

Final

Rhode Island Supreme Court
Ethics Advisory Panel Op. 2017-01
Issued February 13, 2017

FACTS:

Two inquiring attorneys have requested the Ethics Advisory Panel's guidance concerning the propriety of providing legal services relating to Rhode Island's medical marijuana law. The attorneys propose to provide legal services to individuals and businesses that seek assistance in obtaining licenses to cultivate, dispense, or supply medical marijuana. They also propose to assist clients in establishing medical-marijuana related businesses. The attorneys ask whether they may advise and assist clients who plan to engage in activities that are permitted under the Rhode Island medical marijuana laws, but which are illegal activities under federal law.

ISSUE PRESENTED:

May the inquiring attorneys provide legal services relating to Rhode Island's medical marijuana law when conduct that is permitted under the law is unlawful under federal law?

OPINION:

The inquiring attorneys may ethically advise clients about Rhode Island's medical marijuana law, and may ethically represent, advise, and assist clients in all activities relating to and in compliance with the law, provided that the lawyers also advise clients regarding federal law, including the federal Controlled Substances Act.

REASONING:

Medical marijuana was legalized in Rhode Island in 2006 with the enactment of "The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act" (hereinafter, medical marijuana law). See G.L. 1956 § 21-28.6-1 et.seq. The statute permits the cultivation, manufacture, sale, distribution, possession, and use of medical marijuana. The activities permitted under the law are subject to a comprehensive regulatory scheme that requires oversight over all aspects of the medical marijuana program while also ensuring patient access and safety. See G.L. 1956 § 21-28.6-2(8). Under federal law, however, pursuant to the Controlled Substances Act, 21 U.S.C. § 841(a)(1), it is unlawful to grow, manufacture, dispense or possess marijuana, which is classified as a Schedule I drug.

The issue presented by the inquiring attorneys arises by virtue of Rule 1.2(d) of the Rules of Professional Conduct which prohibits lawyers from counseling or assisting a client in conduct that the lawyer knows is criminal. Rule 1.2(d) 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 law.

The Panel is therefore asked whether it is ethically permissible under Rule 1.2(d) for attorneys to provide legal services relating to Rhode Island's medical marijuana law. Those services may include advising clients of the validity, scope, meaning or application of the medical marijuana law, as well as legal services that assist clients with the requirements for participation in Rhode Island's medical marijuana program, such as drafting documents, negotiating contracts, appearing before regulatory agencies, and organizing business entities. A fairer characterization of the issue presented here is this: Should a lawyer who provides legal services relating to lawful activities under Rhode Island law be subject to discipline because those activities are unlawful under federal law? The Panel's response is "No." Several factors lead the Panel to this conclusion.

"The Rules of Professional Conduct are rules of reason." R.I. Rules of Professional Conduct, Preamble & Scope, ¶ 14. In the context of this inquiry, clients are seeking to participate in a lawful medical marijuana program. They are not pursuing a course of criminal conduct. It follows then, that when lawyers assist clients in a lawful medical marijuana program, the lawyers are not assisting those clients in conduct that is criminal. Rather, they are providing assistance in implementing and promoting state law, and in this instance, a state law that is sufficiently complex so as to warrant the assistance of lawyers. The Panel believes that when our Supreme Court adopted Rule 1.2(d), the Court never intended to prohibit lawyers from advising clients on Rhode Island law, or from assisting clients in conduct permitted under Rhode Island law.

Next, marijuana enforcement by the United States Department of Justice has been relaxed. In 2013, the Department of Justice issued a memorandum advising United States attorneys and law enforcement that, in states that have legalized marijuana in some form, and have strong regulatory and enforcement systems in place, the Department of Justice will defer to enforcement of state law by state and local law enforcement and their regulatory agencies. See Memorandum from James M. Cole, Deputy Attorney General, to U.S. Attorneys, "Guidance Regarding Marijuana Enforcement" (Aug. 29, 2013).

The Panel is further informed by the legislative finding in the Rhode Island medical marijuana law which states:

(2) According to the U.S. Sentencing Commission and the Federal Bureau of Investigation, ninety-nine (99) out of every one hundred (100) marijuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marijuana. G.L. 1956 § 21-28.6-2(2).

The Panel is also guided by an evolving consensus among courts and ethics committees, which permits lawyers to assist clients in navigating the statutory and regulatory structure of marijuana legislation. Several state supreme courts have amended their Rule 1.2(d). Most recently, the supreme courts in New Jersey in August 2016, Ohio in September 2016, and Pennsylvania in October 2016, amended their rules to make such assistance expressly permissible. The New Jersey Supreme Court added the following to the Court's Rule 1.2(d):

A lawyer may counsel a client regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.

Alaska, Connecticut, Hawaii, Illinois, and Oregon have similarly amended Rule 1.2(d). The states of Colorado, Nevada, Vermont, and Washington have added similar language to the comments to their Rule 1.2.

Ethics committees in several states, including Arizona, Minnesota, and New York, have issued ethics opinions concluding that it is ethically permissible for lawyers to provide legal services relating to their jurisdictions' marijuana laws. The Florida Bar Board of Governors and the Massachusetts Board of Bar Overseers have issued policy statements relating to marijuana laws. The joint policy of the Massachusetts Board of Bar Overseers and Office of Bar Counsel, issued on December 16, 2016, states:

Massachusetts Board of Bar Overseers and Office of the Bar Counsel will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of 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 or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy.

Finally, the Panel considered the legislative finding in Rhode Island's medical marijuana law which states:

(4) States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. Therefore, compliance with this chapter does not put the state of Rhode Island in violation of federal law. G.L. 1956 § 21-28.6-2(4).

Accordingly, the Panel concludes that the inquiring attorneys may ethically advise clients about Rhode Island's medical marijuana law, and may ethically represent, advise, and assist clients in all activities relating to and in compliance with the law, provided that the lawyers also advise clients regarding federal law, including the federal Controlled Substances Act.