

# CANNABIS LAW, THE CONSTITUTION, AND THE ABA MODEL RULES

by  
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*Though a growing number of states have legalized recreational or medical cannabis use, cannabis is still categorized as a Schedule I substance under the Controlled Substances Act, and its use, possession, and cultivation are federal offenses. This conflict between state and federal law creates a unique challenge for the legal community. Unless states with legalized cannabis programs have amended their state rules of professional conduct or provided advisory opinions on the matter, local attorneys assume a great deal of risk when representing clients within the cannabis industry.*

*To further complicate matters, what happens when a lawyer, who is licensed to work in a state with amended rules or prescribed ethical guidance, attempts to relocate to a state without such measures? Might their bar applications be denied? This Note explores the hypothetical example of a fictional attorney who is faced with such a predicament. What are her options? Can she challenge the constitutionality of the decision?*

*As the number of states across the country legalizing cannabis use increases, so too does the probability of scenarios like the one presented in this Note. I examine not only the potential constitutional arguments for lawyers placed in these difficult situations, but also the various measures that can be taken at the state and federal level to avoid such quandaries altogether.*

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## I. INTRODUCTION

Ten years ago, Ima A. Tourney graduated from law school in Cascadia, a state remarkably similar to Oregon. After graduation, she landed a great job with a general business law firm. When she was asked if she would take on the firm's first cannabis client, Ima was apprehensive. Although the cannabis business was in the bounds of state law, she would be advising and assisting the client in violation of federal law,<sup>1</sup> which would make her actions a clear violation of the Cascadia Bar Association's Rules of Professional Conduct. Even though she was hesitant, the rent needed to be paid, and she was excited to expand her work into a budding industry, so she took on the client. Soon enough, Ima became known as the local cannabis attorney and got referrals from around the state. Her client list grew, and she was able to open one of the most well-known and respected specialty business law firms that worked almost exclusively with professionals in the cannabis trade.

Over the years, Ima worked with the Cascadia State Bar to incorporate changes to provide guidance to attorneys who work with clients operating in the state cannabis business; in most states, the Rules of Professional Conduct (Rules) provide that attorneys will assist clients in ventures that fall within the bounds of state and federal law, like the Rules in Oregon.<sup>2</sup> Her work with the Cascadia State Bar was integral to the creation of the Cannabis Law Section. Cascadia became the fourth state, after Oregon, to recognize cannabis as a legal specialty.<sup>3</sup>

Ima has enjoyed her work in Cascadia and in the cannabis law field—but she now finds herself in a sticky situation. A tragedy has befallen her beloved father, Ura A. Tourney, a prominent lawyer in Ohio. Ura has built one of the largest personal injury firms in Ohio, and he made Ima promise years ago that if something happened to him, she would return to Ohio to run the firm. Although Ima never took the Ohio Bar, she looked at the requirements and saw that if she passed the bar in another state and was engaged in the practice of law for at least five of the past ten

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<sup>1</sup> Controlled Substances Act of 1970, 21 U.S.C. § 812 (2012).

<sup>2</sup> OR. RULES OF PROF'L CONDUCT r. 1.2 (amended 2018) (“[A] lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”).

<sup>3</sup> Joseph Ditzler, *Oregon State Bar Recognizes Cannabis Legal Specialty*, BULLETIN (Mar. 30, 2017, 12:01 AM), <https://www.bendbulletin.com/business/5190446-151/oregon-state-bar-recognizes-cannabis-legal-specialty>.

years, she qualified for admission without examination.<sup>4</sup> Ima sold off her firm in Cascadia, submitted her application to the Ohio bar (including the character and fitness questions), and headed to Ohio. Much to her chagrin, when she arrived in Ohio, ready to take over her father's firm, she found that her application for admission to the Ohio Bar had been denied based on her failure to meet the character and fitness qualifications.

Ima, dazed and confused by the news, began to research how this could have happened. When she contacted the Ohio Supreme Court to learn more, her email was answered with only an opinion from the Board of Professional Conduct, issued in 2016, that discussed the ethical implications for attorneys regarding Ohio's Medical Marijuana Law.<sup>5</sup> While the Ohio legislature passed a measure legalizing medical marijuana, the ethics guidance provided to the state's attorneys was essentially that they could advise—but not assist—their clients in complying with Ohio's medical marijuana laws.<sup>6</sup> When Ima appealed the Board's decision, her appeal was rejected on the grounds that she had failed to satisfy “the essential eligibility requirements for the practice of law as defined by the Board,” due to her cannabis practice in Cascadia. The Board determined that Ima's practice showed that she was willing to assist clients in violating federal law, which would be in violation of Ohio's Rules.

While Ima's situation may seem like a scenario presented on a law school exam, it does raise questions in the hazy realm of cannabis law as to an individual's fundamental right of travel and right to practice law. In contrast, there are state's rights issues as well, implicating federalism and the Full Faith and Credit Clause. Case law addressing this exact issue is not available yet, but state bar associations across the nation have made rulings and changed their professional codes of conduct to reflect changing cannabis laws.<sup>7</sup>

At the heart of this issue is the conflict between state and federal law, the lack of guidance by the federal government, and incompatible goals in client representation while adhering to state bar ethics guidelines. Not only are attorneys faced with the challenge of navigating the differing laws between their state governments and the federal government, but they are also faced with the dilemma of adhering to

<sup>4</sup> SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO r. 1, § 9, <http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf>.

<sup>5</sup> Supreme Court of Ohio Board of Prof'l Conduct, Op. 2016-6 (2016) (discussing ethical implications for lawyers under Ohio's medical marijuana law).

<sup>6</sup> *Id.* (“A lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise. A lawyer may provide advice as to the legality and consequences of a client's proposed conduct under state and federal law and explain the validity, scope, meaning, and application of the law.”).

<sup>7</sup> Phil Cherner, *Marijuana and Your License to Practice Law*, AM. BAR ASS'N (Feb. 2016), [https://www.americanbar.org/content/dam/aba/events/professional\\_responsibility/2016%20Meetings/Conference/Materials/breakout3/2\\_ethics\\_of\\_pot\\_lecture\\_2016\\_february.pdf](https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2016%20Meetings/Conference/Materials/breakout3/2_ethics_of_pot_lecture_2016_february.pdf).

ethics guidelines while providing zealous advocacy for their clients. Using Ima's circumstances as an example, this Note will examine the constitutional implications of contradictory federal and state law, the responses of state bar associations to the legalization of cannabis in their states, and some approaches that could be taken by the federal government and state bar associations in guiding attorneys.

## II. CONSTITUTIONAL ISSUES

Ima's dilemma touches on different constitutional claims that implicate her personal liberties and fundamental rights. Although the Supreme Court gutted the Privileges or Immunities Clause in its first interpretation of the newly ratified Fourteenth Amendment in the *Slaughter-House Cases* in the late 1800s, the Court did clarify that movement between the states and participation in trade and commerce were fundamental rights protected by the Constitution.<sup>8</sup> The Court explained:

The first occurrence of the words 'privileges and immunities' in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, . . . shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."<sup>9</sup>

What does a monopoly of slaughterhouses in Louisiana in the 1800s have to do with practicing cannabis law? In Ima's case, this could be the cornerstone of her argument to show that Ohio violated the Fourteenth Amendment when it prohibited her from pursuing her livelihood after relocating to the state.

Attorneys are faced with conflicting state and federal laws and laws conflicting among the states themselves. If a case of these circumstances came before a court, it would have to weigh the compelling state interest and the means to achieve that interest against the infringement on the individual's rights.<sup>10</sup> After looking at the potential constitutional violation resulting from Ima's claim, a court would then evaluate the different compelling state interests.

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<sup>8</sup> *Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

<sup>9</sup> *Id.* at 75.

<sup>10</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 938 (4th ed. 2013).

### A. *Ima's Claims*

With state and federal laws at odds, attorneys are too often left in the dark when it comes to the legality of advising and assisting their clients in states where cannabis has been legalized. Ima's case will allow us to apply the different claims, arguments, and defenses that both she and the state could present. First, the constitutional issues will be evaluated, followed by conflicting ethical guidelines, which implicate state bar associations.

Ima would have constitutional claims that the state of Ohio violated the Equal Protection Clause of the Fourteenth Amendment by infringing upon her right to travel.<sup>11</sup> By denying her bar application based on activities that fell within the state law in the state where she had been practicing law, she was not being treated as others in a similar situation, such as a criminal defense attorney from Cascadia seeking and gaining admission to the Ohio Bar. In the 1999 *Saenz* decision, the Court determined that the Privileges or Immunities Clause, in addition to the Equal Protection Clause, protected the right to travel.<sup>12</sup> Ima could rely on the holding in the *Saenz* decision, arguing that the decision by the Ohio bar violated her right to travel and establish residence in another state as it treated her differently than other citizens of the state.<sup>13</sup> Ima's denial of bar admission would inhibit her ability to earn a living in the state of Ohio, so the state would be treating her differently from all other attorneys who practiced law following the state guidelines in their previous home states.

Ima would have a stronger case if she were challenging a statute that directly prohibited admission to the bar based on lawful actions in another state. But, as the Supreme Court of Ohio was ultimately responsible for the decision in her case, she is challenging the actions of a state actor, and therefore has the right to challenge its actions under the state action doctrine.<sup>14</sup> Denying a person their livelihood because they lawfully followed the guidelines of the state in which they were practicing law could be argued as analogous to cases where attorneys have been denied bar admission based on residency requirements.<sup>15</sup>

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<sup>11</sup> *Id.* at 934.

<sup>12</sup> *Saenz v. Roe*, 526 U.S. 489, 501 (1999).

<sup>13</sup> *Id.* at 500 (“The ‘right to travel’ discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”).

<sup>14</sup> CHEMERINSKY, *supra* note 10, at 548.

<sup>15</sup> See *Barnard v. Thorstenn*, 489 U.S. 546, 547 (1989) (holding that residency requirements for bar admission violated Privileges and Immunities Clause); *Frazier v. Heebe*, 482 U.S. 641, 650 (1987) (holding that a residency requirement for bar admission was “unnecessary and arbitrar[y]” and that an in-state office requirement was “unnecessary and irrational”).

Not only does Ima have a strong case under the Fourteenth Amendment, but she also has a strong case under the Privileges and Immunities Clause of Article IV, § 2 of the Constitution.<sup>16</sup> As a matter of commercial association, “the practice of law is important to the national economy.”<sup>17</sup> In *Piper*, the Court held that the practice of law was a fundamental right, as it holds a non-commercial role and duty, and therefore fell under the purview of Article IV, § 2.<sup>18</sup> The *Piper* decision provides Ima with one of the most compelling arguments, as the “lawyer who champions unpopular causes surely is as important to the ‘maintenance or well-being of the Union.’”<sup>19</sup> Her work in Cascadia is surely unpopular to the Ohio Bar, but that does not change the fact that she legally practiced law based on the laws of the state in which she was practicing prior to seeking relocation. Her work is protected as a fundamental right under Article IV, § 2, and her right to travel is protected under the Fourteenth Amendment, under both the Privileges or Immunities and Equal Protection Clauses.<sup>20</sup> As her claims are based on the infringement of fundamental rights, a court would apply strict scrutiny to determine if the state had a sufficiently compelling interest to deny her those rights.<sup>21</sup>

If Ima’s arguments that her fundamental rights were infringed upon fails, she still has another claim to make. Also contained in Article IV is the Full Faith and Credit Clause.<sup>22</sup> While the Court has clearly stated that the clause applies in the realm of judicial decisions from other states, it has not been as articulate on how the Full Faith and Credit Clause applies to sister state statutes.<sup>23</sup> Ima’s application of the Full Faith and Credit Clause would rely on the class of cases holding that a state was forbidden to apply “its own local law to a transaction because of the demands of the due process clause of the Fourteenth Amendment.”<sup>24</sup> Ima would have to show that Ohio’s application of its own state law and ethics guidelines in the decision to deny her bar admission had “no reasonable contact” with the actions that were legal within the bounds of Cascadia’s law. From the litany of constitutional rights infringement claims that Ima has, it seems she might feel confident about her chances. However, the state is not without its own defenses, and it has some constitutional arguments to use.

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<sup>16</sup> U.S. CONST. art. IV, § 2; Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985).

<sup>17</sup> *Piper*, 470 U.S. at 283.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (quoting Baldwin v. Mont. Fish & Game Comm’n, 436 U.S. 371, 388 (1978)).

<sup>20</sup> See U.S. CONST. amend. XIV, § 1.

<sup>21</sup> See CHEMERINSKY, *supra* note 10, at 933.

<sup>22</sup> U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.”).

<sup>23</sup> Willis L. M. Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 339 (1952).

<sup>24</sup> *Id.* at 342.

### B. *State's Arguments*

Fundamental liberties and rights are at issue, bringing about a strict scrutiny analysis, which requires the government to show a compelling state interest and no less onerous means of attaining those interests to validate the infringement of Ima's rights.<sup>25</sup> Because the same strict scrutiny analysis would be applied to each of Ima's constitutional claims of fundamental rights infringement, a court would apply the compelling state interest offered by the government against each of the infringement claims made by Ima under the Fourteenth Amendment's Privileges or Immunities and Equal Protection Clauses and Article IV's Full Faith and Credit and Privileges and Immunities Clauses. Residency and in-state office requirements for bar admission have been struck down as unconstitutional because the state's interests were not sufficiently substantial to justify the denial of constitutionally protected liberties.<sup>26</sup> In *Piper*, the state defended a residency requirement for bar admission by asserting that non-residents would be less likely to be familiar with local rules, to behave ethically, to be available for court proceedings, or to be available to perform pro bono work in the state.<sup>27</sup> The Court found that the reasons put forth by the state did not meet the substantiality test, nor were the means chosen the least restrictive to achieve those goals.<sup>28</sup>

While Ima would likely point specifically to the ruling in *Piper* to support her claim, as her legal practice in another state does not determine that she would act unethically in Ohio, she might be remiss, based on the court's interpretation of ethical conduct. Ima's actions in Cascadia were within the bounds of that state's law and that state bar's ethical guidelines, so she should argue that the Ohio bar can infer that her practice in Ohio would be within the bounds of its laws and ethical guidelines. However, regardless of how carefully Ima stayed within the bounds of Cascadia's laws, the state still has a strong argument that her activities in Cascadia, while legal under state law, were still in violation of federal law. The inference the state could draw from her activities is that regardless of how she defends her activities in Cascadia, her willingness to assist clients in activities that were in direct violation of federal law proves her lack of character and fitness to practice in the state of Ohio, based on Ohio's Rules.

Where a person resides is a weak reason to declare that they might not be ethically prepared to practice in the state; the integrity of state and federal law would seem to be a much more compelling state interest. The state could point to the

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<sup>25</sup> CHEMERINSKY, *supra* note 10, at 936.

<sup>26</sup> Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985).

<sup>27</sup> *Id.* at 285.

<sup>28</sup> *Id.*

Controlled Substances Act<sup>29</sup> as the basis for denying Ima's application. When presented with the compelling state interest of upholding criminal drug laws in *Employment Division v. Smith*, the Court found that the interest in "health, safety, and public order" was substantial enough to overcome infringing an individual's fundamental rights.<sup>30</sup> While *Smith* addressed a First Amendment Free Exercise claim, the holding still suggests that the Court might rule a state's interest in enforcing the law substantially compelling enough to infringe on an individual's fundamental rights in other applications.

A finding of a compelling state interest could put a dent in Ima's case, but the state would still have to show that denying her a license to practice law in the state was the least restrictive means of achieving that end.<sup>31</sup> Although Ima could argue that the state has protocols in place to discipline attorneys that violate the Rules, the state would likely point to Ima's prior conduct as a violation of federal law and argue that denying her bar admission was the least restrictive means of achieving the objective of law enforcement. The Court in *Smith* held that possession and use of an illegal drug by a single person is "harmful and dangerous,"<sup>32</sup> and it could extend this argument to Ima's case. By issuing one person who intentionally assisted clients in breaking federal drug laws a license to practice law, the integrity of the drug laws of the state and federal governments would be brought into question. The state could argue that Ima left herself open to potential bar admission denial when she acted contrary to the state's Rules.

Ima's final constitutional challenge under the Full Faith and Credit Clause could be overcome by the state with a showing of reasonable contact between the application of its own law and the transaction in question.<sup>33</sup> Most jurisprudence in the Full Faith and Credit doctrine focuses on judicial decisions rather than on conflicting state statutes. *In re Estate of Gardner* exemplifies how the lack of guidance on the application of the doctrine can lead to frustrating outcomes.<sup>34</sup> In 2002, a

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<sup>29</sup> Controlled Substances Act of 1970, 21 U.S.C. §§ 801–971 (2012).

<sup>30</sup> *Emp't Div. v. Smith*, 494 U.S. 872, 899 (1990) ("[A] government's criminal laws might usually serve a compelling interest in health, safety, or public order . . .").

<sup>31</sup> CHEMERINSKY, *supra* note 10, at 938.

<sup>32</sup> *Smith*, 494 U.S. at 905 ("Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous.").

<sup>33</sup> Reese, *supra* note 23, at 42 ("Due process no longer forbids a state from applying its own law unless it has no reasonable contact with the transaction, and, where such a reasonable contact exists, full faith and credit does not compel a state to apply another's law in preference to its own. In other words, further experience with the subject has induced the Court to withdraw almost entirely from the field of choice of law.").

<sup>34</sup> Shawn Gebhardt, *Full Faith and Credit for Status Records: A Reconsideration of Gardiner*, 97 CALIF. L. REV. 1419, 1421 (2009) ("[T]he current state of full faith and credit jurisprudence

marriage between a man and a transgender woman was nullified by a Kansas court that refused to recognize a birth certificate from Wisconsin that was reissued after the plaintiff's sex reassignment surgery.<sup>35</sup> The court determined that the reissued birth certificate did not overcome the Kansas interpretation of legal sex.<sup>36</sup> While that case dealt with executive records, it demonstrates how conflicting state laws can lead to unpredictable results. Until the federal government offers guidance to the states on how to traverse the landscape of conflicting state and federal laws, Ima's dilemma does not have a clear outcome in her constitutional claims. Just as the government has failed to provide clear guidance, many states with legalized cannabis have failed to provide clear guidance to attorneys trying to navigate conflicting state and federal laws while providing zealous advocacy to their clients.<sup>37</sup>

### III. ABA MODEL RULES

In states where medical or recreational marijuana has been legalized and ethical guidance has not been provided, nor safe harbor provisions implemented in the state's ethics rules, lawyers can be left in a quandary because they are unable to assist their clients in activities that are legal under state law.<sup>38</sup> Luckily for Ima, there have been some amendments to the Ohio Rules since the denial of her bar application which could help her get the decision reversed without having to wade through the waters of constitutional law.<sup>39</sup>

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can cause illogical, fundamentally unfair, and unconstitutional outcomes to prevail in cases involving executive branch documents.”).

<sup>35</sup> *In re Estate of Gardiner*, 42 P.3d 120, 137 (2002) (“J’Noel remains a transsexual, and a male for purposes of marriage under K.S.A.2001 Supp. 23–101. We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as female. . . . However, the validity of J’Noel’s marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.”); Gebhardt, *supra* note 34, at 1420.

<sup>36</sup> *Gardiner*, 42 P.3d at 136 (“[T]he legislature clearly viewed ‘opposite sex’ in the narrower traditional sense. The legislature has declared that the public policy of this state is to recognize only the traditional marriage between ‘two parties who are of the opposite sex,’ and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be public policy of this state.”); Gebhardt, *supra* note 34, at 1421.

<sup>37</sup> Peter A. Joy & Kevin C. McMunigal, *Lawyers, Marijuana, and Ethics*, CRIM. JUST., Spring 2017, at 29, 30.

<sup>38</sup> Gregory J. Ryan & Timothy Nolen, *Ethical Considerations for Lawyers Advising State Sanctioned Cannabis Businesses Under the American Bar Association Model Rules of Professional Conduct*, CANNABIS L.J., <https://journal.cannabislaw.report/usa-ethical-considerations-for-lawyers-advising-state-sanctioned-cannabis-businesses-under-the-american-bar-association-model-rules-of-professional-conduct/> (last visited May 13, 2019).

<sup>39</sup> Ian A. Stewart, *The Legal Ethics of Advising the Cannabis Client*, WILSON ELSER (Sept. 19, 2017), [https://www.wilsonelser.com/news\\_and\\_insights/insights/2965-the\\_legal\\_ethics\\_of\\_advising\\_the\\_cannabis\\_client](https://www.wilsonelser.com/news_and_insights/insights/2965-the_legal_ethics_of_advising_the_cannabis_client) (discussing the Ohio Supreme Court’s amendment to the Code of Conduct that allows an attorney to advise and assist clients adhering to the state’s cannabis laws).

The amendments effectively nullified the opinion offered by the Board of Professional Conduct, which previously held that even though the state had legalized medical marijuana, an attorney could not assist a client in complying with the new state laws.<sup>40</sup> Prior to these changes, the Board's textual interpretation of the state's Rules held that Rule "1.2(d) does not distinguish between illegal client conduct that will, or will not, be enforced by the federal government."<sup>41</sup> Although this change in Ohio law might help clear up Ima's dilemma, it highlights two ABA Model Rules of Professional Conduct (MRPC) that are implicated in this problem: MRPC 1.2(d) and 8.4(b) and (d).<sup>42</sup>

In states where cannabis has been legalized, but the state bar has not offered guidance or adapted local Rules to account for state cannabis legislation, those wishing to engage in the cannabis industry face barriers to access, not only in banking and trademark registration, but also in legal services.<sup>43</sup> Even in states that have issued guidance, lawyers have first been told they can advise, not assist their clients, only to have those decisions reversed later.<sup>44</sup> Arizona's bar has created an issue of semantics rather than ethics when telling attorneys "that when consulting with a client who wants to lease premises to sell medical marijuana it's all right to explain that such conduct is legitimate under state law, illegal under federal law, and then go about reviewing the lease for them as if they don't intend to sign it."<sup>45</sup>

Several states have amended their Rules, but in states that have not, attorneys who practice in the cannabis industry do so with risk, as they might face a variety of consequences, from criminal prosecution to bar sanctions.<sup>46</sup> States have focused on MRPC 1.2(d), which asserts that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."<sup>47</sup> To address the changes in state cannabis law, states have either amended their Rules or

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<sup>40</sup> *Id.* at 31.

<sup>41</sup> Supreme Court of Ohio Board of Prof'l Conduct, Op. 2016-6 (2016) (discussing ethical implications for lawyers under Ohio's medical marijuana law).

<sup>42</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2, 8.4 (AM. BAR ASS'N 2016).

<sup>43</sup> Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 219–20 (2016).

<sup>44</sup> Maine Board of Overseers of the Bar, Op. 215 (2017) (vacating previous guidance prohibiting attorneys from assisting clients in adhering to state cannabis laws); Ryan & Nolen, *supra* note 38 (discussing different state bar interpretations and amendments to ethics guidelines after cannabis legislation passed in various states).

<sup>45</sup> Cherner, *supra* note 7.

<sup>46</sup> Bruce E. Reinhart, *Dazed & Confused: Legal and Ethical Pitfalls in Marijuana Law*, CRIM. JUST., Winter 2017, at 4, 9.

<sup>47</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2.

provided advisory opinions to denote that an attorney can assist a client who is operating within the bounds of state law, as long as the attorney advises their clients as to their violations of federal law.<sup>48</sup>

While states have concentrated primarily on MRPC 1.2(d), MRPC 8.4(b) and (d) are also implicated when an attorney assists a client in the cannabis industry, especially in states that have not amended their Rules or provided additional guidance.<sup>49</sup> The pertinent misconduct subsections of MRPC 8.4 read:

It is professional misconduct for a lawyer to:

....

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; . . . .

....

(d) engage in conduct that is prejudicial to the administration of justice . . . .<sup>50</sup>

As of late 2017, no states had modified their versions of Rule 8.4.<sup>51</sup> Although it would be unlikely that a state that had legalized cannabis would discipline an attorney for assisting a client in adhering to state law,<sup>52</sup> it is not unfathomable that a state whose laws are consistent with the current federal cannabis laws would conclude that assisting a client in violating federal law would reflect poorly on the lawyer's honesty and trustworthiness.

#### IV. PROPOSED APPROACH

Ima's situation may seem far-fetched, but it is not beyond the scope of possibility. When faced with a compelling state interest and an infringement on an individual's rights, the past has shown us that a court's decisions do not always fall where we think they should. Even though a state has a compelling interest in upholding its criminal laws and its own ethical standards for determining bar admission, that state would have to show that keeping Ima from practicing law within its boundaries was the least onerous means to achieve those interests. The constitutionally protected interests at stake are high, as the fundamental liberty right of travel and the

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<sup>48</sup> Reinhart, *supra* note 46, at 5.

<sup>49</sup> *Advising Clients on Marijuana Use, Sale*, AM. BAR ASS'N (Oct. 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/november-2017/the-ethical-landmines-surrounding-advising-clients-about-marijua.html> (discussing how, while states have amended MRPC 1.2 to reflect changing cannabis laws, no states have amended MRPC 8.4).

<sup>50</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4 (b), (d).

<sup>51</sup> *Advising Clients on Marijuana Use, Sale*, *supra* note 49.

<sup>52</sup> *KCBA Ethics Advisory Opinion on I-502 & Rules of Professional Conduct*, KING CTY. BAR ASS'N (Oct. 2013), [http://www.kcba.org/judicial/legislative/pdf/i502\\_ethics\\_advisory\\_opinion\\_october\\_2013.pdf](http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf).

right of an attorney to practice law are both implicated in this scenario. Until there is clear guidance from the Federal Government on this issue, a court would likely apply a balancing test, but it is unclear which way the scales would tip, as both Ima and the state are claiming relatively compelling interests.

Under the Full Faith and Credit Clause, Congress has the power to declare the effect of one state's statute on another state.<sup>53</sup> While it would be nice to think that the federal government could come to the aid of the states to clarify how to approach this problem, it has not itself been able to determine how to approach the conflicting state and federal cannabis laws. Until January 4, 2018, the Cole Memo represented the primary guidance postulated by the federal government in regard to the enforcement of marijuana laws in states that had legalized cannabis, but then-Attorney General Jeff Sessions rescinded that memo and put the prosecutorial decisions of enforcement in the hands of the U.S. Attorneys, creating disruption and apprehension in the cannabis industry.<sup>54</sup> While the current federal government guidance on this issue is cloudy at best, ideally, the government should devise a "federalism-based legislative solution" to remedy the issue of state's rights, which President Trump has committed to support.<sup>55</sup> Colorado Senator Cory Gardner has been working on a bill that would clarify that "the federal government cannot interfere with states that have voted to legalize marijuana."<sup>56</sup> If a bill were passed that provided those protections to the states, Ima would have a stronger constitutional challenge. She could argue that if the federal government cannot interfere, surely a sister state should not be able to infringe her constitutional right when she lawfully adhered to state law where she previously practiced.

With the lack of clear guidance from the federal government on this issue, perhaps the answer could come from the states. Many states have been trying to correct the predicaments faced by attorneys trying to assist their clients.<sup>57</sup> Although it would

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<sup>53</sup> *Article IV: Section I. Full Faith & Credit*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/anncon/html/art4frag8\\_user.html](https://www.law.cornell.edu/anncon/html/art4frag8_user.html).

<sup>54</sup> Cheryl Miller, *James Cole's Marijuana Memo Just Got Revoked. Here's What He Thinks About That*, LAW.COM: RECORDER (Jan. 4, 2018), <https://www.law.com/therecorder/2018/01/04/james-coles-marijuana-memo-just-got-revoked-heres-what-he-thinks-about-that/?sreturn=20190209190202>.

<sup>55</sup> Daniella Diaz & Phil Mattingly, *Trump Promises GOP Lawmaker to Protect States' Marijuana Rights*, CNN (Apr. 13, 2018), <https://www.cnn.com/2018/04/13/politics/marijuana-colorado-white-house-cory-gardner-trump/index.html>.

<sup>56</sup> Seung Min Kim, *Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff Over Justice Nominees*, WASH. POST (Apr. 13, 2018), [https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800\\_story.html?noredirect=on&utm\\_term=.663d6336a808](https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html?noredirect=on&utm_term=.663d6336a808).

<sup>57</sup> Reinhart, *supra* note 46, at 5.

be helpful for states to enact legislation that would allow for professionals to act within the bounds of state law, that is not always the case.

Texas, a known conservative state, while maintaining a strong stance on marijuana criminalization, has legislated the legalization of CBD oil in the treatment of epileptic seizures.<sup>58</sup> But the law itself creates ambiguities in getting access to the CBD oil, as it necessitates a doctor's prescription.<sup>59</sup> This would require the doctor to violate federal law by prescribing a Schedule I drug.

Imagine this scenario: a doctor has a patient who could benefit from CBD oil, but to protect her medical license and stay on the right side of the law, she seeks legal advice. The Texas state bar's lack of guidance to the legal community, combined with the lack of guidance from the Drug Enforcement Agency (DEA) for physicians faced with this quandary,<sup>60</sup> means that the doctor could be denied access to legal advice, or simply be given the stock advice that if they chose to prescribe the drug, in accordance with their Hippocratic Oath, they would be in violation of federal law. The lack of ethical guidance for legal and medical professionals puts those professionals in a dilemma of either doing what is right for their clients and patients or protecting their licenses and livelihoods. For this reason, it is vital that states address the inconsistencies in their laws and Rules.

While cannabis is illegal under federal law, conflicts will persist among the states and the federal government. In order for Ima's scenario to not become a reality, the ABA Model Rules must be revised to address conflicts between state and federal laws and provide protections for attorneys and other professionals who are working within the legal bounds of their state systems.<sup>61</sup> Adherence to the law should be the primary goal for attorneys, but that is only an attainable goal when the Rules are clarified as the law changes.

## V. CONCLUSION

As long as state and federal laws are at odds, attorneys will be faced with an ethical dilemma as to how much assistance they can provide to their clients while staying within the bounds of the Rules of their states. With state laws in conflict, there is the potential for an attorney who seeks multi-state licensing to be denied bar admission for activities with clients that were legal in one state, but still viewed as violating federal law and Rules in another. While Ima's scenario has not played out in court yet, the hypothetical example remains all too possible.

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<sup>58</sup> Stephen Paulsen, *Texas Has a New Medical Marijuana Law, but It May Well Serve No Patients*, HOUS. PRESS (Sept. 5, 2017), <http://www.houstonpress.com/news/new-medical-marijuana-law-in-texas-may-help-no-one-9754688>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Ryan & Nolen, *supra* note 38.

Ima's story shows us that the constitutional questions that are raised are not easily answered, because while our federal Constitution goes a long way to protect individual liberties, it also carves out protections for the states. Ima's fundamental rights arguments implicating the Fourteenth Amendment's Privileges or Immunities and Equal Protection Clauses and Article IV's Full Faith and Credit and Privileges and Immunities Clauses should provide her a solid foundation in defense of those rights. However, the state interest is compelling, and a court could find that the state's denial of bar admission is the least onerous way to achieve those means in Ima's case. Luckily for Ima, Ohio came to its senses and amended its Rules, giving clarity to both attorneys in the state and to the ethics board. Now, to create as much clarity as possible in a hazy area of law, it is vital that state bar associations amend their Rules or provide clear guidance that allow for attorneys to not only advise, but also assist, their clients in adhering to the state cannabis laws without fear of repercussions.