Ethics Advisory Opinion

From the State Bar of New Mexico's Ethics Advisory Committee

Formal Opinion: 2016-01

Topic: Lawyer's Ability to Represent Medical Cannabis Businesses

Rules Implicated: 16-102 NMRA (2015)

Disclaimer:
The Ethics Advisory Committee of the State Bar of New Mexico ("Committee") is constituted for the purpose of advising inquiring lawyers on the application of the New Mexico Rules of Professional Conduct in effect at the time the opinion is issued (the "Rules") to the specific facts as supplied by the inquiring lawyer or, in some instances, upon general issues facing members of the bar. The Committee does not investigate facts presented to it and generally assumes the facts presented are true and complete. The Committee does not render opinions on matters of substantive law. Lawyers are cautioned that should the Rules subsequently be revised or facts differ from those presented, a different conclusion may be reached by the Committee. The Committee's opinions are advisory only, and are not binding on the inquiring lawyer, the disciplinary board, or any tribunal. The statements expressed in this opinion are the consensus of the Committee members who considered the issue.

Question Presented:
Can a New Mexico lawyer comply with the Rules of Professional Conduct in representing non-profit producers, courier and manufacturers of medical cannabis and approved laboratories?

Summary Answer:
Yes, but a lawyer may not counsel or "assist" a client to commit a crime.

Analysis:
The issue before the Committee was whether a law firm can represent non-profit producers, couriers and manufacturers of medical cannabis and approved laboratories. This presented a novel question to the Committee. It involves issues of federalism, public policy and the meaning of "assistance" under rule 16-102(D) NMRA. As other states have dealt with this issue and the Committee conducted a thorough review of opinions on the subject[1].

The Committee is in agreement, as are all of the related opinions available, that a lawyer may "represent" a medical cannabis business in so far as to advise it on the legality of its proposed activities. This is squarely covered under our Rule 16-102(D):

> **D**. Course of conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or misleads the tribunal. *A lawyer may, however, 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.* (emphasis added)

What is much less clear is whether a lawyer can actually "represent" such a business for substantive business-related purposes, such as creating an LLC, negotiating contracts, or other possible tax and business representation. The Committee is in agreement that this determination rests within the same section of the Rule, specifically the language admonishing a lawyer from "counsel[ing] a client to engage, or assist[ing] a client in conduct that the lawyer knows is criminal." *Id.* As producing and distributing any type of cannabis, including medical cannabis permitted under state laws, is illegal under federal law, 21 U.S.C. § 841(a)(1), a lawyer may not provide prohibited counseling or assistance.

The Committee looked at several jurisdictions in its analysis and notes that the Arizona State Bar Committee on the Rules of Professional conduct came to a different conclusion. However, in the Committee's opinion, that opinion is based on a value judgment of the current state of federal laws and prosecutions and not on a true reading of the Rules of Professional Conduct. The Arizona Committee seems to add what this Committee feels are irrelevant factors (3) and (4) to the analysis, when it based its conclusion on the fact that:

> [N]o prior Arizona ethics opinions or cases have addressed the novel issue presented by the adoption of the Act — whether a lawyer may ethically "counsel" or "assist" a client under the following conditions: (1) the client's conduct complies with a state statute expressly authorizing the conduct at issue; (2) the conduct may nonetheless violate federal law; (3) the federal government has issued a formal "memorandum" that essentially carves out a safe harbor for conduct that is in "clear and unambiguous compliance" with state law, at least so long as other factors are not present (such as unlawful firearm use, or "for profit" commercial sales); and (4) no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds.

While the Committee understands Arizona's desire to allow this type of representation, it does not feel that factors (3) and (4) overcome the fundamental fact of illegality under current federal law. Similarly, the Illinois State Bar came up with this seemingly inconsistent conclusion:

> The negotiation of contracts and the drafting of legal documents for such a client are means of assisting the client in establishing a medical marijuana business. Therefore, an attorney who performs such work would be assisting the client in conduct that violates federal criminal law, even though such conduct is permissible under the new state law. But as quoted above, a lawyer may provide such assistance if the lawyer is assisting the "client to make a good-faith effort to determine the validity, scope, meaning or application of the law."

> As Preamble [14] notes, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses. One of the purposes of legal representation is to enable clients to engage in legally regulated businesses efficiently, and that purpose is advanced by their retention of counsel to handle matters that require legal expertise. A lawyer who concludes that a client's conduct complies with state law in a manner consistent with the application of federal criminal law may provide ancillary services to assure that the client continues to do so. Illinois Professional Conduct Advisory Opinion 14-07 (October, 2014)

The Committee is in agreement that the more accurate position, which comports with our Rule 16-102, is clearly stated in Maine's Opinion:

> Maine and its sister states may well be in the vanguard regarding the medicinal use and effectiveness of marijuana. However, *the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not*. So long as both the federal law and the language of the Rule each remain the same, an 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. Maine Board of Overseers of the Bar, Professional Ethics Commission Opinion #199 (2010) (emphasis added). *See also* Connecticut Bar Association Professional Ethics Committee, Informal Opinion 2013-02 (same).

The Colorado Bar Association Ethics Committee, in a formal opinion, encapsulated the inherent tensions, but also sided with the letter of the Rules of Professional Conduct:

> Public policy considerations favor lawyers providing the full range of legal advice authorized under Colo. RPC 2.1 so that their clients may comply with Colorado's marijuana use laws. "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." *Hickman v. Taylor*, 329 U.S. 495, 514 (U.S. 1947) (Jackson, J., concurring). Nevertheless, unless 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). Formal Opinion 125 (2013). *See also* Disciplinary Board of Hawai'i Supreme Court Formal Opinion 49 (2015)(same).

Of note, after the ethics opinion cited above, the Supreme Court of Colorado added a comment to its rule permitting lawyers to "assist a client in conduct that the lawyer reasonably believes is permitted [under state law]," and directs that the lawyer "shall also advise the client regarding related federal law and policy." Colo. RPC 1.2 (2012), Comment 14[2]. Similarly, the Connecticut Superior Court amended its Rules on July 1, 2014, adding that lawyers may "counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." Connecticut Rule of Professional Conduct 1.2(d), explaining in the Commentary that this change "is intended to permit counsel to provide legal services to clients without being subject to discipline under these Rules notwithstanding that the services concern conduct prohibited under federal or other law but expressly permitted under Connecticut law, e.g., conduct under An Act Concerning the Palliative Use of Marijuana, Public Act 12-55, effective Oct. 1, 2012." *Id.*

The Committee agrees with the Maine and Colorado opinions that assistance to these medical cannabis businesses would violate the Rules of Professional Conduct as currently written. The Committee has also determined that attorneys with multiple licenses or on inactive status in New Mexico are equally subject to our Rules of Professional Conduct for activities conducted in other jurisdictions. Therefore, the Committee cautions New Mexico attorneys representing medical cannabis businesses in states that may specifically permit such representation under their rules that this does not alter the lawyer's responsibilities under our Rules of Professional Conduct.

The Committee is unable to agree as to the exact parameters of "assistance." At one end of the spectrum, the Committee is in general agreement that negotiating contracts for the purchase of cannabis would be directly assisting the client to engage in a criminal activity. At the other end of the spectrum, some Committee members opined that forming a general alternative medical business, which *could possibly* include the prescribing and distributing of medical cannabis would not be such assistance. However, even with this example some Committee members felt there was impermissible assistance. Overall, the Committee feels that attorneys must analyze the issue of "assistance" for themselves, based upon the specific facts of the situation, bearing in mind that that line may be tested through a disciplinary complaint.

Conclusion: A New Mexico lawyer may represent non-profit producers, courier and manufacturers of medical cannabis and approved laboratories, to the extent that representation is not in the form of impermissible counseling to engage in or providing "assistance" in the commission of crimes.

Endnotes

1 The Committee has also taken note of two facts, though determined neither is dispositive to the question presented. Those facts are: 1) The New Mexico Supreme Court recently declined to adopt proposed Rule 16-102(E) which expressly permitted a lawyer to "counsel or assist a client regarding conduct expressly permitted by the [Medical Cannabis Act], ¶¶26-2B-1-7 NMSA"; and 2) lawyers throughout the country, including New Mexico, are currently representing medical cannabis businesses in myriad of ways.

2 Of further note, the U.S. District Court for Colorado declined to adopt this new comment to the rule, specifically excluding it except as to permit practitioners in the U.S. District Court to advise clients regarding the "validity, scope and meaning" of Colorado's marijuana laws. Local Rule D.C.COLO.LAttyR 2(b)(2) (Dec. 1, 2015). This federal local rule created a significant split in the ethical rules applicable to state and federal practitioners in Colorado.