

Opinion #215. Attorneys' Assistance to clients under Rule 1.2 regarding the use and sale of Medical and Recreational Marijuana

Vacating Opinion #214

Issued by the Professional Ethics Commission

Date Issued: March 1, 2017

The Professional Ethics Commission (Commission) provides this opinion to clarify that, notwithstanding current federal marijuana laws, Maine Rule of Professional Conduct 1.2 permits an attorney to counsel or assist clients who are engaged in conduct related to the sale or use of marijuana consistent with Maine's laws and regulations governing medical and recreational marijuana.

Opinion 199 was issued on July 7, 2010. That opinion responded to a request from Bar Counsel to the Commission to render an opinion concerning the general parameters within which an attorney may, consistent with the Maine Rules of Professional Conduct, represent or advise clients under Maine's Medical Marijuana Act because of the interplay of that law with the Federal prohibition against the distribution and possession of marijuana.

Opinion 199 cited a guidance, dated October 19, 2009, from the United States Deputy Attorney General which directed United States Attorneys not to focus federal resources on individuals whose actions are in "clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." That guidance, however, made it clear that the Federal law against the distribution of marijuana was still in effect, recognized that "no State can authorize violations of federal law" and that the guidance did "not 'legalize' marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil or criminal matter." The Department of Justice (DOJ) has issued two subsequent guidance memoranda, both of which essentially reaffirm the 2009 guidance.

The issue presented which led to Opinion 199 was whether and how an attorney might act in regard to a client whose intention is to engage in conduct which is permitted by state law and which is a federal crime, even though it might not currently be prosecuted under federal law.

The opinion cited Maine Rule of Professional Conduct 1.2(e), which states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of the 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.

The opinion noted that when the proposed client conduct is known to be a violation of federal criminal law, attorneys may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law but are forbidden from counseling a client to engage in the business or to assist a client in doing so. The opinion concluded that where the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis.

The Commission feels it is appropriate to revisit this opinion and to offer additional guidance to individuals and entities seeking legal advice to assist them in navigating the statutory and regulatory structure posed by Maine legislation with specific regard to marijuana (either medical or recreational). In doing so, the Commission notes that there are two different issues to be addressed: 1) whether Maine lawyers can advise clients on how to conform their conduct to the law; and 2) whether a Maine lawyer may provide services that go beyond the provision of legal advice to clients involved in the sale or use of marijuana as permitted under Maine law, such as negotiation of contracts and drafting of legal documents for such a client to assist the client in establishing a marijuana business.

With regard to the first question, the Commission notes that since Opinion 199 was issued, several other states have had occasion to address state legalization of medical or recreational marijuana and its impact on Rule 1.2. In that regard, a consensus has developed that lawyers should be permitted to advise clients on how to conform their conduct to the law and that the provision of legal advice to clients involved in the marijuana trade falls squarely within that exception.

The second part of the analysis is whether Maine lawyers are permitted to go beyond merely providing legal advice to determine the validity, scope, meaning or application of the law to the point of advising clients on how to conform their conduct to the law. This would include, for instance, the negotiation of contracts and the drafting of legal documents to assist a client in establishing a marijuana business. The issue is that an attorney who performs such work is assisting the client in conduct that violates federal criminal law, even though such conduct is permissible under state law.

Other states have reviewed this distinction and determined that lawyers may ethically assist a client in legal matters expressly permissible under state law even if it may violate applicable federal law within certain parameters. For instance, Arizona concluded that such conduct is permissible, but only when three requirements are met: (1) there are no court decisions holding that provisions of the law are preempted, void, or otherwise invalid; (2) the lawyer reasonably concludes that the client is fully complying with state law requirements; and (3) the lawyer advises the client about possible federal law violations or recommends that the client seek other legal counsel to do so. Likewise, Washington added a new comment to its Rule 1.2 in 2015 as follows: “At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope, and meaning of Washington Initiative 502 and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders and other state and local provisions implementing them.”

In support of the comment, Washington noted that (1) the state Governor and Attorney General were on board; (2) the state executive branch was actively involved in implementation of the relevant laws; (3) since the adoption of the statute the federal authorities had not sought to impair the statute's operation; and (4) Congress has prevented the DOJ from using appropriated funds to prevent states from implementing medical marijuana laws.

In 2013 Colorado took a similar position to Maine and determined that lawyers could represent clients in proceedings related to past activities; advise government clients, argue, or lobby for certain rules, regulations, or standards; and could advise clients about consequences of marijuana use or commerce under Colorado or federal law, but could not assist clients in structuring or implementing transactions that violated federal law and could not represent a lessor or supplier in the transaction if the lawyer knew the client's intended use of the property or supplies. In 2014, however, the state added a comment to its rule changing its position: "A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, 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."

Similar conclusions have been reached by Nevada Oregon and Pennsylvania. Recently, the Ohio Supreme Court amended its Rule 1.2(d) (September 2016) to include the following new provision: "A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, order, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law."

Based on a re-evaluation of Opinion 199, the Commission issued Opinion 214, which recommended that M. R. Prof. Conduct 1.2(e) should be amended consistent with that change enacted by other states to include the following additional language:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; or(3) counsel or assist a client regarding conduct expressly permitted by Maine law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Through Opinion 214, that potential amendment was submitted and proposed to the Advisory Committee on the Rules of Professional Conduct (Advisory Committee) for its assessment. After significant consideration, that Committee reached a majority conclusion that no such amendment to Rule 1.2 is necessary or appropriate. In recognizing the difficult problems of professional responsibility facing practitioners in this area, the Advisory Committee agreed that in the "specific instance of the marijuana laws, lawyers should not be subject to discipline for counseling or assisting clients to engage in conduct that conforms to Maine law, merely because that conduct violates a federal law, so long as federal authorities have declared they have no intention of enforcing the federal law against those who are complying with relevant state law."

However, a majority of the Advisory Committee also felt it unwise to craft a rule of general applicability for this specific issue and instead suggested that the Commission reconsider Opinion 214 to clarify that counseling or assisting a client to engage in conduct that conforms to Maine laws regarding marijuana does not violate Rule 1.2. This Commission appreciates the effort put forth by the Advisory Committee in reaching its conclusion and hereby adopts and references portions of the Advisory Committee’s reasoning.

In light of that posture, the Commission has reconsidered its Opinion 214 and offers the following further clarification of that opinion. In engaging in the reconsideration, the Commission looked to the intent of Rule 1.2. The Rules of Professional Conduct are recognized to be rules of reason, intended to be interpreted in light of “the purposes of legal representation and of the law itself.” M. R. Prof. Conduct, Preamble ¶ [14B]. In that light, Rule 1.2 must reasonably be read considering the context of its interaction with Rule 8.4. Specifically, Rule 8.4 does not make every violation of law a violation of Rule 1.2 and instead contemplates only those violations that reflect adversely on a lawyer’s honesty, trustworthiness or fitness to practice law.

Likewise, Rule 1.2 does permit a lawyer to “counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” Rule 1.2(e). This is necessary in order to balance a lawyer’s obligations under the Rules with the public’s general interest in obtaining legal assistance to understand the law and to conform its conduct. Defining Rule 1.2 too strictly on matters involving marijuana would inhibit lawyers from assisting clients in testing the boundaries and validity of existing law, which is recognized to be an integral part of the development of the law. Thus, the Commission recognizes that such strict interpretation of Rule 1.2 would more likely have a detrimental effect, particularly where, as here, it appears the regulation of use and trade in marijuana is in a developmental phase. To subject lawyers to discipline for counseling or assisting clients to engage in Maine’s testing of this area would be, in practical effect, to shut down this particular approach to development of the law. The public’s need for legal assistance and right to receive it are substantial, and concerns about upholding respect for the law and legal institutions are not significant enough to outweigh those considerations in this circumstance.

Therefore, in clarifying and hereby replacing Opinion 214, the Commission opines that, notwithstanding current federal laws regarding use and sale of marijuana, Rule 1.2 is not a bar to assisting clients to engage in conduct that the attorney reasonably believes is permitted by Maine laws regarding medical and recreational marijuana, including the statutes, regulations, Orders and other state or local provisions implementing them. The Commission cautions that, because the DOJ guidance on prosecutorial discretion is subject to change, lawyers providing advice in this field should be up to date on federal enforcement policy, as well as any modifications of federal and state law and regulations, and advise their clients of the same.

Enduring Ethics Opinion

Credits

Copyright © 2013
All rights reserved.