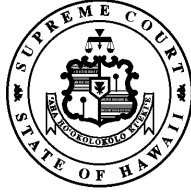


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FORMAL OPINION NO. 49

MEDICAL MARIJUANA

In light of Act 241 of the 2015 Hawai'i Legislative Session and Rule 1.2(d) of the Hawai'i Revised Code of Professional Conduct, we are asked to advise:

- (1) whether a lawyer may provide legal advice about Act 241; and
- (2) whether a lawyer may provide legal services to facilitate the establishment and operation of a medical marijuana business "when such acts are expressly authorized under [Act 241], but remain a crime under federal law, albeit with a low enforcement priority."

We answer the first question in the affirmative and the second in the negative.

Act 241 "establishes a regulated statewide dispensary system for medical marijuana to ensure safe and legal access to medical marijuana for qualifying patients." [Act 241§ 1.] The lengthy act establishes strict criteria for licensing the production and sale of medical marijuana. We recognize that:

- (1) applicants for the licenses and the businesses established thereby would greatly benefit from the services provided by lawyers;
- (2) the current leadership of the U.S. Department of Justice, with caveats and conditions, has indicated it gives low priority to prosecuting violations of federal drug law when production and sale of marijuana is authorized by a state law;

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- (3) the Congress temporarily has prohibited expenditure of funds to prosecute persons implementing state laws that authorize the use, distribution, possession, or cultivation of marijuana; and
- (4) several states, by one means or another, allow lawyers to provide both (a) advice with regard to state law and (b) services needed for producers and sellers to comply with state law allowing the production and distribution of marijuana, but the Maine Professional Ethics Commission has concluded lawyers may not provide services.¹

Crucial to our opinion is that Congress has not amended federal criminal law to exempt state authorized production and distribution of marijuana and the Hawai'i Supreme Court has not amended HRPC Rule 1.2(d) to provide an exception to Rule 1.2(d)'s prohibition against assisting a client in conduct the lawyer knows to be criminal.

Rule 1.2(d) of the Hawai'i Rules of Professional Conduct provides:

(d) 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 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.

¹ By statute, **Minnesota** exempted attorneys from disciplinary action by the Minnesota Supreme Court. See Minnesota Statutes 152.32 Subd. 2(i). **Connecticut** amended its version of Rule 1.2(d) to allow lawyers to "counsel or assist. . . regarding conduct expressly permitted by Connecticut law" but required counseling with regard to other law. The **Colorado** and **Nevada** Supreme Courts amended Comment to their versions of Rule 1.2(d) to allow lawyers to provide advice and services, with the condition lawyers also advise about federal law. The **Washington** Supreme Court has added a comment to its version of Rule 1.2(d) that allows lawyers to provide advice and services "[a]t least until there is a change in federal enforcement policy[.]" The State Bar of **Arizona** opines lawyers "ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under" Arizona's medical marijuana law. The **New York** State Bar Association has opined its version of "Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance." The **Illinois** State Bar Association is recommending Illinois rules be amended. The **Maine** Professional Ethics Commission, concluded its Rule 1.3(d) "forbids attorneys from counseling a client to engage in the business or to assist a client in doing so" where "the proposed client conduct is known to be a violation of federal criminal law."

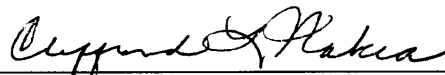
Comment [9] says:

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Rule 1.2(d) clearly allows a lawyer to counsel a client with regard to the requirements of any law, including Act 241. As comment [9] observes, however, Rule 1.2(d) prohibits a lawyer from "assisting a client to commit a crime." The lawyer who requested our opinion and most of the entities that have addressed the issue, including the Department of Justice, agree that assisting clients in meeting state licensing and business requirements that authorize production and distribution of marijuana would be assisting the client to commit a federal crime.

Consequently, until such time as the Hawai'i Supreme Court amends HRPC Rule 1.2(d) or adds an appropriate comment, or the Congress acts to except from federal criminal law state authorized production and distribution of marijuana, a lawyer may advise a client with regard to legality under state and federal law on the subject of marijuana production and distribution and may advocate for changes in court rules or state or federal laws on the subject, but a lawyer may not "provide legal services to facilitate the establishment and operation of a medical marijuana business" in accordance with Act 241 or otherwise.

DATED: Honolulu, Hawai'i, August 27, 2015



Hon. Clifford L. Nakea (Ret.)
Chairperson, Disciplinary Board