



ISBA Professional Conduct Advisory Opinion

This Advisory Opinion expresses an interpretation of Illinois Rule of Professional Conduct 1.2(d) for the situation in which a lawyer provides services to a client whose conduct conforms to Illinois law but violates federal law. The ISBA believes this Advisory Opinion, narrowly tailored to the facts presented, is based upon sound policy and a good faith interpretation of the Illinois Rules of Professional Conduct. However, the ISBA has no role in lawyer regulation or discipline and a lawyer's reliance on this Advisory Opinion may not serve as a defense to allegations of misconduct in the situation presented.

Opinion No. 14-07 October 2014

Subject: Advice to Client; Government Representation; Scope of Representation

Digest: An Illinois lawyer may provide services to a client on legal matters generated by the Compassionate Use of Medical Cannabis Pilot Program Act.

References: Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILCS 130/5 *et seq.*

Controlled Substances Act, 21 USC § 841(a)(1); 21 USC § 846

U.S. Department of Justice Memorandum, August 29, 2013, <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

Illinois Rules of Professional Conduct: Preamble [14]; Rule 1.2(d); Rule 1.2, Comment [9]

Janan Hanna, *Medical marijuana implementation a work in progress*, 102 Ill Bar J 370 (August 2014)

Arizona Ethics Opinion 11-01 (February 2011)

Connecticut Informal Opinion 2013-02 (January 16, 2013)

Connecticut Rule of Professional Conduct 1.2(d), effective January 1, 2015

FACTS

The Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILCS 130/5 *et seq.*, allows the use of marijuana by persons with certain illnesses, and provides for state regulation of marijuana cultivation centers and dispensaries. The federal Controlled Substances Act makes it illegal to manufacture, distribute or dispense a controlled substance, including marijuana, 21 USC § 841(a)(1), or to conspire to do so. 21 USC § 846. The U.S. Department of Justice has issued a memorandum stating its intention not to interfere with the medical use of marijuana pursuant to state laws, provided the state laws tightly regulate and control the medical cannabis market. Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013) (“DOJ Memorandum”), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

The State of Illinois has promulgated detailed regulations concerning the cultivation and distribution of cannabis for medical purposes. Persons and entities wishing to engage in the cultivation and distribution of medical marijuana desire legal advice to assist them in navigating the statutory and regulatory structure posed by this legislation. It is anticipated that Illinois lawyers will be called upon to provide such clients with all manner of services, such as applying to the Illinois Department of Agriculture and the Department of Financial and Professional Regulation for registrations, drafting operating agreements, negotiating commercial leases and contracts for supplies, and advising as to zoning issues. Also, Illinois lawyers may be requested to advise municipalities concerning the amendment of zoning regulations to account for cultivation centers and dispensaries.

QUESTIONS

1. May an Illinois lawyer provide legal advice and render other legal services (such as drafting legal documents and conducting negotiations) to a client engaged in the medical marijuana business under the foregoing circumstances, in which acts that are expressly authorized under state law remain a crime under federal law, albeit without prosecution?
2. May an Illinois lawyer counsel a municipal government concerning zoning regulations for cultivation centers and dispensaries?

OPINION

1. Legal services to clients in the medical marijuana business.

The questions posed require consideration of Illinois Rule of Professional Conduct 1.2(d), which provides 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 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.

The text of this rule requires that the inquiry be divided into two separate issues. The first is whether a lawyer may provide services that are strictly advisory to a client involved in the medical marijuana business. Since the rule provides an exception for counseling a client concerning a proposed course of conduct and the application of the law, it is the Committee's opinion that the provision of legal advice to clients involved in the medical marijuana trade falls squarely within that exception.

The Illinois medical marijuana law consists of 45 sections, with 25 definitional paragraphs (410 ILCS 130/10), a set of immunities and presumptions related to the medical use of marijuana (410 ILCS 130/25), and provisions for taxation (410 ILCS 130/190 *et seq.*). Additionally, 270 pages of rules have been adopted by the state departments of Agriculture, Public Health, Financial and Professional Regulation, and Revenue. Janan Hanna, *Medical marijuana implementation a work in progress*, 102 Ill Bar J 370 (August 2014). The statutory and regulatory scheme governs an industry that is brand new to Illinois as a legally sanctioned activity. It presents a classic example of a business in serious need of legal advice and counsel.

Comment [9] of Rule 1.2 demonstrates that the rule is not to be applied in such a way as to stifle the ability of a lawyer to provide guidance to a client through a legal opinion:

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.

Given the conflict between federal and state law on the subject of marijuana as well as the accommodation provided by the Department of Justice, the provision of legal advice to those engaged in nascent medical marijuana businesses is far better than forcing such businesses to proceed by guesswork.

The present question was considered in a cogent manner by the State Bar of Arizona in Arizona Ethics Opinion 11-01 (February 2011), at Section IV:

A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be

presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

The Committee agrees: when a new statutory and regulatory system is promulgated by the State of Illinois, Illinois lawyers must be permitted to advise clients on how to conform their conduct to the law.

The second issue raised by the inquiry is whether an Illinois lawyer may provide services that go beyond the provision of legal advice to medical marijuana clients. 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.

Because of the unique circumstances presented by this inquiry, an Illinois lawyer who represents and counsels medical marijuana clients should tread carefully over the legal terrain. When advising a client concerning conduct governed by the new Illinois law, the importance of the client’s conformity with the law and regulations should be stressed. The safe harbor provided by the DOJ Memorandum depends, in part, on “whether the operation is demonstrably in compliance with a strong and effective state regulatory system.” DOJ Memorandum, p. 3. A lawyer who advises a client on how to evade state regulation, other than by making “a good-faith effort to determine the validity, scope, meaning or application of the law,” in the words of Rule 1.2(d), acts in violation of the rule.

The guidance on prosecutorial discretion provided by the DOJ Memorandum is subject to change, so lawyers providing advice in this field should be up to date on federal enforcement policy, as well as any modifications of federal and state law and regulations. Under the present state of affairs, it is the opinion of the Committee that the provision of legal services to clients involved in the medical marijuana business is consistent with the Rules of Professional Conduct.

2. Zoning advice to municipalities.

One section of the Illinois medical marijuana statute provides, in part, “A unit of local government may enact reasonable zoning ordinances or resolutions, not in conflict with this Act or with Department of Agriculture or Department of Public Health rules, regulating registered medical cannabis cultivation center [sic] or medical cannabis dispensing organizations.” 410 ILCS 130/140. The citizenry will benefit from legal advice provided to municipalities concerning zoning, and the Committee sees no reason to prevent Illinois lawyers from rendering such services.

A government client in the circumstances posed would not be manufacturing, distributing or dispensing marijuana, or conspiring to do so. It would not be engaging in criminal conduct, and therefore a lawyer who provides zoning advice would not be assisting the client in the commission of a crime. Rule 1.2(d) is not an impediment to lawyers who wish to furnish such services.

CONCLUSION

The Committee is aware that the view expressed in the foregoing advisory opinion is not held universally, as can be seen by comparing the approach taken in Arizona Ethics Opinion 11-01 with that of Informal Opinion 2013-02 (January 16, 2013) of the Connecticut Bar Association. For that reason, the Committee stresses that this opinion is for the guidance only of Illinois-licensed lawyers. The Committee also points out that its ethics opinions are not intended as legal advice, and they do not immunize any lawyer from disciplinary action.

Given the text of Rule 1.2(d), there is some degree of uncertainty surrounding the duties of an Illinois lawyer when representing a client involved in the medical marijuana business. That uncertainty would be removed if Rule 1.2(d) were to be amended, as is occurring in Connecticut, to account for the unique situation in which the laws of another jurisdiction run counter to those of Illinois. Effective January 1, 2015, Connecticut Rule of Professional Conduct 1.2(d) is 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.

Substantive changes in the Illinois Rules of Professional Conduct should not be made without good reason and thorough consideration. In the judgment of the ISBA, the ethical conundrum faced by Illinois lawyers who represent medical marijuana businesses is sufficiently grave to merit a change in Rule 1.2(d) along the lines of the Connecticut amendment. Contemporaneously with the publication of this opinion, the ISBA is recommending to the Illinois Supreme Court Rules Committee that just such an amendment be promulgated.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

© Copyright 2014 Illinois State Bar Association