Q&A

LAWYER LIABILITY AND ETHICS

Arizona Medical Marijuana Lawyers: How Privileged Are Their Communications with Clients?

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Client confidentiality and the attorney-client privilege are pillars of the American legal system. They ensure that lawyers and clients can discuss legal matters without fear that those communications will later become discoverable in civil or criminal litigation. However, lawyers who communicate with clients engaged in the Arizona medical marijuana industry must ensure that those clients are aware of an ongoing threat.

In 2010, Arizona voters passed Proposition 203, more commonly known as the Arizona Medical Marijuana Act (the "Act"). As a result, Arizona became one of a growing number of jurisdictions within the United States to legalize medical marijuana. In February 2011, shortly after the Act was passed, the State Bar of Arizona addressed a pressing ethical issue: may a lawyer ethically advise and assist a client regarding activities that comply with the Act even if those activities violate federal law? See State Bar of Ariz. Ethics Op. 11-01: Scope of Representation.

The State Bar considered Ethical Rule 1.2(d), which states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent …" It then found that, provided that certain conditions are met, a lawyer may ethically perform legal acts that are necessary to assist a client in engaging in "conduct that is expressly permissible under the Act." For example, a lawyer may assist clients in establishing and licensing non-profit business entities, and representing clients in proceedings regarding licensing and certification issues. The State Bar supported its conclusion with the fact that the federal government had "issued a formal 'memorandum' that essentially carv[ed] out a safe harbor for conduct that is in 'clear and unambiguous compliance' with state law."

Today, despite the growing number of jurisdictions that have legalized medical marijuana, federal enforcement of the Controlled Substances Act is, at best, dynamic. For example, last year, the United States Attorney General rescinded the same memorandum that the State Bar cited in its 2011 opinion. Although the State Bar has not overruled its opinion, it is still important for lawyers to carefully advise their clients with respect to the Act. Indeed, the State Bar's opinion explicitly requires lawyers to ensure clients are advised regarding "the potential federal law implications and consequences" of undertaking actions that the Act permits.

One of those consequences is client confidentiality and waiver of the attorney-client privilege. Under Ethical Rule 1.6(a), generally "[a] lawyer shall not reveal information relating to the representation of a client." Under the attorney-client privilege, "an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." A.R.S. § 12-2234. But what happens if a lawyer is communicating and assisting a client with future criminal conduct?

Both client confidentiality and the attorney-client privilege might be susceptible to a rule called the "crime-fraud exception." This exception, which exists under the law of the United States and Arizona, was notably discussed in the United States Supreme Court opinion, United States v. Zolin, 491 U.S. 554 (1989). In that case, the Supreme Court held that the attorney-client privilege may not extend to cases where communications are "made for the purpose of getting advice for the commission of a fraud or crime." Courts do not appear to have addressed the exception in the context of receiving advice for complying with state medical marijuana laws. However, lawyers who assist clients with conduct that complies with the Act might still be communicating with a client about issues that violate federal law. As a result, there is a possibility that attorney-client communications regarding the Act might not be privileged, and lawyers must advise their clients accordingly.

Federal enforcement of the Controlled Substances Act remains uncertain. But it is clear that state medical marijuana laws can conflict with federal law. In light of this reality and the State Bar of Arizona's instruction to advise clients of potential federal law implications and consequences of complying with the Act, lawyers who practice medical marijuana law must take great care to ensure their clients are properly informed. ■