



Professional Ethics Committee

30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
P: (860) 223-4400
F: (860) 223-4488

Approved January 16, 2013

Informal Opinion 2013-02
PROVIDING LEGAL SERVICES TO CLIENTS SEEKING LICENSES UNDER
THE CONNECTICUT MEDICAL MARIJUANA LAW

An Act Concerning the Palliative Use of Marijuana, Public Act 12-55, effective Oct. 1, 2012, provides for the registration of marijuana users and the licensing of growers and dispensers of marijuana to be used to alleviate symptoms of a debilitating medical condition. We have been asked whether a lawyer may advise clients about the requirements of the Act and assist clients and represent them before state agencies in establishing and licensing businesses permitted under the Act.

Federal law, particularly the Controlled Substances Act, prohibits the growing, distribution and dispensing of marijuana and potentially subjects violators to criminal and civil penalties. The U.S. Department of Justice, as recently as June, 2011, has clearly stated that state laws are not a defense to civil or criminal enforcement of federal law prohibiting the cultivation, sale or distribution of marijuana, including the Controlled Substances Act. (D.O.J. Memorandum, June 29, 2011, p. 2).

Public Act 12-55 creates a broad licensing and registration structure to be implemented by regulations issued by the Connecticut Department of Consumer Protection. The Act defines qualified users of medical marijuana, and regulates their primary caregivers, their physicians, pharmacists who will be permitted to dispense marijuana, distributors and growers. Patients,

caregiver groups, health professionals and persons interested in business activities can be expected to seek legal advice concerning the requirements of the Act, the Department of Consumer Protection's rule-making process, and the requirements of state and federal law. Lawyers providing advice in these circumstances will be performing in their traditional role as counselors. Lawyers who advise clients and assist them in the rule-making and regulatory process also act in the classic mode envisioned by professional standards. Accord, Arizona State Bar Ethics Opinion. 11-01 (2011)

At some point, perhaps, but not necessarily after the planning and licensing are complete, some clients may expect their lawyers to assist them by providing advice and services in aid of functioning marijuana enterprises that may violate federal law. It is at this point that a lawyer must consider Rule of Professional Conduct 1.2(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 a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The Comment to Rule 1.2(d) provides that once a lawyer discovers that client conduct the lawyer considered legally proper is criminal or fraudulent, the lawyer must end his or her assistance. Rule of Professional Conduct 1.4(a)(5) encourages lawyers to inform clients of the limits of the lawyer's ability to assist clients in these circumstances. Commentators and others have treated the topic of lawyers assisting in client criminal conduct in some detail. See, e.g., C. Wolfram Modern Legal Ethics p 69 (1985), Restatement of the Law Governing Lawyers sec. 8. See also, Conn. Bar Assoc. Informal Op. 09-02 (2009). The Official Commentary to Rule 1.2 states: "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.”

It is not our role to predict the path that the law may take in resolving the conflict between the federal Controlled Substances Act and state laws regulating the medical use of marijuana. The Rules of Professional Conduct permit lawyers to make novel, good faith, and non-frivolous arguments that challenge the law. Conn Bar Assoc. Informal Op. 09-92. Though, perhaps, subject to legal and political challenges, the Controlled Substances Act stands. Whether or not the CSA is enforced, violation of it is still criminal in nature. See Memorandum For United States Attorneys “Guidance Regarding The Ogden Memo In Jurisdictions Seeking to Authorize Marijuana For Medical Use” by James M. Cole, U.S. Deputy Attorney General (June 29, 2011). See, also, *Gonzalez v. Raich*, 545 U.S. 1 (2005). While Connecticut law may allow certain behavior, that same behavior currently constitutes a federal crime.

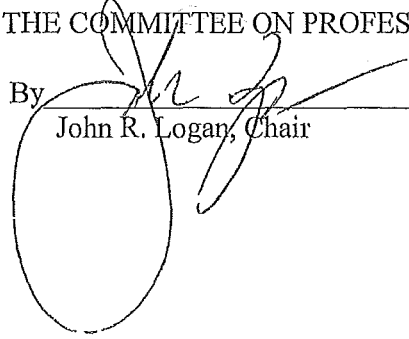
We decline to categorize particular factual circumstances that may raise issues of culpability because the circumstances may be so various as to make the effort valueless. C.f. Maine Professional Commission Opinion 199 (2010). Nonetheless, “the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not....[A]n attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law”. *Id.* At a minimum, a lawyer advising a client on Public Act 12-55 must inform the client of the conflict between the state and federal statutes, and that the conflict exists regardless of whether federal authorities in Connecticut are or are not actively enforcing the federal statutes.

It is our opinion that lawyers may advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act. Lawyers may not assist clients in conduct that is in violation of federal criminal law. Lawyers should carefully assess where the line is between those functions

and not cross it.

THE COMMITTEE ON PROFESSIONAL ETHICS

By



John R. Logan, Chair