Denver Law Review

Volume 89
Issue 4 *19th Annual Rothgerber Conference - Toward a Constitutional Right of Access to Justice: Implications and Implementation*

Article 14

December 2020

Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health

Alec Rothrock

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Alec Rothrock, Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health, 89 Denv. U. L. Rev. 1047 (2012).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

IS ASSISTING MEDICAL MARIJUANA DISPENSARIES HAZARDOUS TO A LAWYER'S PROFESSIONAL HEALTH?

ALEC ROTHROCK†

Colorado Rule of Professional Conduct 1.2(d) states, in part, that a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal."[1] A lawyer who provides legal services to a medical marijuana dispensary does not assist in his client's violation of *Colorado* criminal laws banning the possession and sale of marijuana as long as the dispensary qualifies as a caregiver under article 18, section 14 of the Colorado Constitution and complies with that section and other legal requirements.[2]

Is the lawyer therefore in compliance with Colo. RPC 1.2(d)?

The answer is "no," not if the same conduct violates federal criminal law.

The analysis and answer are no different under Amendment 64 to the Colorado Constitution with respect to a lawyer's assistance of a client in the recreational marijuana business.[3]

I. IS MEDICAL MARIJUANA LEGAL?

In 2000, Colorado voters passed an amendment to the Colorado Constitution creating limited exemptions from C.R.S. § 18-18-406, which makes unlawful the possession, use, and sale of marijuana.[4] Since that time, hundreds of medical marijuana dispensaries have opened for business in the State of Colorado.

As with any new business owner, a lawyer may be engaged to provide a variety of legal services incident to the creation of the business, including:

- forming the entity that will operate it;
- drafting and negotiating buy-sell agreements among the owners;
- drafting and negotiating loan documents or documents raising capital for the business;

---

† Alec Rothrock is a shareholder at Burns, Figa & Will P.C. His practice emphasizes legal ethics and attorney discipline defense. Mr. Rothrock is a past chair of the Colorado Bar Association Ethics Committee. A version of this article appeared in the May 25, 2010 edition of the *Business Law Newsletter* of the Business Law Section of the Colorado Bar Association.

1. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
2. COLO. CONST. art. 18, § 14.
3. *Id.* art. 18, § 16.
4. *Id.* art. 18, § 14.

- assisting in preparing applications for required licenses;
- registering trademarks;
- helping to draft and negotiate the documents necessary to purchase or rent the property from which the business operates; and
- furnishing an opinion letter opinion regarding the client's legal rights and risks.

And that is just to get the business up and running, to say nothing of the need for legal services to the ongoing business.

Yet 21 U.S.C. § 841(a)(1)[5] continues to make the possession, use, and sale of marijuana illegal at the federal level, even though it affects some purely intrastate activities.[6] Indeed, in the so-called Ogden Memo, adopted in October 2009, the United States Department of Justice directed federal prosecutors to focus their resources elsewhere than on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"; however, the memo confirmed that the conduct remains illegal under federal law.[7] Since the release of the Ogden Memo, U.S. Attorneys in different jurisdictions have taken less sanguine public positions on the enforcement of 21 U.S.C. § 841(a)(1).[8]

II. COLORADO RULE OF PROFESSIONAL CONDUCT 1.2(D) DECONSTRUCTED

A. Colorado Rule of Professional Conduct 1.2(d) Applies to Conduct Made Criminal Under any Law

Colorado Rule of Professional Conduct 1.2(d) applies to conduct made criminal under any law. It states as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[9]

Colorado Rule of Professional Conduct 1.2(d) thus prohibits the distinct activities of (1) counseling a client to engage in criminal conduct

---

5. 21 U.S.C. § 812(c) lists "marihuana" as a controlled substance within the meaning of 21 U.S.C. § 841(a)(1).

6. Gonzales v. Raich, 545 U.S. 1, 22 (2005).

7. Memorandum for Selected United States Attorneys from David W. Ogden (Oct. 19, 2009), *available at* http://blogs.usdoj.gov/blog/archives/192.

8. *E.g.*, Letter from John F. Walsh, United States Attorney, to Stanley L. Garnett, District Attorney (Mar. 20, 2012), *available at* http://www.justice.gov/dea/pubs/states/newsrel/2012/den032012.pdf

9. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).

and (2) assisting a client in criminal conduct. The lawyer must also "know" that the client's conduct is criminal. These terms are described below. First, however, there is a threshold question about whether Rule 1.2(d) prohibits lawyer counseling and assistance of conduct that is not illegal under state law but is illegal under federal law.

For purposes of Rule 1.2(d), if certain conduct is criminal under any jurisdiction's law, the fact that it is not criminal under the concurrently applicable law of another jurisdiction is irrelevant. Also, a federal no-prosecution policy is not a change in the law, and by its nature, it is temporary.

Ethics opinions from two other states reach diametrically opposed conclusions regarding the effect of the federal government's no-prosecution policy on lawyers' obligations under Rule 1.2(d). A Maine ethics opinion states that Rule 1.2(d)

> does not make a distinction between crimes which are enforced and those which are not. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. . . . [T]here is no guarantee that, with a change in policy, administration, or resources, the federal law might ultimately be enforced to the chagrin of lawyers whose conduct enabled the dispensaries.[10]

In contrast, an Arizona ethics opinion interprets the Ogden Memo as creating a "safe harbor for conduct that is in 'clear and unambiguous compliance' with state law" unless and until a court holds that federal law preempts Arizona's medical marijuana law.[11] The Arizona opinion concludes by stating that it "decline[s] to interpret and apply" Rule 1.2(d) in a way that prevents lawyers from assisting clients in engaging in activities authorized by 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."[12]

Arizona's opinion is flawed. It suggests that Arizona's medical marijuana law either displaces federal law within the State of Arizona or protects Arizona citizens from the application of federal law. If this was the intent of the opinion, it represents a misunderstanding of federalism. If, instead, the intent of the opinion was to hold up the current no-prosecution policy as a "safe harbor," it ignores the clear words of Rule 1.2(d) and incautiously encourages Arizona lawyers to rely on a policy

---

10. Maine Op. 199, "Advising Clients Concerning Maine's Medical Marijuana Act" (July 7, 2010).

11. Section IV, Analysis, Arizona Op. No. 11-01 (February 2011).

12. *Id.*

that could change at any time. Like it or not, the federal law remains unchanged and in force in every corner of Arizona.

B. Discussing the Legal Consequences of a Proposed Course of Conduct and Making Good Faith Arguments Under the Law

Lawyers have an important role in the medical marijuana business. Colorado Rule of Professional Conduct 1.2(d) in fact permits them to engage in this role. Specifically, Rule 1.2(d) permits lawyers to "discuss the legal consequences of any proposed course of conduct with a client and . . . counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[13] There is no more important function for lawyers in our society.

Colorado Rule of Professional Conduct 1.2(d) permits—and clients expect lawyers to give—an "honest opinion about the actual consequences that appear likely to result from a client's conduct."[14] Provided the lawyer does not encourage the client to break the law, discussing the "legal consequences" of a proposed course of conduct may include a discussion not only of what the law is, but also of the likelihood of its enforcement in a given situation.[15] In a working paper, Professors Sam Kamin and Eli Wald of the University of Denver Sturm College of Law, relying on the *Restatement (Third) of the Law Governing Lawyers*, agree with this point and argue that a lawyer can "advise a client that enforcement of the law, at least vis-à-vis dispensaries operating within the confines of the state's regulatory apparatus, is a low priority."[16] Such advice would not violate Rule 1.2(d); whether it is sound advice at the time it is given is another matter.

Lawyers are not ethically responsible if the client uses this information to engage in a crime or fraud. The lawyer's responsibility may be "especially delicate" when the "client's course of action has already begun and is continuing."[17] A lawyer may not "continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent."[18]

A leading treatise offers the example of the lawyer who advises a client that it is unlawful to claim certain tax deductions but also that the likelihood that the Internal Revenue Service will discover them in an

13. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
14. *Id.* 1.2 cmt. 9.
15. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1588 (1995).
16. Sam Kamin & Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?* 27 (2012), *available at* http://works.bepress.com/sam_kamin/3.
17. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10.
18. *Id.*

audit is minimal.[19] According to the authors, there is no "wholly satisfactory" answer to whether the lawyer assisted the client in criminal conduct, in violation of Rule 1.2(d), or simply explained the law and the legal consequences of the client taking the deductions.[20]

Applying the analysis of a 1985 ABA Formal Ethics Opinion, however, if the lawyer had a good faith belief that the deductions were lawful, or that there was a good faith argument in support of taking them, Rule 1.2(d) would not prohibit the lawyer from advising the client about the option of taking the deductions. This would be the case even if the lawyer believed that it was more likely than not that the client's position would fail if challenged.[21]

Counseling or assisting a client to make a "good faith effort to determine the validity, scope, meaning or application" of a law does not mean advising a client to break the law without telling anyone.[22] The lawyer must advise the client to affirmatively challenge the law either to test its validity or applicability in the client's circumstances or to protest against what the client considers a greater evil.[23] This is what the Comment to Rule 1.2(d) describes as a "course of action involving disobedience."[24]

For example, a New Hampshire lawyer advised her client—the mother in a child abuse case—to violate a statute making it unlawful to disclose information without the court's permission that might identify the child or parent involved in a hearing in such a case.[25] In hopes of currying public favor, the mother gave extensive documentation about the hearing to a local newspaper. In a subsequent lawyer discipline case, the lawyer argued that the Comment authorizing a "course of action involving disobedience" permitted her to "self-determine the validity of the

---

19. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 5.14, at 5-47 to -48 (3d ed., 2012 Supp.). Another commentator expressed the view that Rule 1.2(d)'s language permitting a lawyer to discuss the legal consequences of a proposed course of conduct must refer to circumstances in which either the client's intentions or the law itself is ambiguous. Otherwise a lawyer could "discuss" with a client "various methods of operating a proposed drug-smuggling ring, murdering a political rival or disgruntled spouse, or cheating a trusting business partner," as long as the lawyer's advice remained "personally uncommitted" and did not "heat up to the level of 'counsel' or 'assist.'" CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 694 (1986).

20. 1 HAZARD & HODES, *supra* note 19, § 5.14, at 5-48.

21. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 352 (1985).

22. *See* W. William Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019, 1022 n.7 (1999) (writing that this part of Rule 1.2(d) "requires distinguishing between good faith test case litigation, classic civil disobedience by appealing to higher law, and *surreptitious* civil disobedience, which is no different than law-breaking" (emphasis in original)).

23. 1 HAZARD & HODES, *supra* note 19, § 5.15, at 5-48, -49.

24. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 12 (2012).

25. Werme's Case, 839 A.2d 1 (N.H. 2003).

statute and advise her client to disobey it because she concluded that [it] is unconstitutional" under the First Amendment.[26]

The New Hampshire Supreme Court disagreed. It observed that the Comment modified a rule that required a "good faith effort to determine the validity, scope, meaning or application" of the law. There were at least two "good faith" options available to the lawyer: (1) seek permission from the court in the child abuse case to disclose the information, and (2) file an action seeking a declaratory judgment that the statute was unconstitutional.[27] The New Hampshire Supreme Court affirmed a reprimand issued by an inferior disciplinary tribunal.[28]

C. The Counseling Prohibition

On the prohibited side of the Rule 1.2(d) spectrum, a lawyer may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[29] For example, a Minnesota criminal defense lawyer was found to have counseled clients to engage in criminal conduct by referring female clients to another client who operated a prostitution business if they could not afford to pay his fees.[30]

A 1952 ABA Formal Opinion admonishes that there is a "sharp distinction . . . between advising what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction."[31] The legal distinction is sharp but the factual difference may be subtle. As the Comment to Rule 1.2 points out, sometimes there is a fine line between presenting an analysis of the law and suggesting the means by which the client may violate it.[32]

A leading authority refers here to a distinction between "innocent discussion" and "active participation"—passive/active distinction.[33] Another authority describes the counseling prohibition in much the same way, stating that it prohibits a lawyer from advising a client about the legality of proposed conduct "with the intent of facilitating or encouraging the client's action."[34] Perhaps this active/passive distinction, or focus on the lawyer's intent, is what the Comment means when it states that a

---

26. *Id.* at 2.
27. *Id.* at 3.
28. *Id.*; *see* 1 HAZARD & HODES, *supra* note 19, § 5.15, at 5-48 (implying that client must act "openly").
29. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
30. *In re* Olkon, 605 F. Supp. 784, 790 (D. Minn. 1985).
31. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 281 (1952); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-5 (1980) ("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 therefor.").
32. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 9.
33. 1 HAZARD & HODES, *supra* note 19, § 5.13, at 5-40.
34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. a (2000).

lawyer may not "knowingly" counsel a client to engage in criminal (or fraudulent) conduct,[35] an adverb absent from the Rule itself.

This focus on the lawyer's state of mind suggests a subjective analysis. One of these same legal authorities states that it also is important to understand the "level of certainty that the client will actually misuse the information."[36] This inquiry is objective in nature.

A classic law school hypothetical that illustrates the counseling prohibition is that of the lawyer who advises a client about which countries do not have extradition treaties with the United States.[37] Another is the lawyer whose client has a "large amount of undeclared income in cash who wants to know how *small* a cash transaction must be before banks are relieved of the duty to report it."[38]

D. The Assisting Prohibition

Rule 1.2(d)'s prohibition against assisting a client in conduct the lawyer knows to be criminal is the most significant impediment to a lawyer who provides legal services to a client in the medical marijuana industry. "Assistance" is a term that requires some connection between the lawyer's conduct and the client's criminal conduct. However, the proximity of the connection leaves bar prosecutors with considerable latitude, checked only by the disciplinary tribunal and superior appellate tribunals.

The Comment to Colorado Rule of Professional Conduct 1.2(d) offers limited help in circumscribing the term. It states, "The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."[39] "Criminal" can be substituted for "fraudulent" in this sentence. If the lawyer believes that the client expects the lawyer to provide this kind of assistance, another Rule of Professional Conduct requires the lawyer to "consult" with the client about the limitations on the lawyer's assistance.[40] Several Colorado attorney discipline cases involve prohibited assistance to a client, including the lawyer who assisted his client in criminal impersonation by failing to disclose her true identity to the district attorney or the court in a criminal trespass case,[41] and the lawyer who assisted a client in emptying his bank

35. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 9.

36. 1 HAZARD & HODES, *supra* note 19, § 5.13, at 5-40.

37. *Id.* at 5-40.1 (emphasis in original).

38. *Id.*; *see also* People v. Gifford, 76 P.3d 519, 520 (Colo. O.P.D.J. 2003) (holding respondent lawyer counseled client was in violation of Colo. RPC 1.2(d) by advising client to offer real estate to his ex-wife in exchange for ex-wife's and another witness's recantation of testimony in a pending criminal matter).

39. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10.

40. *Id.* 1.4(a)(5); *accord id.* 1.2 cmt. 13.

41. People v. Casey, 948 P.2d 1014 (Colo. 1997).

accounts and supplying him with money preparatory to fleeing with his minor child to avoid a child custody order.[42]

A leading treatise states that both the counseling and assisting prohibitions in Rule 1.2(d) "track[ ] standard principles of accessorial liability."[43] For example, "Pursuant to 18 U.S.C. § 2, a defendant may be charged as a principal in the commission of a substantive criminal offense whenever he 'aids, abets, counsels, commands, induces or procures its commission. . . .' In order to prove a crime of aiding and abetting, the government must prove that the defendant associated with the criminal venture, that he purposefully participated in it, and that he sought by his actions to bring it about."[44]

An ABA Formal Opinion holds that assisting a client in a crime or fraud may include a lawyer's failure to disavow her own work product if she discovers that her client has used the work product to further a crime or fraud.[45] The example given in the ABA Opinion is that of outside counsel to a small lighting fixture company that was in the process of obtaining a $5 million unsecured loan from a bank. After issuing an opinion of counsel attesting to, among other things, the enforceability of the company's lighting fixture contracts against the client's customers, outside counsel discovers that for the past three years, the chief executive officer and the treasurer of the company have been creating millions of dollars worth of false lighting installation contracts. In other words, a material portion of outside counsel's opinion letter is false. Outside counsel believes that her continuing representation of the client in the matter would "discourage inquiry into the soundness of the loan and perhaps even encourage the bank to make further extensions of credit." The opinion concludes that the lawyer must withdraw from the representation of the company in that matter and disavow her opinion letter, even if doing so will effectively disclose information that the lawyer is obligated to keep confidential.[46]

---

42. People v. Chappell, 927 P.2d 829 (Colo. 1996).

43. 1 HAZARD & HODES, *supra* note 19, § 5.12, at 5-36. Engaging in criminal conduct usually constitutes disciplinable conduct, whether or not the lawyer is convicted. COLO. R. CIV. P. 251.5(b); COLO. RULES OF PROF'L CONDUCT R. 8.4(b) (2012).

44. United States v. Wang, 898 F. Supp. 758, 761 (D. Colo. 1995); *see also* COLO. REV. STAT. § 18-1-603 (2012) ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.").

45. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 366 (1992).

46. *See* . COLO. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (lawyer must decline or withdraw from representation if representation would violate Colo. RPC 1.2(d), inter alia, or "other law"). Colo. RPC 1.2 cmt. 10 and Colo. RPC 4.1 cmt. 3 state that if necessary to avoid assisting a client in a crime or fraud, a lawyer not only must withdraw from the representation but also must "disaffirm an opinion, document, affirmation or the like." The latter goes on to state that in "extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under [Colo. RPC 4.1(b)] the lawyer is

Examples of improper "assistance" tend to arise in a non-litigation setting. In a litigation setting, a lawyer's representation of a client related to medical marijuana is less likely to constitute impermissible "assistance" if the client's conduct is completed, or if the client is making a "good faith effort to determine the validity, scope, meaning or application of the law," as discussed above.

An isolated criminal defense representation involving allegedly illegal use or possession of marijuana does not constitute assistance of the crime in violation of Rule 1.2(d), even though the lawyer's objective in the representation is to gain or preserve the client's freedom, which, at a basic level, permits the client to engage in the same conduct again.[47] After all, the same could be said about virtually any criminal defense representation.

Criminal defense representation for past conduct is not permissible, however, when a lawyer "accepts a retainer from an organization, known to be unlawful, and agrees in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities." [48] For a lawyer to undertake such an arrangement, the enterprise must be "lawful."[49] This distinction conjures an image of swarthy men involved in organized crime, but from the perspective of federal law, a dispensary owned by Rotary Club members also may be considered an "unlawful" organization.

But the entire purpose of some litigation is to permit the client to engage in conduct illegal under federal law. A lawyer who fights to obtain unemployment compensation for an employee discharged from employment for using marijuana in compliance with state medical marijuana law, but in violation of the employer's "zero-tolerance drug policy," assists the client's continued violation of federal law prohibiting the use of marijuana.[50] However, the lawyer does not violate Rule 1.2(d) if the

---

required to do so, unless the disclosure is prohibited by Rule 1.6." In turn, Colo. RPC 1.6(b)(3) and (4) permit a lawyer to reveal information relating to the representation in order to prevent fraud by a client or substantial financial injury that may result from a client's crime or fraud, but only if the client has "used the lawyer's services."

47. People v. Sexton, No. 10CA1206, 2012 WL 503648 (Colo. App. Feb. 16, 2012).

48. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 281 (1952); *accord* United States v. Castellano, 610 F. Supp. 1151, 1165–66 (S.D.N.Y. 1984) (quoting ABA Formal Op. 281 with approval); *see also id.* ("[I]t need hardly be [be]labored that an attorney may not agree with an illegal syndicate to represent its members or employees with respect to future violations of the law." (second alteration in original) (quoting *In re Abrams*, 266 A.2d 275 (N.J. 1970)) (internal quotation marks omitted)).

49. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 12 (2012) (stating Rule 1.2(d) "does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise"); ABA Defense Function Standard 4-3.7(c) ("Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.").

50. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

representation constitutes a "good faith effort" to determine the "meaning" of the unemployment compensation statute involved. A lawyer who challenges a trial court's restriction on a divorce client's parenting time, imposed because the client's use of medical marijuana allegedly endangered the client's minor child, assists the client's violation of federal law but does not violate Rule 1.2(d) if the lawyer's services represented a good faith effort to determine the application of law of child endangerment.[51]

Similarly, a lawyer who seeks to permit a client on probation to use medical marijuana notwithstanding a condition of the client's probation requiring him not to "commit another offense" while on probation assists the client to violate federal law, but does not violate Rule 1.2(d) if the action constituted a good faith effort to determine the meaning of a state probation statute and the medical marijuana provisions of the Colorado Constitution.[52] A lawyer who represents a dispensary in opposing a zoning ordinance that has the effect of closing the client's operation is seeking to keep the client stay in business, a business activity that violates federal law, but does not violate Rule 1.2(d) if done in a good faith effort to determine the validity of the ordinance.[53]

E. Knowledge of Criminal Conduct

With respect to both the counseling and assisting prohibitions, the lawyer must "know" that the client's conduct is criminal. Knowledge means actual knowledge of the fact in question. [54] A reckless state of mind does not constitute knowledge.[55] However, knowledge may be, and often must be, inferred from the circumstances.[56]

It is not clear from Colorado Rule of Professional Conduct 1.2(d) whether the emphasis of the knowledge requirement is on the lawyer's awareness of the client's activities or on the lawyer's awareness of their criminal nature.[57] It may be both, although it is doubtful that a lawyer's ignorance of the law would excuse a violation of Rule 1.2(d).

Nor is willful ignorance of a client's activities likely to serve as a valid defense to a Rule 1.2(d) violation. In a 1981 informal opinion, the ABA Committee on Ethics and Professional Responsibility construed a virtually identical rule in the ABA Model Code of Professional Respon-

---

51. *In re* Marriage of Parr & Lyman, 240 P.3d 509 (Colo. App. 2010).

52. People v. Watkins, 282 P.3d 500 (Colo. App., 2012).

53. Giuliani v. Jefferson Cnty. Bd. Cnty. Comm'rs, No. 11CA1919, 2012 WL 5360940 (Colo. App. Nov. 1, 2012).

54. COLO. RULES OF PROF'L CONDUCT R. 1.0(f).

55. *Id.* 1.0 cmt. 7A.

56. *Id.* 1.0(f).

57. *Compare id.* 1.2(d) ("[L]awyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent." (emphasis added)), *with id.* 1.2 cmt. 9 ("Paragraph (d) prohibits a lawyer from *knowingly* counseling or assisting a client to commit a crime or fraud." (emphasis added)).

sibility to mean that "[a] lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting . . . criminal conduct and without relying on past client crime . . . to achieve results the client now wants. Otherwise, the lawyer has a duty of further inquiry."[58] This language is not inconsistent, at least according to some commentators, with a lawyer's operating assumption that a client is using the lawyer's counsel for lawful purposes.[59]

In their paper, Professors Kamin and Wald rely on the *Restatement (Third) of the Law Governing Lawyers* to argue that a lawyer does not assist a client within the meaning of Rule 1.2(d), unless the lawyer has an "actual intent to encourage the commission of the crime."[60] The *Restatement* defines "assisting" in this context as "providing"—with the "intent of facilitating or encouraging the client's action"—"other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency."[61]

One problem with this interpretation is that Rule 1.2(d) itself does not require proof of the lawyer's intent, and the *Restatement* does not have the force of law. Although some Rules of Professional Conduct, including Rule 1.2(d), require bar counsel to prove a lawyer's knowledge of certain facts, few if any require bar counsel to prove the lawyer's intent. The lawyer's intent is generally relevant as a matter of proof only for purposes of determining the appropriate sanction for a rule violation.[62]

III. APPLICATION OF COLORADO RULE OF PROFESSIONAL CONDUCT 1.2(D) TO REPRESENTATION OF MEDICAL MARIJUANA DISPENSARIES

In most instances, a lawyer will know when a client is engaging a lawyer's services to establish a medical marijuana dispensary. This will usually be the client's stated purpose in consulting the lawyer, and the client needs no encouragement from the lawyer to embark on the venture. The client may even request that the lawyer analyze the laws—state and federal—that apply to the operation of the proposed business. So far, so good under Colorado Rule of Professional Conduct 1.2(d). For the lawyer, the delicate ethical concern lies in knowing the difference be-

58. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981).

59. Michael M. Mustokoff, Jonathan L. Swichar & Cheryl R. Herzfeld, *The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following* United States v. Anderson, 9 ANNALS HEALTH L. 107, 118 (2000).

60. Kamin & Wald, *supra* note 16, at 29.

61. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. a (2000).

62. *E.g.*, *In re* Roose, 69 P.3d 43, 48 (Colo. 2003) (discussing difference between knowledge and intent for purposes of determining appropriate level of discipline under ABA Standards for Imposing Lawyer Sanctions).

tween "directing, suggesting, or assisting in criminal . . . conduct, on the one hand, and providing information about the law . . . on the other."[63]

It is possible to draw distinctions under Colorado Rule of Professional Conduct 1.2(d) between conduct that does and does not further a client's federal criminal conduct. With the exception of the legal opinion, all of the activities described above would likely fall under the vague definition of assistance, unless perhaps dispensary activities are only one possible business activity of the enterprise. The proximity of the lawyer's services to the dispensary's core activities is likely to be a critical factor, so helping a small dispensary is more ethically risky than helping a far flung enterprise whose activities may or may not include these core activities.

It is readily apparent that drawing lines between providing information, on one hand, and providing counseling or assistance, on the other, is largely a self-defeating exercise. There are a good many public policy reasons why Rule 1.2(d) should not smother lawyer assistance to clients in the medical marijuana industry, but these reasons do not change the plain wording of Rule 1.2(d). And, of course, Colorado Rule of Professional Conduct 1.2(d) is not interpreted one way for medical marijuana violations of federal law and another way for all other crimes. Lawyers who represent medical marijuana dispensaries in a business setting almost cannot help but violate the rule.

The possible disciplinary consequences for this conduct are an entirely different matter. They depend on matters largely outside lawyers' control, namely the initiation of a request for investigation with Colorado's Office of Attorney Regulation Counsel (OARC), and OARC's prosecution policy.

No Colorado lawyer has been publicly disciplined, or even subjected to public charges, based on counseling or assisting a client to participate in the medical marijuana business in compliance with state law. There is no indication that OARC interprets Colorado Rule of Professional Conduct 1.2(d) in the elastic way that federal courts have historically interpreted the Commerce Clause in federal constitutional jurisprudence. OARC's policy on disciplinary prosecution for providing standard legal services to state-law abiding members of the medical marijuana industry seems to be one of tolerance, not unlike the policy on criminal prosecution taken by the Justice Department in the Ogden Memo. Of course, just as the dispensaries must rely on the criminal prosecution policy of the current President's administration, so too must Colorado lawyers rely on the disciplinary prosecution policy of OARC and its supervisor, the Colorado Supreme Court.

---

63. Pepper, *supra* note 15, at 1588.