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New York State Bar Association
Committee on Professional Ethics

Opinion 1177 (11/08/2019)

Topic: Counseling clients in illegal conduct; medical marijuana law.

Digest: The Committee reaffirms its conclusion in N.Y. State 1024 (2014) that a lawyer may ethically assist a client in conduct designed to comply with New York's medical marijuana law.

Rules: 1.2(d).

FACTS

1. In July 2014, New York, following the lead of 22 other states, adopted the Compassionate Care Act ("CCA"), a law permitting and regulating the cultivation, distribution, prescription, and use of marijuana for medical purposes. The CCA enables specially approved organizations such as hospitals and community health centers to dispense medical marijuana to patients who have been certified by a health care provider and who have registered with the state Department of Health, and provides further for the regulation and registration of organizations to manufacture and deliver marijuana for authorized medical uses.

2. Although federal criminal law forbids the possession, distribution, sale, or use of marijuana, the United States Department of Justice ("DOJ") does not enforce the law against individuals and entities engaged in the cultivation, transportation, delivery, prescription, or use of medical marijuana in accordance with state regulatory law. In 2013, the DOJ issued a memorandum (the "Cole Memo") restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana.

3. On September 29, 2014, this Committee issued Opinion 1024, which concluded that, "in light of current federal enforcement policy, the N.Y. Rules of Professional Conduct (the "Rules") permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana." *Id.* ¶ 26. Opinion 1024 said, too, that "[i]f federal enforcement were to change materially, this Opinion might need to be reconsidered." *Id.* ¶ 25.

4. In December 2014, as part of a spending measure subject to periodic review, Congress enacted the Rohrabacher-Farr amendment (now known as the Rohrabacher-Blumenauer amendment, hereafter the "Rohrabacher Amendment"), which prohibits the DOJ from using any of the funds appropriated by Congress to prevent states with medical marijuana laws "from implementing their own State laws that authorize, the use, distribution, possession, or cultivation of medical marijuana." https://www.congress.gov/amendment/113th-congress/house-amendment/748/text. The Rohrabacher Amendment was the basis of the decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir 2016), which prohibited the Department of Justice from

prosecuting defendants who complied with their respective states' medical marijuana laws. Since 2014, Congress has continuously renewed the Rohrabacher Amendment (by healthy bipartisan majorities) in subsequent spending measures. Although the Cole Memo was rescinded by former Attorney General Jeff Sessions on January 4, 2018, General Sessions' successor, William Barr, said during his confirmation hearing that he would not target state legal marijuana businesses, and would leave it to Congress to act.

QUESTION

5. Does the Committee adhere to its conclusion in Opinion 1024 that lawyers may assist clients in complying with New York's medical marijuana law?

OPINION

6. The Committee concludes that, notwithstanding the Attorney General's rescission of the Cole Memo, the guidance provided in Opinion 1024 remains sound because, in light of the Rohrabacher Amendment, federal law and enforcement practice continue to permit New York to implement its medical marijuana law.

7. After providing extensive factual and legal background, which we need not repeat here, Opinion 1024 focused on the application of Rule 1.2(d), which provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." We observed that, as a general matter, "although a lawyer may not encourage a client to violate the law or assist a client in doing so, a lawyer may advise a client about the reach of the law," and that therefore "a lawyer may give advice about whether undertaking to manufacture, transport, sell, prescribe or use marijuana in accordance with the CCA's regulatory scheme would violate federal narcotics law." N.Y. State 1024 ¶ 21. We observed also that "Rule 1.2(d) forbids a lawyer from assisting a client in conduct only if the lawyer *knows* the conduct is illegal or fraudulent. If the lawyer believes that conduct is unlawful but there is some support for an argument that the conduct is legal, the lawyer may provide legal assistance under the Rules (but is not obligated to do so)." *Id.* ¶ 22 (emphasis in original). We then turned to "[t]he difficult question [that] arises if the lawyer *knows* that the client's proposed conduct, although consistent with state law, would violate valid and enforceable federal law." *Id.* ¶ 23 (emphasis in original).

8. On that question, we said that "[o]rdinarily, . . . while the lawyer could advise the client about the reach of the federal law and how to conform to the federal law, the lawyer could not properly encourage or assist the client in conduct that violates the federal law. That would ordinarily be true even if the federal law, although applicable to the client's proposed conduct, was not rigorously enforced and the lawyer anticipated that the law would not be enforced in the client's situation." *Id.* We reasoned, however, that "the situation is different where the state executive branch determines to implement the state legislation by authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent the implementation of the state law. In that event, the question under Rule 1.2(d) is whether a lawyer may assist in conduct under the state medical marijuana law that the lawyer knows would violate federal narcotics law that is on the books but deliberately unenforced as a matter of federal executive discretion." *Id.*

9. In concluding that lawyers may assist clients in complying with New York's medical marijuana laws, we explained in part (*id.* ¶ 24):

> We do not believe that by adopting Rule 1.2(d), our state judiciary meant to declare a position on this debate or meant to preclude lawyers from counseling or assisting conduct that is legal under state law. Rule 1.2(d) was based on an ABA model and there is no indication that anyone – not the ABA, not the state bar, and not the state court itself – specifically considered whether lawyers may serve in their traditional role in this unusual legal situation. We assume for purposes of this Opinion that state courts will themselves serve in their traditional role: As issues of interpretation arise in litigation under the CCA, state courts will be available to issue interpretive rulings and take other judicial action that has the practical effect of assisting in the implementation of the CCA. Serving this role will not undermine state judicial integrity. Similarly, we do not believe that it derogates from public respect for the law and lawyers, or otherwise undermines the objectives of the professional conduct rules, for lawyers as "officers of the court" to serve in their traditional role as well, if they so choose. Obviously, lawyers may decline to give legal assistance regarding the CCA.

10. The DOJ's rescission of the Cole Memo does not meaningfully change federal law enforcement policy. If anything, the adoption, continued approval, and implementation of the Rohrabacher Amendment reinforces our earlier conclusion. Not only does the DOJ continue to permit states to implement their medical marijuana laws, but federal legislation now prohibits the DOJ from preventing states from doing so.

11. Accordingly, we reaffirm our earlier conclusion that the Rules permit lawyers to give legal assistance regarding the CCA that goes beyond a mere discussion of the legality of the client's proposed conduct. "Implicitly, the state law authorizes lawyers to provide traditional legal services to clients seeking to act in accordance with the state law. . . . Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy." *Id.* ¶ 25

CONCLUSION

12. In light of current federal policy, the Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law.