Can a Florida Lawyer Advise a Client About Medical Marijuana?

by Christopher B. Hopkins

While it is purely a coincidence that Pink Floyd will release its first album in twenty years around the same time that Floridians vote on Amendment 2 in November, the question whether Florida lawyers may ethically advise their clients about marijuana business remains... hazy. What has the Florida Bar said and how have other states handled the issue?

Rule 4-1.2(d) sets out the general rule ("not counsel a client to engage, or assist a client…in conduct that the lawyer knows or reasonably should know is criminal") and then the two-part safe harbor exception: "however, a lawyer may discuss the legal consequences of any proposed course of conduct… or… determine the validity, scope, meaning or application of the law." In short, a lawyer cannot counsel or assist a client to break the law but the lawyer can discuss consequences of any proposed actions and can explain the "validity, scope, meaning or application" of the law. But what if the client has questions about conduct which is legal under state law but illegal under federal law?

Amendment 2 is up for public vote and, if it receives more than 60% of the vote, medical marijuana will be legal in Florida. In the interim, Governor Scott signed into law the "Compassionate Medical Cannabis Act of 2014" for the medical use of low-THC cannabis for "qualified patients." The Act creates five dispensaries around the state which will require rule-making as well as lead to zoning, tax, insurance, and other legal issues.

In its lowest dose form, medical marijuana is already here in Florida. But cultivation, distribution, and use of marijuana remains illegal under the federal Controlled Substance Act (CSA). How are lawyers to deal with this conflict?

Several states with marijuana laws have issued ethics opinions regarding whether a lawyer can ethically advise a client regarding the use or business of medical marijuana. The Florida Bar, however, issued this policy:

"The Florida Bar will not prosecute a Florida Bar member solely for advising a client regarding the validity, scope, and meaning of Florida statutes regarding medical marijuana or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida 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."

This appears to be more of an exception than a policy, since the lawyer would still knowingly be counseling a client engaging in conduct illegal under federal law. For example, drafting a contract for a marijuana-related transaction legal under state statute appears permissible. If Amendment 2 passes, presumably the Policy will be revisited since, taken literally, the new law is a constitutional change and not a statute or lower provision. It further remains unclear exactly how far the lawyer needs to go advising the client regarding federal law "and policy" -- a clouded legal arena since the Department of Justice has issued memoranda de-emphazing enforcement and prosecution.

In light of the conflict between state and federal laws, some states have either amended the rule or added to the comment. In Colorado, where advising a client about state marijuana laws was unethical until mid-2014, the prior opinion emphasized the distinction regarding when the conduct occurred: a lawyer could give tax preparation advice to a medical marijuana business since the conduct-illegal-under-federal-law was in the past. However, the same lawyer could not engage in tax planning for a marijuana business, since that would be engaging or advising regarding ongoing illegal conduct (the lawyer could advise clients about consequences, scope, and limitations).

Below is the current crop of state ethics rules:

Arizona (2011): permissible as long as (1) no court decision has held the state cannabis laws preempted or invalid, (2) lawyer reasonably concludes the client's activities comply fully with state law, and (3) lawyer advises client regarding possible federal law implications.

Colorado (2014): permissible to advise on state laws but lawyer shall also advise client on federal law and policy.

Connecticut (2013): not permitted. Lawyer must advise clients of the conflict between state and federal law; lawyers may advise clients about the state Act but may not assist clients in conduct which violates federal law.

Maine (2010): not permitted if the legal service "rises to the level of assistance in violating federal law."

Nevada (2014): permissible to advise on state laws but lawyer shall also advise client on federal law and policy.

Washington: Rule change pending. State bar is reportedly not prosecuting lawyers for advising on state laws as long as DOJ policy does not change.

Despite these budding ethics opinions, more problems will undoubtedly spark up: (1) can a lawyer participate in a marijuana business? (2) what are the implications if a lawyer is a "qualified patient" consuming marijuana lawfully but still practicing law? (3) how does a lawyer quantify the sufficiency of advice regarding "federal law and policy"?

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