

The Legal Int

THE OLDEST LAW JOURNAL IN THE U

PHILADELPHIA, WEDNESDAY, OCTOBER 14, 2015

Lawyers Unhappy With Bars' Opinion On Pot Industry

BY GINA PASSARELLA

Of the Legal Staff

The Pennsylvania Supreme Court should adopt an amendment to the Rules of Professional Conduct to allow for lawyers to ethically represent clients in the medical marijuana industry, ethics committees of the Pennsylvania and Philadelphia bar associations have jointly recommended.

But as currently written, the committees said, the rules "forbid" a lawyer from counseling clients on activity such as drafting or negotiating contracts for the purchase, distribution or sale of marijuana.

The advisory opinion and recommendation issued Monday by the PBA's legal ethics and professional responsibility committee and the Philadelphia Bar Association's professional guidance committee has lawyers in this practice area disappointed and trying to figure out how they will proceed with such representation.

The advisory opinion was in response to several inquiries from bar members about the propriety of providing legal services from

Pot continues on 10

Pot

continued from 1

Pennsylvania law firms to clients interested in operating under another state's marijuana laws or in preparation for the possible legalization of medical marijuana in Pennsylvania.

The trouble under either scenario is that regardless of what an individual state's law says, federal law still deems marijuana growth and distribution illegal. That has created an "ethical conundrum" for Pennsylvania lawyers, the committees said.

The committees' solution took the more conservative of the approaches followed by other state bar associations that have addressed the issue. All of the findings surround Rule of Professional Conduct 1.2(d), which forbids a lawyer from counseling a client to engage in illegal activities.

Some states, such as Arizona, have read Rule 1.2(d) to allow for the provision of legal services to the cannabis industry if the activities in question comport with state law and the lawyer advises the client of the possible implications under federal law.

The Pennsylvania and Philadelphia bars, however, take the approach like that done in Michigan where the rules were amended to protect lawyers advising in this space.

"To address the existing, and growing, need for legal assistance with respect to marijuana-related activities that are authorized, or will, in the future, become authorized under various states' laws, it is recommended that Rule 1.2(d) be amended to authorize lawyers to provide legal assistance with respect to conduct that is expressly permitted by the law of the state where it takes place

or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct," the joint ethics opinion said.

Andrew Sacks of Philadelphia's Sacks Weston Millstein Diamond is active in lobbying for the passage of a medical marijuana bill in Pennsylvania and sought the advisory opinion from the Philadelphia Bar Association.

Sacks said he didn't like the opinion because he "would like to start representing people right now," but he said he respected it. Sacks said he expected this approach from bar associations in a relatively conservative state like Pennsylvania and gave the bar associations credit for coming out with an opinion before the law was even passed. He said that shows the bars recognize this is a growing area of law and a significant ethical concern.

"What they did is they threw a fireball into the Supreme Court of Pennsylvania's lap," Sacks said, adding that maybe the court could address the issue before the legislation currently percolating in the General Assembly is passed.

But Steven Auerbach, an attorney who submitted a draft advisory opinion to the committees in December 2014 urging for a finding that Rule 1.2(d) does not have to be amended, said he doesn't see this moving quickly.

Before the PBA would even make an official recommendation to the Supreme Court rules committee to make this change, its board and House of Delegates must vote on the proposal at its November meeting. A PBA spokeswoman said the association would not have a comment on the ethics committees' advisory opinion until after

the November vote.

Auerbach said he has focused his whole practice on cannabis law and has a lot at stake. He called the advisory opinion an "unfortunate misstep" that will most deeply affect the sickest and most vulnerable of society.

Auerbach said medical marijuana legislation is novel legislation and the stakeholders needing legal advice range from legislators to health care providers and local municipalities to patients. In terms of how he will practice in this space moving forward, Auerbach said he would continue to fight for more inclusive protections for lawyers.

"At the end of the day, an attorney has to take their ability to practice law very seriously. My license is my ability to literally put food in my son's mouth, but I also have to recognize my role in society and help vulnerable people," Auerbach said of the oath he took when admitted to the bar.

William G. Roark of Hamburg, Rubin, Mullin, Maxwell & Lupin is the course planner for two continuing legal education programs later this year on the cannabis industry that are being hosted by the PBA's Pennsylvania Bar Institute. He said he and his firm have the utmost respect for the PBA, the drafters of the advisory opinion and the difficult position they were put in having to balance two different laws. But he said the purpose of any medical marijuana legislation is to help sick patients and his firm feels anyone looking to further that goal deserves legal representation.

"Those people are going to need representation and our reading of Rule 1.2(d) enables us to do that still," Roark said.

Roark said his firm would advise clients of the committees' opinion and the ramifications

under federal law.

According to the advisory opinion, the bar committees said they agreed that, once a jurisdiction legalizes some form of marijuana usage, the public would be better served by having lawyers advise those involved in the industry.

"However, the committees do not agree that the indisputable existence of such a need for legal services can justify ignoring the clear language of a Rule of Professional Conduct," the opinion said.

The bar committees said they didn't want to rely on the U.S. Department of Justice's policy that it would not prioritize enforcement of federal marijuana laws, and would not look to interfere with state laws that have legalized marijuana sale and usage. They said the Rules of Professional Conduct make no distinction between laws that are enforced and those that are not.

"The committee does not believe that clear compliance with state law is an adequate safeguard against exposure to the consequences of a disciplinary rule violation," the advisory opinion said.

The advisory opinion noted that, even if the Disciplinary Board of the Supreme Court agreed to follow other states' leads by not initiating proceedings against lawyers practicing in this space, a lawyer must provide legal services in compliance with the Rules of Professional Conduct.

Sacks said that the ethical conundrum will persist as long as marijuana continues to be deemed a Schedule I drug, which has no accepted medical use.

Gina Passarella can be contacted at 215-557-2494 or at gpassarella@alm.com. Follow her on Twitter @GPassarellaTLI.

Pennsylvania
eDiscovery

2nd Edition

Pennsylvania eDiscovery

2nd Edition

The Legal Intelligencer

