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New York State Bar Association
Committee on Professional Ethics

Opinion 1024 (9/29/14)

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

Digest: In light of current federal enforcement policy, the New York 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.

Rules: 1.2(d), 1.2(f), 1.2 cmt 9, 1.16(c)(2), 6.1 cmt 1, 8.4(b).

FACTS

1. In July 2014, New York, following the lead of 22 other states, adopted the Compassionate Care Act ("CCA"),[1] a law permitting the use of medical marijuana in tightly controlled circumstances. The CCA regulates the cultivation, distribution, prescription and use of marijuana for medical purposes. It permits 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 it further provides for the regulation and registration of organizations to manufacture and deliver marijuana for authorized medical uses.

2. At the same time, federal criminal law forbids the possession, distribution, sale or use of marijuana, and the federal law provides no exception for medical uses. The U.S. Department of Justice takes the position that the federal law is valid and enforceable even against individuals and entities engaged in the cultivation, transportation, delivery, prescription or use of medical marijuana in accordance with state regulatory law; however, the U.S. Department of Justice has adopted and published formal guidance restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana.

QUESTION

3. Under these unusual circumstances, do the New York Rules of Professional Conduct ("Rules") permit a lawyer to provide legal advice and assistance to doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession or use of marijuana for medical purposes to help them act in compliance with state regulation regarding medical marijuana and consistently with federal enforcement policy?

[1] Laws of 2014, Chap. 90 (signed by the Governor and effective on July 5, 2014).

OPINION

4. Lawyers may advise clients about the lawfulness of their proposed conduct and assist them in complying with the law, but lawyers may not knowingly assist clients in illegal conduct. Rule 1.2(d) 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." Disciplinary Rule 7-102(A)(7), contained in the pre-2009 Code of Professional Responsibility, was to the same effect. As this Committee has observed, if a client proposes to engage in conduct that is illegal, "then it would be unethical for an attorney to recommend the action or assist the client in carrying it out." N.Y. State 769 (2003); *accord* N.Y. State 666 (1994).

5. This ethical restriction reflects lawyers' fundamental role in the administration of justice, which is to promote compliance with the law by providing legal advice and assistance in structuring clients' conduct in accordance with the law. *See also* Rule 8.4(b) (forbidding "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"). Ideally, lawyers will not only attempt to prevent clients from engaging in knowing illegalities but also discourage clients from conduct of doubtful legality:

> The most effective realization of the law's aims often takes place in the attorney's office, . . . where the lawyer's quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose. . . .
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> The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.

Am. Bar Ass'n & Ass'n of Am. Law Sch., Professional Responsibility Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958). The public importance of lawyers' role in promoting clients' legal compliance is reflected in the attorney-client privilege, which protects the confidentiality that is traditionally considered essential in order for lawyers to serve this role effectively. *See, e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

6. It is counter-intuitive to suppose that the lawyer's fundamental role might ever be served by assisting clients in violating a law that the lawyer knows to be valid and enforceable. But the question presented by the state's medical marijuana law is highly unusual if not unique: Although participating in the production, delivery or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana. Both the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to

promote their compliance with state law and current federal policy. Under these unusual circumstances, for the reasons discussed below, the Committee concludes that Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.

Legal background

7. Much has been written elsewhere about the interrelationship between federal criminal narcotics laws and recent state medical marijuana laws. For purposes of this opinion, only the following basic understanding is needed.

8. Under federal criminal law, marijuana is a Schedule I narcotic, whose manufacture, possession and distribution is prohibited, and for which there is no approved medical use. Further, individuals and entities are forbidden by federal law not only from violating these laws as principals, but also, under principles of accessorial liability, from intentionally aiding and abetting others in violating the narcotics law, counseling others to violate the narcotics law, or conspiring with others to violate the narcotics law.[2]

9. For many years, states likewise criminalized the manufacture, possession and distribution of marijuana, allowing for concurrent federal and state enforcement of the criminal law. Most prosecutions of narcotics laws, especially with regard to marijuana, occurred at the state and local level. However, in recent years, more than 20 states have legalized marijuana for medicinal purposes to make it available by prescription. Colorado and Washington have gone farther, developing regulation permitting the sale and use of marijuana for recreational purposes.

10. The U.S. Department of Justice ("DOJ") takes the position that the manufacture, possession and distribution of marijuana remains a federal crime, and can be enforced by federal law enforcement officials, even when the conduct in question is undertaken in accordance with state medical marijuana laws. However, current federal policy restricts federal enforcement activity, including civil as well as criminal enforcement, concerning medical marijuana. The Deputy Attorney General's August 29, 2013 memorandum, titled "Guidance Regarding Marijuana Enforcement," acknowledges that "the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws," and the federal government has concentrated its effort in accordance with federal enforcement priorities, such as preventing the distribution of marijuana to minors, preventing revenue from marijuana sales from going to criminal enterprises, and preventing marijuana activity from being used as a cover for trafficking other drugs. The memorandum directs Department attorneys and federal law enforcement authorities to focus their enforcement resources and efforts on these priorities, which are less likely to be threatened "[i]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale,

[2] *See, e.g.*, 18 U.S.C. §2(a)("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C. § 2(b)("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

and possession of marijuana." Although the memorandum makes plain that it is not intended to create any enforceable substantive or procedural rights, the memorandum might fairly be read as an expression by the current Administration that it will not enforce the federal criminal law with regard to otherwise-lawful medical marijuana activities that are carried out in accordance with a robust state regulatory law and that do not implicate the identified federal enforcement priorities. Over the period of more than a year since the memorandum was published, federal law enforcement authorities have acted consistently with this understanding.

11. The CCA allows specified licensed New York physicians to prescribe, and patients to use, medical marijuana only in pill form or in a form that may be inhaled as a vapor, but not in a form that may be smoked. Medical marijuana may only be prescribed for identified, documented medical conditions categorized as "severe[ly] debilitating or life-threatening." The regulation of medical marijuana under the law will be overseen by the Health Department, which, among other things, will authorize and register a limited number of organizations ("Registered Organizations") to manufacture and dispense marijuana for medical use, will issue registration cards to patients or their caregivers certified to receive medical marijuana, and will set prices. The law restricts who may be hired by Registered Organizations, regulates their production and dispensation of medical marijuana, establishes a tax on their receipts, and criminalizes various abuses. *See generally* Francis J. Serbaroli, "A Primer on New York's Medical Marijuana Law," NYLJ, July 22, 2014, p. 3.

<u>The potential role of lawyers in providing legal assistance regarding compliance with the medical marijuana law</u>

12. Lawyers might provide a range of assistance to clients seeking to comply with the CCA and to act consistently with federal law enforcement policy. Among the potential clients are public officials and agencies including the Health Department that have responsibility for implementing the law, health care providers and other entities that may apply to be selected or eventually be selected as Registered Organizations authorized to manufacture and dispense medical marijuana, physicians seeking to prescribe medical marijuana, and patients with severely debilitating or life-threatening conditions seeking to obtain medical marijuana. Any or all of these potential clients may seek legal assistance not only so that they may be advised how to comply with the state law and avoid running afoul of federal enforcement policy but also for affirmative legal assistance. The Health Department may seek lawyers' help in establishing internal procedures to conduct the registrations and other activities contemplated by the law. Entities may seek assistance in applying to become Registered Organizations as well as in understanding and complying with employment, tax and other requirements of the law. Physicians may seek help in understanding the severe restrictions on the issuance of prescriptions for medical marijuana and in navigating the procedural requirements for effectively issuing such prescriptions.

13. Leaving aside the federal law, the above-described legal assistance would be entirely consistent with lawyers' conventional role in helping clients comply with the law. Indeed, it seems fair to say that state law would not only permit but affirmatively expect lawyers to provide such assistance. In general, it is assumed that lawyers, by virtue of their expertise and ethical expectations, have a necessary role in ensuring the public's compliance with the law. "As our society becomes one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance." Rule 6.1, Cmt. [1]. This is

especially true with regard to complex, technical regulatory schemes such as the one established by the CCA, and where, as in the case of the CCA, noncompliance can result in criminal prosecution.

14. However, the federal law cannot easily be left aside. The question of whether lawyers may serve their traditional role is complicated by the federal law. Assuming, as we do for purposes of this opinion, that the federal marijuana prohibition remains valid and enforceable notwithstanding state medical marijuana law, then individuals and entities seeking to dispense, prescribe or use medical marijuana, or to assist others in doing so, pursuant to the CCA would potentially be violating federal narcotics law as principals or accessories; in that event, the legal assistance sought from lawyers might involve assistance in conduct that the lawyer knows to be illegal.

Prior ethics opinions

15. Several other bar association ethics committees have confronted this problem but reached different conclusions under their counterparts to Rule 1.2(d). Most of these opinions pre-dated DOJ's August 2013 guidance, but took account of a 2009 DOJ memorandum suggesting that federal law enforcement would not be directed at patients and their caregivers who are in "clear and unambiguous compliance" with state medical marijuana laws.

16. In 2010, Maine's ethics committee took the view that although lawyers may assist clients in determining "the validity scope, meaning or application of the law," the rule "forbids attorneys from assisting a client in engaging in the medical marijuana business" because the rule "does not make a distinction between crimes which are enforced and those which are not. . . . [A]n attorney needs to . . . determine whether the particular legal service being requested rises to the level of assistance in violating federal law." Maine Op. 199 (July 7, 2010).

17. Connecticut's ethics committee similarly concluded that a lawyer may not assist a client insofar as its conduct, although authorized by the state's medical marijuana law, which created a broad licensing and registration structure to be implemented by the Department of Consumer Protection, violates federal law. Connecticut Op. 2013-02 (Jan. 16, 2013). The opinion noted that much of the legal assistance sought by clients seeking to comply with the law (e.g., patients, caregivers, physicians, pharmacists, distributers and growers), such as legal advice and assistance regarding the law's requirements and the rule-making and regulatory processes, would be consistent with lawyers' "traditional role as counselors" and "in the classic mode envisioned by professional standards." But some of that legal work might nevertheless constitute impermissible assistance in violating federal law.

18. More recently, in the context of Colorado's state law decriminalizing and regulating the sale of marijuana for recreational purposes, the state's ethics committee opined: "[U]nless 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)." Colorado Op. 125 (Oct. 21, 2013). However, the committee recommended amending the state ethics rules to authorize lawyers to

advise and assist clients regarding marijuana-related conduct, notwithstanding contrary federal law.[3]

19. In 2011, Arizona's ethics committee reached a very different conclusion, however, based in significant part on the premise that "no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds."

> In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.
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> 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.

Arizona Op. 11-01 (Feb. 2011). The opinion concluded:

> • If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the Act expressly permits; and
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> • The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and

[3] Colorado added a new comments [14] to Rule 1.2 of the Colorado Rules of Professional Conduct, permitting a lawyer to counsel a client regarding the validity, scope and meaning of the Colorado marijuana law and to assist a client in conduct that the lawyer reasonably believes is permitted by that law, but the lawyer must also advise the client regarding related federal law and policy. Nevada adopted a new Comment [1] to Rule 1.2 that is substantively identical to Colorado Comment [14]. In Washington State, the King County Bar Association has urged the Washington Supreme Court to amend the Washington Rules of Professional Conduct to add a comment to Rule 8.4 and a new Rule 8.6, to make clear that conduct permitted by the state marijuana law does not reflect adversely on the lawyer's honesty, trustworthiness or fitness in other respects, and that a lawyer is not subject to discipline for counseling or assisting a client in conduct permitted by the state marijuana law, even though the conduct may violate federal law. Those proposals were still pending when we issued this opinion.

> • The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then
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> • The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.

Id.

20. A recent opinion of the King County (Washington) Bar Association endorsed the Arizona committee's conclusion and much of its reasoning,[4] in the context of Washington's adoption of a state-regulated system for producing and selling marijuana for recreational purposes:

> While the KCBA does not agree with all components of the Arizona opinion, its emphasis on the client's need for legal assistance to comply with state law accurately reflects the reality that Washington clients face in navigating the new Washington law. The initial proposed implementing regulations for I-502, for example, have added 49 new sections in the Washington Administrative Code encompassing 42 pages of text. These regulations are consistent with I-502's express goal of removing the marijuana economy from the province of criminal organizations and bringing it into a "tightly regulated, state-licensed system." In building this complex system, the voters of Washington could not have envisioned it working without attorneys. As the State Bar of Arizona recognized, disciplining attorneys for working within such a system would deprive the state's citizens of legal services 'necessary and desirable to implement and bring to fruition that conduct expressly permitted under state law.

KCBA Ethics Advisory Opinion on I-502 [Initiative 502 - marijuana legalization] & Rules of Professional Conduct (Oct. 2013). Following suit, the Washington State bar ethics committee recently proposed adding a Comment to the state's ethics code and issuing an advisory opinion authorizing lawyers to assist clients in complying with the state marijuana law at least until federal enforcement policy changes.

Analysis

21. As Rule 1.2(d) makes clear, 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. *See* N.Y. State 455 (1976) ("[W]here the lawyer does no more than advise his client concerning the legal character and consequences of the act, there can be no professional impropriety. That is his proper function and fully comports with the requirements of Canon 7. . . . But, where the lawyer becomes a motivating force by encouraging his client to commit illegal acts or undertakes to bring about a violation of law, he oversteps the bounds of propriety."). Thus, 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. If the lawyer

[4] The King County opinion rejected the implication of the Arizona opinion that the propriety of the lawyer's assistance turned on the fact that the state medical marijuana law had not yet been invalidated or preempted.

were to conclude competently and in good faith that the federal law was inapplicable or invalid, the lawyer could so advise the client and would not be subject to discipline even if the lawyer's advice later proved incorrect. *See, e.g.*, ABA Op. 85-352 (1985) ("[W]here a lawyer has a good faith belief . . . that a particular transaction does not result in taxable income or that certain expenditures are properly deductible as expenses, the lawyer has no duty to require [disclosure] as a condition of his or her continued representation . . . . In the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged by the IRS, as well as of the potential penalty consequences to the client if the position is taken on the tax return without disclosure.").[5] As the Second Department recognized in dismissing a prosecution against a lawyer who allegedly gave erroneous advice about the lawfulness of the client's proposed conduct:

> We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here is profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

Matter of Vinluan v Doyle, 60 AD3d 237, 243, 873 NYS2d 72 (2d Dep't 2009).

22. Further, 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). *See* Rule 1.2(f) ("A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal."); s*ee also* Rule 1.16(c)(2) ("a lawyer may withdraw from representing a client when . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent").

[5] Inasmuch as this Committee limits itself to interpreting the ethics rules, we take no view on whether a colorable argument can be made that the federal narcotics law is invalid or unenforceable in situations where individuals or entities transport, distribute, possess or use marijuana pursuant to state medical marijuana law. We note, however, that as a constitutional matter, duly enacted federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. We also note, in particular, that in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes.

23. The difficult question arises if the lawyer *knows* that the client's proposed conduct, although consistent with state law, would violate valid and enforceable federal law.[6] Ordinarily, in that event, 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. *See* Charles W. Wolfram, Modern Legal Ethics 703 (1986) ("on the whole, lawyers serve the interests of society better if they urge upon clients the desirability of complying with all valid laws, no matter how widely violated by others they may be"); *cf.* Restatement (Third) of the Law Governing Lawyers § 94, Cmt. f (2000) ("A lawyer's advice to a client about the degree of risk that a law violation will be detected or prosecuted [is impermissible when] the lawyer thereby intended to counsel or assist the client's crime, fraud, or violation of a court order."). But 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.

24. This situation raises political and philosophical questions that this Committee cannot and need not resolve regarding how best to make and implement law in a federal system. Some may think it anomalous, where Congress has recognized no relevant exception to its narcotics prohibitions, for states to adopt medical marijuana laws that appear to contravene federal law and for the federal executive branch, through the exercise of prosecutorial discretion, effectively to carve out an exception for the implementation of these state laws. Others may think that DOJ's forbearance is consistent with its tradition, known to Congress, of exercising prosecutorial discretion to mitigate the criminal law's excesses, including where the criminal law reaches farther than its underlying purposes. 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 sort of 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.[7] 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

[6] Rule 1.2(d) allows lawyers to assist clients in good faith challenges to a law's validity, but that is not the situation posed here.

[7] If the state courts were to nullify the CCA based on inconsistent federal narcotics law, the question addressed in this opinion would, of course, become moot.

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.

25. We conclude that the New York Rules of Professional Conduct permit lawyers to give legal assistance regarding the CCA that goes beyond a mere discussion of the legality of the client's proposed conduct. In general, state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation. As the Arizona and King County opinions recognized, a state medical-marijuana law establishing a complex regulatory scheme depends on lawyers for its success. Implicitly, the state law authorizes lawyers to provide traditional legal services to clients seeking to act in accordance with the state law. Further, and crucially, in this situation the federal enforcement policy also depends on the availability of lawyers to establish and promote compliance with the "strong and effective regulatory and enforcement systems" that are said to justify federal forbearance from enforcement of narcotics laws that are technically applicable. The contemplated legal work is not designed to escape law enforcement by avoiding detection. *Cf.* Rule 1.2 cmt. [9] ("There is a critical distinction between presenting an analysis of the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."); N.Y. State 529 (1981) ("[T]he Code distinguishes between giving legal advice and giving advice which would aid the client in escaping punishment for past crimes. EC 7-5 warns that 'a lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment'"). Lawyers would assist clients who participate openly and subject to a state regulatory structure that the federal government allows to function as a matter of discretion. 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.[8] If federal enforcement were to change materially, this Opinion might need to be reconsidered.

CONCLUSION

26. In light of current federal enforcement policy, the New York Rules of Professional Conduct 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.

(34-14)

[8] For essentially the same reason, we regard Rule 8.4(b) as inapplicable. Assuming that a lawyer's legal assistance in implementing the state medical-marijuana law technically violates the unenforced federal criminal law, we do not believe that the lawyer's assistance under the circumstances described here would amount to "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."