prof’l Ethics Comm., Op. 199 (2010), available at www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article (“Where the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis. Bar Counsel has asked for a general opinion regarding the kind of analysis which must be undertaken. We cannot determine which specific actions would run afoul of the ethics rules. We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk and needs to be carefully evaluated.”). Colorado’s ethics committee came to a similar conclusion before the Supreme Court weighed in to the contrary. See Colorado Ethics Comm. Formal Op. 125 (2013), available at www.cobar.org/tcl/tcl_articles.cfm?articleid=8370 (“[U]nless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct

permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client’s past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d).”).

6. COLO. RULES OF PROF’L CONDUCT R. 1.2(d) (2014).

7. *Id.* cmt. 14 (“A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, §§ 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.”).

8. *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007), cert. denied, 129 S. Ct. 623 (2008); see also *People v. Crouse*, No. 12CA2298, 2013 WL 6673708, at *7–9 (Colo. App. Dec. 19, 2013).

9. *Id.* at 663 (citations omitted).

10. See, e.g., John Ingold, *Legalization Complicates Police Marijuana Investigations in Colorado*, DENVER POST, July 14, 2014, available at www.denverpost.com/news/ci_26147592/legalization-complicates-police-marijuana-investigations-colorado (“Since the passage of limited marijuana legalization in Colorado in 2012, law enforcement officials say many agencies are making fewer busts of illegal marijuana distributors and seizing fewer illegally grown plants. . . . But those same officials contend the drop-off comes not from a decline in illegal growing but from an increased hesitance of detectives to make busts in a state where the margins of legal and illegal cultivation can be blurry.”).

11. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2014).

12. See, e.g., Editorial, *Torture Lawyers*, N.Y. TIMES, Feb. 24, 2010 (“Is this really the state of ethics in the American legal profession? Government lawyers who abused their offices to give the president license to get away with torture did nothing that merits a review by the bar?”).