

**PENNSYLVANIA BAR ASSOCIATION
LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY COMMITTEE**

**PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE**

JOINT FORMAL OPINION 2015-100

**PROVIDING ADVICE TO
MARIJUANA RELATED BUSINESSES**

Summary

Current federal law enforcement policy limits the likelihood of prosecution for violation of the Controlled Substances Act for those involved in marijuana-related activities that are specifically authorized and regulated under state law. However, the manufacture, distribution, dispensation and possession of marijuana are still crimes under federal law. Therefore, Rule 1.2(d) of the Pennsylvania Rules of Professional Conduct prohibits a lawyer from counseling or assisting a client in such conduct, even though the conduct may be specifically authorized under applicable state law. A lawyer may, however, explain to the client the potential consequences of a proposed course of conduct, including whether or not such conduct would be in conformance with applicable state and federal law.

To address the existing and growing need for legal assistance with respect to marijuana-related activities that are authorized, or will, in the future, become authorized under various states' laws, it is recommended that Rule 1.2(d) be amended to authorize lawyers to provide legal assistance with respect to conduct that is expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Background

The Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee and the Philadelphia Bar Association Professional Guidance Committee ("the Committees") have received a number of inquiries concerning the propriety of a Pennsylvania lawyer providing legal services from a Pennsylvania office to: (1) individual and business clients who wish to engage in activities that are subject to another jurisdiction's state marijuana law, which legalizes marijuana for medical and/or recreational use, but which activities are illegal under federal law; or (2) a client who wishes to engage in activities that are subject to Pennsylvania's proposed marijuana law, which would legalize marijuana for medical purposes, but which activities are illegal under federal law.

Over twenty states and the District of Columbia have legalized the use of marijuana for medical purposes while Colorado, Oregon and Washington have legalized marijuana for recreational use. In Pennsylvania, legislation has been proposed under which limited use of marijuana for medical purposes would be legal.¹

However, under the federal Comprehensive Drug Abuse Prevention and Control Act, otherwise known as the Controlled Substances Act (“CSA”)² marijuana is classified as a Schedule I drug that has “no currently accepted medical use in treatment in the United States.”³ thereby making it a “controlled substance.” The CSA makes it unlawful to manufacture, distribute, dispense, or possess a controlled substance.⁴

On August 29, 2013, the U.S. Department of Justice (“DOJ”) issued a memorandum to all U.S. attorneys providing guidance regarding marijuana enforcement. The DOJ outlined its enforcement priorities, and advised attorneys and law enforcement to focus their efforts on persons or organizations whose activities interfere with one or more of those priorities, regardless of state law. The DOJ advised that in jurisdictions that have enacted laws legalizing marijuana in some form and have implemented strong regulatory and enforcement systems, conduct in conformity with state laws and regulations would be less likely to threaten its stated priorities; thus, in those cases, DOJ would defer to enforcement of state law by state and local law enforcement and regulatory bodies. The DOJ made it clear, however, that even in jurisdictions with strong and effective regulatory systems, persons whose conduct threatens federal priorities would be subject to federal enforcement action.⁵

Multijurisdictional Practice: Rule 5.5

Despite DOJ’s current guidance, the conflict between federal and state law creates several ethical issues for a Pennsylvania lawyer. Before those issues can be addressed, however, the lawyer must first determine whether the provision of legal services within Pennsylvania to recipients outside of Pennsylvania violates PA RPC 5.5. That Rule provides in relevant part:

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice Of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

¹ Senate Bill 3 passed the Senate by a vote of 40:7 and is currently before the House Rules Committee.

² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, tit. II, 84 Stat. 1236, 1242 (codified as amended at 21 U.S.C. §§801-889 (2006)).

³ 21 U.S.C. §812(b)(1)(B).

⁴ 21 U.S.C. §841.

⁵ <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

A Pennsylvania lawyer may provide to a client within Pennsylvania legal services such as advising the client about the law of another state, conducting research of the law of another state, advising the client about the application of a law of another state, and drafting legal documents that have legal effect in another state. *See PBA Informal Op. 2001-62* (Sept. 11, 2001) (subject to certain caveats, it was permissible for a Pennsylvania lawyer to provide advice to franchisees of a common franchisor concerning certain common issues in real estate leases to be executed in other jurisdictions). Restatement (Third) of the Law Governing Lawyers (2000) § 3 Jurisdictional Scope of Practice of Law by Lawyer, Comment e provides:

Some [transactional] activities are clearly permissible. Thus, a lawyer conducting activities in the lawyer's home state may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising, the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law. *It is also clearly permissible for a lawyer from a home-state office to direct communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telecopier, or other forms of electronic communication.* On the other hand, as with litigation, it would be impermissible for a lawyer to set up an office for the general practice of nonlitigation law in a jurisdiction in which the lawyer is not admitted. (emphasis added).

See PBA Formal Op. 90-02 (Mar. 2, 1990) (subject to certain caveats, it was permissible for a lawyer who was not licensed in Pennsylvania to prepare loan documentation, negotiate the terms of loan agreements, and offer an opinion as to the enforceability of the loan documents in transactions involving loans secured by property located in Pennsylvania).

However, a lawyer licensed in Pennsylvania would violate PA RPC 5.5 if the lawyer were to practice law in another jurisdiction in violation of that jurisdiction's rules of professional conduct or unauthorized practice of law statutes. Comment [2] to Rule 5.5 notes that "the definition of the practice of law is established by law and varies from one jurisdiction to another." Therefore, the lawyer would have to determine whether the proposed services constitute the practice of law under the law of the applicable jurisdiction. The lawyer would then have to determine whether any exceptions to that jurisdiction's general prohibition on out-of-state practice apply.

If the lawyer determines that no violation of PA RPC 5.5(a) will occur, the next step is to determine whether the proposed legal services will violate PA RPC 1.2(d), which states:

(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.

Comment [9] states:

[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.

This Rule distinguishes between counseling and assisting the client in criminal or fraudulent conduct, which is prohibited, and discussing the legal consequences of any proposed course of conduct or assisting a client to make a good faith effort to determine the validity, scope, meaning or application of the law, which is permitted. Determining what is prohibited under this provision requires a two-step analysis – (1) Is the client's conduct criminal or fraudulent?; and (2) does the lawyer have actual knowledge (as opposed to mere suspicion) that the conduct is criminal or fraudulent? If the lawyer determines that the client's conduct is criminal or fraudulent and the lawyer knows that it is, the lawyer cannot provide any counseling or assistance to the client in connection with that conduct, but may give an honest opinion about the legal consequences of the client's conduct if the client chooses to pursue it.

Opinions of Other Bar Associations

Other bar association ethics authorities that have addressed whether lawyers in their respective states may ethically counsel or assist clients in matters that are permissible under their state laws, but impermissible under federal law, have come to varying conclusions.

The Professional Ethics Commission of Maine cautioned an attorney about representing or advising clients under Maine's Medical Marijuana Act, which permits the creation of dispensaries for the purpose of providing qualified patients with marijuana for medical use. The Commission first noted that the conduct proposed by the client was known to violate federal criminal law. Therefore, the role of the lawyer was limited. The lawyer would be permitted to counsel or assist the client in making a good faith effort to determine the validity, scope, meaning or application of the law, but the lawyer could not counsel or assist the client in criminal conduct. The lawyer would have to determine

whether the particular legal service being asked of the lawyer rose to the level of assistance in violating federal law. The Commission noted, “We cannot determine which specific actions would run afoul of the ethical rules. We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk which needs to be carefully evaluated.” *Maine Prof'l Ethics Comm'n*, Op. 199 (July 7, 2010).

The following year, the State Bar of Arizona determined that Arizona’s Rule 1.2(d) permits a lawyer to counsel or assist a client in complying with the Arizona Medical Marijuana Act if: “(1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client’s proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client’s activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of representation.” It is interesting to note that Arizona’s conclusion is premised on access to legal services and the role of lawyers to provide those services, and a federal memo that states that federal law enforcement will not target those operating in compliance with state law. *Comm. on the Rules of Prof'l Conduct of the State Bar of Arizona*, Op. 11-01 (Feb. 2011).

Connecticut concluded that lawyers may advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act, but may not assist clients in conduct that is in violation of federal criminal law. At a minimum, a lawyer must inform the client of the conflict between state and federal law regardless of the fact that federal authorities in Connecticut may not be actively enforcing the federal statute. *Prof'l Ethics Committee of the Conn. Bar Ass'n*, Op. 2013-02 (Jan. 16, 2013). Effective January 1, 2015, Connecticut Rule of Professional Conduct 1.2(d) was amended to include a new subpart (3), and now reads as follows:

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 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.

Formal Opinion No. 49 of the Disciplinary Board of the Hawaii Supreme Court (Aug. 27, 2015) reached essentially the same conclusion as the Connecticut opinion. As a result, the Hawaii Supreme Court has proposed an amendment to Hawaii Rule 1.2(d) that is very similar to that which our Committees recommend be adopted in Pennsylvania, as discussed below.

The King County Bar Association (KCBA) in the State of Washington, which passed legislation decriminalizing marijuana, favored the approach taken by the State Bar of Arizona and concluded that a lawyer “who fully advises a client of the federal law implications of [Washington’s marijuana law] and the CSA may assist the client, so long as the counseled or assisted conduct is expressly permitted by [Washington’s marijuana law].” *King County Bar Ass’n*, Op. on I-502 & Rules of Prof’l Conduct (Oct. 2013). In November 2014, the Washington Supreme Court adopted new Comment [18] to Rule 1.2, which provides:

[18] 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 (Laws of 2013, ch. 3) 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 Colorado where medicinal and recreational use of marijuana is legal, that state’s highest court adopted a new Comment [14] to Rule 1.2, which became effective in March 2014, permitting lawyers to advise and assist clients about marijuana issues without fear of discipline. The new comment provides:

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII secs. 14 & 16, 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.

The Illinois State Bar Association’s Professional Conduct Committee concluded that an Illinois lawyer may provide services that are strictly advisory to a client involved in the marijuana business because the provision of such services falls squarely within the exception to Rule 1.2 which allows a lawyer to “discuss the legal consequences of any proposed course of conduct with the client” and to “counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law.” As to the provision of services that go beyond legal advice, the Committee acknowledged that “the negotiation of contracts and the drafting of legal documents for a medical marijuana client are means of assisting the client in establishing a medical marijuana business. Therefore, a lawyer 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.” Nevertheless, the Committee concluded that a lawyer’s assistance in helping clients conform their conduct to state law so as to avoid federal prosecution in light of DOJ’s current guidance would amount to a lawyer assisting the client to make a good-faith effort to determine the validity, scope, meaning or application of the law. The Committee stated, “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.” *ISBA Prof’l Conduct Comm. Op. 14-07* (October 2014).

Opinion 2015-1 of the Bar Association of San Francisco (the “San Francisco Opinion”) primarily addressed whether a lawyer could ethically advise or assist a client in activities that are authorized under California’s medical marijuana law, but which are illegal under the CSA. Unlike Pennsylvania Rule 1.2(d), the applicable California Rule of Professional Conduct, Rule 3-210, only prohibits “advising the violation of any law,” but does not specifically prohibit “assisting” a client in criminal conduct. However, while acknowledging this distinction, the San Francisco Opinion did not focus on it. In fact, the Opinion conceded that advising and assisting a client in conduct which is authorized under California law, but which is illegal under federal law, would not conform to the literal language of California Rule 3-210. However, given the unique circumstances presented by the conflict between California’s medical marijuana law and federal law, the Opinion concluded that a lawyer could advise and assist a client with marijuana related activities that were permitted under California law, so long as the lawyer also advised that the client’s proposed activities may violate federal law, and also advise of the risk of prosecution for such a violation.

Thus, rather than focusing upon whether the lawyer’s proposed activities complied with the literal language of the applicable California Rule of Professional Conduct, the San Francisco Opinion focused upon the client’s need for legal representation with respect to marijuana related activities, and suggested that the lawyer’s ethical obligation to provide needed legal representation could override strict adherence to the rules. The Opinion cautioned that California’s disciplinary authorities might disagree with this analysis of the lawyer’s ethical obligations, and further cautioned that a lawyer engaging in such conduct faced some risk of federal prosecution for aiding and abetting.

The San Francisco Opinion also concluded that advising and assisting a client with respect to marijuana related activity would not violate Model Rule 1.2(d), which is identical to Pennsylvania Rule 1.2(d). This portion of the Opinion did not address how assisting a client with conduct which violated a federal criminal statute could be reconciled with Rule 1.2(d)’s prohibition against assisting a client in conduct that the lawyer knows is criminal. Instead, the San Francisco Opinion again focused upon fulfilling the need for legal services, stating: “An ethical lawyer should not be limited to the bare words of a disciplinary rule in deciding upon commitments to the client or duties to the public.”

Analysis

The Committees agree that, once a jurisdiction makes the policy decision to authorize some form of marijuana related activity, those who choose to engage in such activity - and the public at large - would be better served if the legal profession was able to advise clients engaged in such activities without fear of professional discipline. However, the Committees do not agree that the indisputable existence of such a need for

legal services can justify ignoring the clear language of a Rule of Professional Conduct. Having reviewed the ethics opinions from other jurisdictions and having carefully considered and weighed the lawyer's obligations under the Pennsylvania Rules of Professional Conduct, the conflict between federal and state law on the subject of marijuana, the DOJ's current guidance regarding marijuana enforcement, and the importance of providing legal services and guidance to those engaged in activities that are in compliance with state law, the Committees conclude as follows:

A lawyer licensed to practice in Pennsylvania is required to comply with the Pennsylvania Rules of Professional Conduct, regardless of where the client is located or the legal work is performed, subject to the application of the choice of law provisions of Rule 8.5(b). Rule 1.2(d) prohibits a lawyer from counseling or assisting the client in criminal or fraudulent conduct, but permits a lawyer to discuss the legal consequences of any proposed course of conduct or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. If the conduct is illegal, Comment [9] to Rule 1.2(d) advises the lawyer not to undertake the representation or to limit the representation to giving an honest opinion about the actual consequences that appear likely to result from a client's conduct.

Given that it is a federal crime to manufacture, distribute, dispense, or possess marijuana, PA RPC 1.2(d) forbids a lawyer from counseling or assisting a client in such conduct by, for example, drafting or negotiating contracts for the purchase, distribution or sale of marijuana.⁶ The fact that the proposed client conduct is permitted by state law, and federal law enforcement may not target those operating in compliance with state law, does not change the analysis, as the Rule makes no distinction between laws that are enforced and laws that are not.

As noted above, we support the notion that to prohibit lawyers from providing clients with the advice and assistance necessary to engage in conduct expressly permitted by state law would deprive those clients of the legal services necessary to implement that conduct. Given these important public policy considerations, professional regulation offices in other jurisdictions have taken the position that they will not initiate disciplinary proceedings against lawyers who in good faith advise or assist clients in conduct that is in strict compliance with state law.⁷ Regardless of whether a similar pronouncement is made by disciplinary authorities here, a lawyer's services must, in any event, be provided in compliance with the Pennsylvania Rules of Professional Conduct.

⁶ In addition, other federal laws including those that address "aiding and abetting" the commission of a crime may expose a lawyer to risks of which the lawyer should be aware.

⁷ The Massachusetts Board of Bar Overseers and Office of Bar Counsel have announced that they "will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope and meaning of the Massachusetts statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state and local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy." See also, *Washington State Bar Association Chief Disciplinary Counsel's Response to RPC Proposal* (Oct. 24, 2013) ("The Office of Disciplinary Counsel has not disciplined and does not intend to discipline lawyers who in good faith advise or assist clients or personally engage in conduct that is in strict compliance with I-502 and its implementing regulations").

Conclusion

Therefore, we conclude that:

1. Under Rule 1.2(d), a lawyer may provide services to a client that are strictly advisory, that is, a lawyer may discuss and explain to the client the consequences of a proposed course of conduct and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
2. In providing such services to clients engaged in the marijuana business, we believe that the lawyer must also advise the client regarding related federal law and policy, because such guidance is clearly a material consideration for the client to take into account for purposes of making an informed judgment how to proceed. *See also* PA RPC 1.4(a)(5) and (b).
3. A lawyer may not advise a client to engage in conduct that violates federal criminal statutes, or assist a client in such conduct, even if such conduct is authorized under applicable state law.

Recommended Amendment to PA RPC 1.2(d)

Clients in other states where medical or recreational use of marijuana is now “legal” (notwithstanding the ongoing prohibition under federal law) and who engage in marijuana-related enterprises require and are entitled to legal advice beyond the limited advice that Pennsylvania-licensed lawyers who abide by the restrictions of Rule 1.2(d) are permitted to provide. Many Pennsylvania lawyers have out-of-state clients that either are conducting business with, or investing in, businesses with some relationship to marijuana, and those clients are entitled to legal advice as to the appropriate and lawful means and methods of participating in such activities, as well as the potential risks of doing so. Soon, Pennsylvania may also legalize the limited use of medical cannabis, and increase the need for Pennsylvania lawyers to provide the kinds of legal assistance that may be viewed as currently prohibited by Rule 1.2(d).

In order to provide clearer guidance and comfort to lawyers who are interested in practicing in this burgeoning area of law, the Committees believe that an amendment to Rule 1.2(d) would be beneficial. Contemporaneously with the issuance of this joint formal opinion, the Committees are recommending that the Supreme Court of Pennsylvania adopt an amendment to Rule 1.2(d) to help remove uncertainty surrounding the duties of Pennsylvania lawyers representing clients involved in a marijuana-related business. The proposed amendment 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, except as stated in paragraph (e), 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.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

This proposal for a Rule amendment should not be interpreted as an endorsement by the Committees or any of their members of the legalization of marijuana for either medical or recreational purposes, which is a matter of public policy that is beyond the Committees' purview. Rather, the recommendation reflects the practical need for legal guidance that has been recognized by the increasing number of jurisdictions that have or will make the policy judgment to legalize marijuana in some form, and which the current version of Rule 1.2(d) fails to adequately address.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT. FURTHER, THE VIEWS AND RECOMMENDATIONS EXPRESSED HEREIN ARE THOSE OF THE COMMITTEES AND DO NOT REPRESENT OR REFLECT THE VIEWS AND RECOMMENDATIONS OF THE PENNSYLVANIA BAR ASSOCIATION OR THE PHILADELPHIA BAR ASSOCIATION.