Formal Opinion 125—The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (Adopted October 21, 2013; Addendum dated October 21, 2013

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Introduction and Scope

In Formal Opinion 124, "A Lawyer's Medical Use of Marijuana" (2012), the Colorado Bar Association Ethics Committee (Committee) addressed the narrow question of whether a lawyer's personal use of marijuana under C.R.S. § 12-43.3-101 - 1001 (the Medical Marijuana Code), standing alone, violated the Colorado Rules of Professional Conduct (Colo. RPC or the Rules). In concluding that the use of marijuana in compliance with the Medical Marijuana Code, by itself, did not violate the Rules, the Committee expressly noted, but declined to address, the related issue of whether a lawyer violates the Rules by counseling or assisting clients in legal matters related to the cultivation, possession, use, or sale of medical marijuana under Colorado law.

That issue has now come to the forefront. Effective December 10, 2012, Colorado passed Amendment 64, which generally permits and regulates the personal use of marijuana in the same way that the personal use of alcohol is permitted and regulated, and which envisions a regulated industry to supply and sell marijuana much like the industry that supplies and sells alcohol. At the same time, however, marijuana continues to be illegal under federal law for all purposes.

Under Colo.RPC 1.2(d), "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. . . ." The Committee has been asked to opine whether, and to what extent, a Colorado lawyer may counsel clients regarding the use of, and commerce in, marijuana consistent with Colo.RPC 1.2(d).

At present, the issue is more theoretical than practical. The Committee knows of no instance in which a Colorado lawyer has been disciplined for counseling or representing clients with regard to marijuana use or commerce that is lawful under Colorado law but unlawful under federal law. This fact, however, does not moot the issue. The Rules have a two-fold purpose: "to provide guidance to lawyers and to provide a structure for regulation conduct through disciplinary agencies." Colo.RPC, Scope [20]. The plain language of Colo.RPC 1.2(d) prohibits Colorado lawyers from counseling a client to engage, or assist a client, in conduct that the lawyer knows to be criminal. Certain client conduct may now be legal under Amendment 64 and the Medical Marijuana Code but may remain a violation of federal criminal statutes. Therefore, the Committee offers this opinion in an effort to prevent the Rules from becoming a source of confusion rather than a source of guidance.

Syllabus

Under Colo.RPC 1.2(d), "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. . . ." Federal law treats the cultivation, possession, sale, and use of marijuana for any purpose, even a medical one, as a crime. By contrast, Colorado law has decriminalized these activities provided that they are conducted in compliance with Colorado's laws and regulations.

The novelty and complexity of the conflict between Colorado and federal law prevent the Committee from devising a bright line distinction between lawyer conduct that complies with Colo.RPC 1.2(d) and lawyer conduct that violates it. Instead, the Committee has determined that there is a spectrum of conduct ranging from that which Colo.RPC 1.2(d) clearly permits to that which it clearly prohibits.

The Committee concludes that a lawyer does not violate Colo.RPC 1.2(d) by representing a client in proceedings relating to the client's past activities; by advising governmental clients regarding the creation of rules and regulations implementing Amendment 64 and the Medical Marijuana Code; by arguing or lobbying for certain regulations, rules, or standards; or by advising clients regarding the consequences of marijuana use or commerce under Colorado or federal law. The Committee further concludes that, for good or ill, under the plain language of Colo.RPC 1.2(d), it is unethical for a lawyer to counsel a client to engage, or assist a client, in conduct that violates federal law. Between these two points lies a range of conduct in which the application of Colo.RPC 1.2(d) is unclear.[1]

Analysis

Federal law criminalizes the cultivation, sale, distribution, and use of marijuana for virtually any purpose. *See* Controlled Substances Act, 21 U.S.C. §§ 801 – 904 (the "CSA"). The CSA categorizes marijuana as a Schedule I controlled substance and prohibits its cultivation, sale, distribution, and use based on Congress's conclusion that marijuana has no accepted utility. 21 U.S.C. § 812(b)(1), (c).

By contrast, Colorado and a number of other states and the District of Columbia have decriminalized the limited use of marijuana for medical purposes. *See* CRS § 12-43.3-102(2), 103. Colorado has also established a regulatory scheme by which qualified individuals may lawfully obtain marijuana. *See*C.R.S. § 12-43.3-101 - 1001. Colorado voters approved a constitutional amendment decriminalizing the possession and use of small amounts of marijuana for recreational use on November 6, 2012. *See*Colorado Ballot Initiative Amendment 64. Marijuana cultivated, manufactured, sold, distributed, and used as permitted by Amendment 64 will be regulated and taxed like alcohol and tobacco. It is anticipated that Colorado will enact a use code for recreational marijuana similar to the Medical Marijuana Code. Notwithstanding state decisions to exempt the cultivation, sale, distribution, and use of marijuana for medical and recreational purposes, such conduct remains criminal under federal law and may be prosecuted by federal authorities.

Colo.RPC 1.2(d) states that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. If the conduct is illegal, Comment [9] to Colo.RPC 1.2 advises the lawyer not to undertake the representation or to limit the lawyer's advice to an honest opinion about the actual consequences that appear likely to result from a client's conduct.

This conflict between federal and state law creates a dilemma for Colorado lawyers. On the one hand, members of the public need legal advice on how to apply or reconcile conflicting

federal and state laws regarding the cultivation, sale, manufacture, distribution, or use of marijuana. On the other hand, a potential client's cultivation, sale, manufacture, distribution, or use of marijuana, although legal under Colorado law, violates federal law.[2]

Public policy considerations favor lawyers providing the full range of legal advice authorized under Colo. RPC 2.1 so that their clients may comply with Colorado's marijuana use laws. "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." *Hickman v. Taylor*, 329 U.S. 495, 514 (U.S. 1947) (Jackson, J., concurring). Nevertheless, unless 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).

This is not to say that a lawyer may never ethically counsel or represent a client in areas in which Colorado has decriminalized marijuana. The question is, at what point do a lawyer's legal services in this area violate Colo.RPC 1.2(d)? Circumstances in which the question arises are too various to permit a single, bright-line answer. It must suffice to describe a spectrum of conduct starting with conduct which the Committee believes is unquestionably permissible, ending with conduct which the Committee believes is undoubtedly unethical, and circling back to the range of conduct in between as to which reasonable minds may differ.

It is, for example, unquestionably permissible for lawyers to represent clients regarding the consequences of their past conduct. Just as a lawyer may ethically defend a client accused of committing a crime, so too may a lawyer ethically represent a client accused of violating Colorado's rules and regulations regarding marijuana, in any area in which that conduct may become an issue—including family law, employment law, workers' compensation law, and criminal law.

Under the Rules, it is equally permissible for government lawyers to counsel their clients regarding the creation and application of zoning and other ordinances and legislation relating to marijuana. The CSA provides that "no civil or criminal liability shall be imposed by virtue of this subchapter upon . . . any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d). Some courts have interpreted this section to provide civil and criminal immunity for state law enforcement officers enforcing valid state marijuana laws. *See City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 369 (2007); *State v. Kama*, 39 P.3d 866, 868 (Or. App. 2002). Under this line of cases, state officials carrying out their responsibilities under Colorado's marijuana laws are not engaging in criminal activity. Relying on these cases, the Committee believes that government lawyers advising these officials do not violate Colo.RPC 1.2(d) when they work to help their clients enforce, interpret, or apply marijuana laws. It is similarly permissible for lawyers to advocate for changes in the law and to help their clients advocate for a change in the law. *See* Colo.RPC 3.9 ("Advocate in Nonadjudicative Proceedings"); Colo.RPC 6.4 ("Law Reform Activities Affecting Client Interests").

Finally, in the family law context, a lawyer may advise a client about the consequences of using marijuana before, during, or after exercising parental rights or parenting time without violating the Rules. Colo.RPC 1.2(d) "does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct." Colo.RPC 1.2(d), cmt. [9].

By contrast, the Committee concludes that the plain language of Colo.RPC 1.2(d) prohibits lawyers from assisting clients in structuring or implementing transactions which by themselves violate federal law. A lawyer cannot comply with Colo.RPC 1.2(d) and, for example, draft or negotiate (1) contracts to facilitate the purchase and sale of marijuana or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana, even though such transactions comply with Colorado law, and even though the law or the transaction may be so complex that a lawyer's assistance would be useful, because the lawyer would be assisting the client in conduct that the lawyer knows is criminal under federal law. Similarly, a lawyer cannot under Colo.RPC 1.2(d) represent the lessor or supplier in such a transaction if the lawyer knows the client's intended use of the property, facilities, or supplies, as such actions are likely to constitute aiding and abetting the violation of or conspiracy to violate federal law.

Between these two extremes is a range of conduct the permissibility of which is subject to question. A case in point is tax law. Advising or assisting clients with tax issues related to the cultivation, sale, distribution, and use of marijuana pursuant to Colorado law may comply with Colo.RPC 1.2(d) insofar as it involves simply counseling a client about the legal consequences of past conduct. However, "[t]here 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." Colo.RPC 1.2(d), cmt. [9]. Under Colo.RPC 1.2(d) as written, a lawyer violates that Rule at the point where tax preparation becomes tax planning, the intent of which is to assist a client in planning the violation of federal law. Similarly, in a family law context, it is unclear to what extent, if any, a lawyer may negotiate a parenting plan or separation agreement in which one component is the permissible use of marijuana, either recreational or medicinal.

Colorado is one of a handful of states conducting an experiment in democracy: the gradual decriminalizing of marijuana. The Committee notes that, as a consequence of Colo.RPC 1.2(d) as written, Colorado risks conducting this experiment either without the help of its lawyers or by putting its lawyers in jeopardy of violating its rules of professional conduct.

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1. *See*, *e.g.*, T.S. Eliot, "The Hollow Men," § V ("Between the conception/And the creation/Between the emotion/And the response/Falls the Shadow").

2. The bar association ethics committees of three other states—Arizona, Connecticut, and Maine—have considered the uncertainty surrounding a lawyer's duties in light of the conflicting provisions of federal and state marijuana laws. Arizona's Ethics Committee refused to "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." State Bar of Ariz. Ethics Op. 11-01 (2011). Maine's Professional Ethics Commission opined that so long as both the federal law

and the language of Rule 1.2(d) remain the same, a lawyer must perform the analysis required by Rule 1.2(d) and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. Maine Prof. Ethics Comm'n, Opinion 199 (2010). Connecticut's Ethics Committee also identified the problem and, quoting the Maine opinion, noted that "the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not," but left it to individual lawyers to draw the line between permissible advice to clients on the requirements of the Connecticut Palliative Use of Marijuana Act and impermissible assistance to clients in conduct that violates federal law. Connecticut Bar Ass'n Prof. Ethics Committee, Informal Opin. 2013-02 (2013).

Addendum to Formal Opinion 125— The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities

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The Colorado Supreme Court's Standing Committee on the Colorado Rules of Professional Conduct has recommended that the Colorado Supreme Court adopt marijuana related amendments to the Colorado Rules of Professional Conduct. The proposed amendments would insulate a lawyer from discipline by the Colorado Supreme Court for the lawyer's personal or medical use of marijuana and for the lawyer's provision of legal services and advice on marijuana-related conduct. The Colorado Bar Association Ethics Committee supports this recommendation.

http://www.cobar.org/tcl/tcl_articles.cfm?articleid=8370