EO-20-0004

[redacted]

February 12, 2020

Clerk of the Arizona Supreme Court
1501 West Washington, Suite #402
Phoenix, AZ 85007-3231

Dear Clerk:

Pursuant to Rule 42.1, Ariz. R. Sup. Ct., this is a request for an opinion by the Attorney Ethics Advisory Committee.

In 2010, Arizona voters adopted the Arizona Medical Marijuana Act [AMMA], which legalized medical marijuana for certain uses. Possessing, distributing, or manufacturing marijuana for medical or recreational purposes, or attempting or conspiring to do so, however, are still federal crimes under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* As a result, states cannot "legalize" marijuana because "[u]nder the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits." *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

The Ethical Rules add a layer of complication to this statutory conflict. Ethical Rule (ER) 1.2(d) forbids a lawyer to "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." In addition, ER 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act" – not necessarily be convicted of one – "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

In 2011, the State Bar of Arizona's Committee on the Rules of Professional Conduct responded to lawyers' questions about their ethical duties under the AMMA by issuing Op. 11-01 (attached). The opinion focused on ER 1.2(d) and framed the issue this way:

> May a lawyer ethically advise and assist a client with respect to activities that comply with the [AMMA], including such matters as advising clients about the requirements of the [AMMA], assisting clients in establishing and licensing non-profit business entities that meet the requirements of the [AMMA], and representing clients in proceedings before state agencies regarding licensing and certification issues?

Op. 11-01 created an exception to ER 1.2(d) for conduct legal under state law. The State Bar committee declined to interpret 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." State Bar of Arizona Ethics Op. 11-01 at 6. Because clients need legal advice and assistance "to implement and bring to fruition that conduct expressly permitted under state law," *id.*, the opinion essentially interpreted ER 1.2(d) as containing an exception for complying with the AMMA.

The AEAC should consider whether Op. 11-01's position is valid, for several reasons.

First, the Ethical Rules should say what they mean and mean what they say. While our Ethical Rules "are rules of reason" that "should be interpreted with reference to the purposes of legal representation and of the law itself" (Preamble to Arizona Rules of Professional Conduct [14]), neither ER 1.2(d) nor ER 8.4(b) contain exceptions for complying with state law. In fact, ER 1.2(d) has been interpreted to encompass both state and federal law. *See, e.g.*, State Bar of Arizona Ethics Op. 00-04 (lawyer could not ethically advise a client to surreptitiously record a telephone call between the client's children and the client's former spouse if the conduct would be "illegal under federal or state law").

One other state bar's ethics committee even has described Op. 11-01 as being "based on a value judgment of the current state of federal laws and prosecutions and not on a true reading of the Rules of Professional Conduct." State Bar of New Mexico Ethics Advisory Committee Op. 2016-01.

By reading an exception into ER 1.2(d), Op. 11-01 avoided what would have been a very unpopular – unpopular but accurate – conclusion: that lawyers could not walk through the door that the AMMA opened, either for clients or for themselves, without engaging in unethical conduct that theoretically could subject them to professional discipline.[1] However, other states' entities, such as the New Mexico bar committee, the Colorado Bar Association and the Ohio Board of Professional Conduct, all reached the unpopular but accurate conclusions that the same operative language prohibited lawyers from helping clients under their state marijuana laws. The supreme courts in all three states then amended their rule or comments to supersede those opinions and allow the conduct. *See, e.g.*, New Mexico Supreme Court order No. 17-8300-006 (June 30, 2017).[2]

[1] While the AMMA includes an immunity provision for agents that prohibits disciplinary action by a professional licensing board or entity, that provision would not apply to lawyers representing clients unless the lawyer were also a "principal officer, board member, employee or volunteer" of the dispensary. A.R.S. § 36-2811(F) ("A registered nonprofit medical marijuana dispensary agent … may not be denied any right or privilege, including civil penalty or disciplinary action by a court or occupational or professional licensing board or entity, for working or volunteering for a registered nonprofit medical marijuana dispensary….."; A.R.S. § 36-2801(13) (defining a"[n]onprofit medical marijuana dispensary agent" as "a principal officer, board member, employee or volunteer of a nonprofit medical marijuana dispensary….."

[2] State Bar of Arizona ethics opinions have reached unpopular but accurate conclusions before and the legal profession did not implode. For example, in 2009, the State Bar's Committee on the Rules of Professional Conduct drafted an opinion that concluded that a lawyer may not ethically participate in a not-for-profit lawyer referral service if the service required the lawyer to pay the service a percentage of the fees earned on a referred case. The involved service, operated by the Maricopa County Bar Association, had begun charging the percentage fees in 2008. When the State Bar advised the MCBA that it would be issuing that opinion, the MCBA immediately filed a petition asking the Supreme Court for an emergency

By reading an exception into ER 1.2(d), Op. 11-01 also unfortunately leads to the proverbial slippery slope. If an exception for special circumstances is read into one rule, that raises the possibility of exceptions (including exceptions that do not benefit lawyers) being read into other rules.

The second reason the AEAC should consider this issue is because one of the conditions on which Op. 11-01 premised its conclusion no longer exists. The opinion explicitly conditioned its analysis in part on the fact that the Obama administration had adopted a safe harbor for some marijuana-related conduct. The Trump administration, in early 2018, rescinded that safe harbor.[3]

Some may contend that a safe harbor of sorts nonetheless still exists. The so-called Rohrabacher-Farr amendment, which has appeared in annual federal appropriations legislation since 2014 and was renewed most recently for fiscal year 2020, blocks the U.S. Department of Justice from spending money from specific appropriations acts "to prevent [states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." The Ninth Circuit has concluded that this amendment bars the DOJ from prosecuting individuals for engaging in activity authorized by state laws – but prohibited by federal law – if those individuals "fully complied with [state] laws." *United States v. McIntosh*, 833 F.3d at 1177.

The New York State Bar Association recently relied on the continued approval of the Rohrabacher-Farr amendment to reaffirm its 2014 opinion that lawyers may provide traditional legal services to clients seeking to act in accordance with state medical-marijuana laws. New York State Bar Association Ethics Op. 1177 (2019), reaffirming Ethics Op. 1024 (2014). As Op. 11-01 did, the NYSBA opinions effectively read an exception into New York Rule 1.2(d) – the same as Arizona's ER 1.2(d) – for legal state conduct when "federal narcotics law … is on the books but deliberately unenforced as a matter of federal executive discretion."

The Rohrabacher-Farr amendment does not solve the ethical conflict between the AMMA and the professional rules, however. The amendment does not decriminalize cannabis. ER 1.2(d) is concerned with whether the conduct is criminal or fraudulent, not whether the conduct is prosecuted or the actor is convicted. In addition, the amendment does not immunize anyone against prosecution for federal marijuana offenses because "Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding." *United States v. McIntosh*, 833 F.3d at 1179, n.5. Finally, the amendment explicitly does not apply to recreational use, which could be in Arizona's future, considering that an initiative petition drive seeking to qualify that issue for the 2020 general election ballot is underway.

---

order amending the involved Ethical Rules to allow the conduct. The Court agreed, and later adopted permanent rule changes. *See* rule-change petition R-10-0023.

[3] Charlie Savage and Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES, Jan. 4, 2018, https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html

The third reason the AEAC should review this issue is based on system integrity. For nearly a decade, we have had an intellectually untenable situation: rules that say one thing and a non-binding[4] advisory opinion that says another.

Since Op. 11-01 was issued, the Arizona Supreme Court has twice rejected (without explanation) rule-change petitions asking that ER 1.2(d) be amended to state an exception for conduct that complies with or is authorized by state law.[5] Both petitions were premised on Op 11-01 having created an exception out of whole cloth.

Does the Supreme Court's action mean that Op. 11-01's conclusion is accurate? If so, then a non-binding opinion issued by a now-defunct State Bar committee has effectively rewritten an Ethical Rule. Would that mean that those old State Bar committee opinions are binding on the discipline system? Or just that one opinion? If just that one opinion, how are lawyers supposed to know that one opinion is binding but others are not?

Or, perhaps, should we interpret ER 1.2(d) to mean what it explicitly says, regardless whether state law authorizes conduct that is still criminal under federal law? If so, then something needs to be done about Op. 11-01, which interprets the rule in a contrary way and leads lawyers astray. That then raises the question of whether State Bar counsel should even follow this kind of a non-binding advisory opinion.[6]

I am not suggesting that the AEAC review the medical-marijuana issue as a backdoor way to achieve what the two rule-change petitions did not. It certainly would be more comfortable and non-controversial to maintain the status quo and perpetuate Op. 11-01's conclusion. But we should make sure any direction given to lawyers can be reconciled with our professional rules. If that direction cannot be reconciled with our professional rules, then either the direction or the rules need to be changed.

The AEAC should review Op. 11-01 and revisit the relationship between the AMMA and the Ethical Rules. No matter the conclusion, any issued opinion will serve the Arizona legal profession and help clarify this issue.

[redacted]

[4] The opinion included a then-standard disclaimer: "Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings."

[5] See rule-change petitions R-16-0027 and R-18-0009.

[6] I am not aware of any bar charges having been filed against any lawyer for allegedly violating ER 1.2(d) by being involved with or representing medical-marijuana businesses. I expect not, considering that Op. 11-01 exists. However, to my knowledge, the Lawyer Regulation Office has not publicly disagreed with Op. 11-01.

STATE BAR OF ARIZONA

OPINION NO. 11-01
(February 2011)

SUMMARY

A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act ("Act"), despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

NOTE: This opinion is limited to the specific facts discussed herein. Because the opinion is based on the Act as currently in effect, subsequent legislative or court action regarding the Act could affect the conclusions expressed herein.

FACTS

In the 2010 general election, Arizona voters approved Proposition 203, titled "Arizona Medical Marijuana Act" ("Act"), which legalized medical marijuana for use by people with certain "chronic or debilitating" diseases. The proposition amended Title 36 of the Arizona Revised Statutes by adding §§ 36-2801 through -2819 and also amended A.R.S. § 43-1201. Arizona became the 16th jurisdiction (15 states and the District of Columbia) to adopt a medical-marijuana law.

Despite the adoption of Arizona's Act, 21 U.S.C. § 841(a)(1) of the federal Controlled Substances Act ("CSA") continues to make the manufacture, distribution or possession with intent to distribute marijuana illegal.

In an October 19, 2009, memorandum ("DOJ Memorandum"), the U.S. Department of Justice advised that it would be a better use of federal resources to not prosecute under federal law patients and their caregivers who are in "clear and unambiguous compliance" with state medical-marijuana laws. The DOJ Memorandum indicates that federal prosecutors still will look at cases involving patients and caregivers, however, if they involve factors such as unlawful possession or use of a firearm, sales to minors, evidence of money-laundering activity, ties to other criminal enterprises, violence, or amounts of marijuana inconsistent with purported compliance with state or local law.

Although characterizing patients and their caregivers as low priorities, the DOJ Memorandum does not characterize commercial enterprises the same way. In fact, the DOJ Memorandum says that the "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority" of the DOJ.[1]

The DOJ Memorandum explains that the DOJ's position is based on "resource allocation and federal priorities" and

> does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

QUESTION PRESENTED

May a lawyer ethically advise and assist a client with respect to activities that comply with the Act, including such matters as advising clients about the requirements of the Act, assisting clients in establishing and licensing non-profit business entities that meet the requirements of the Act, and representing clients in proceedings before state agencies regarding licensing and certification issues?

[1] The DOJ recently further refined this position, in a February 1, 2011, letter regarding the City of Oakland's Medical Cannabis Cultivation Ordinance: "The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the [DOJ]. This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana. Accordingly, while the [DOJ] does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the [DOJ Memorandum], we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law."

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

. . .

(d) 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.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 86-05 (March 1986), 87-05 (February 1987), 00-04 (November 2000)

OPINION

I. Introduction

The Act's passage gives rise to complex issues related to the proper ethical role of lawyers in advising and assisting clients about activities falling within the scope of the Act but which potentially may violate applicable federal law. Novel issues are presented regarding the relationship between Arizona's Act and federal law prohibitions on the manufacture, distribution or possession of marijuana.[2]

In addition to such unresolved legal issues, the DOJ Memorandum leaves unclear the extent to which federal prosecutors will pursue violations of federal law for conduct that complies fully with Arizona's Act and whether Arizona's medical-marijuana law ultimately may be held to be preempted or invalid in whole or in part.

While these issues are being decided by prosecutors and courts, it is important that lawyers have the ability to counsel and assist their clients about activities that are in compliance with the Act — and traditionally at the heart of the lawyer's role — by assisting clients in complying with the Act's requirements through the performance of such legal services as: establishing medical-marijuana dispensaries; obtaining the necessary licensing and registrations; representing clients in proceedings before Arizona agencies responsible for implementing the Act; and representing

---

[2] For example, the United States Supreme Court has held that the CSA does not establish an implied medical-necessity exception to prohibitions on manufacture and distribution of marijuana. *See United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). California has held that the state's medical-marijuana law is not preempted by the CSA because there is "no positive conflict" in that the state law does not require activities in violation of federal law. In so holding, the California court noted that "governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws." *See Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 759-60, 115 Cal. Rptr. 3d 89, 107-08 (2010), *review denied* Dec. 1, 2010.

governmental entities to draft rules and regulations or otherwise counsel the governmental entity with respect to its rights and obligations under and concerning the Act.

II. Ethical Rule (ER) 1.2(d) and Prior Ethics Opinions and Court Decisions

Although Arizona's medical-marijuana law is new, it raises a timeless issue for lawyers: whether the client is seeking the lawyer's help to engage in conduct that the lawyer knows is criminal or fraudulent. As one treatise explains, Model Rule (MR) 1.2(d), which mirrors Arizona's ER 1.2(d), states the dividing line as follows:

> [W]hile a lawyer may discuss, explain, and predict the consequences of proposed conduct that would constitute crime or fraud, a lawyer may not counsel or assist in such conduct. Rule 1.2(d) is thus the close relative – in the disciplinary context – of the criminal law of aiding and abetting, and the civil law of joint tort feasance. As is the case in those other forms of accessorial liability, however, the principle of Rule 1.2(d) is much easier to state than to apply.

Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering* § 5.12 at 5-37, 5-38 (3d ed. 2005).

Comment 10 to ER 1.2 emphasizes that a lawyer is not for hire as an accomplice or enabler of criminal conduct:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There 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.

These principles have been applied in three prior Arizona ethics opinions and in Arizona disciplinary cases, which have addressed the issue of whether the lawyer could affirmatively counsel or recommend conduct by the client that the lawyer knew was criminal or fraudulent.

The first two ethics opinions addressed whether a lawyer may advise a client to refuse to submit to blood, breath or urine tests upon being arrested for driving while intoxicated. Ariz. Ethics Ops. 86-05 (March 1986), 87-05 (February 1987). Opinion 86-05 concluded that, based on the then-state of the law, a lawyer could not advise a client to refuse to submit to a test upon being arrested for DUI, but could discuss the consequences of refusal without actually counseling refusal. When a new appellate opinion on the subject changed the law several months later, the Committee reconsidered Op. 86-05 and issued Op. 87-05, which concluded that a lawyer could ethically advise a client to refuse to undergo blood, breath or urine tests.[3]

[3] The Committee does not express any opinion here as to whether the conclusions reached in Op. 86-05 or Op. 87-05 are still valid in light of *Carrillo v. Houser*, 224 Ariz. 463, 232 P.3d 1245 (2010), which held that the DUI implied-

In discussing ER 1.2(d) under the then-state of the law, Op. 86-05 concluded:

> It is one thing to tell a client that proposed conduct may violate the antitrust laws, for example. It is quite another to advise the client affirmatively to undertake such conduct. ER 1.2(d), recognizing the distinction, explicitly forbids a lawyer to "counsel a client to engage… in conduct that the lawyer knows is criminal or fraudulent." Neither "criminal" nor "fraudulent" is explicitly defined in either the Rule or the accompanying Comment.

Similarly, the third opinion addressed whether a lawyer may ethically advise a client that the client may record telephone conversations between the client's children and the client's former spouse without the former spouse's knowledge and consent. Ariz. Ethics Op. 00-04 (November 2000). In Op. 00-04, the answer to whether a lawyer could ethically advise a client to record a telephone call hinged on the answer to the basic question of whether the client's proposed conduct would be "illegal under federal or state law." If so, "then the inquiring attorney may not, under ER 1.2(d), advise the client to tape record telephone conversations between the client's children and the client's former spouse."

Arizona lawyer-discipline cases demonstrate that ER 1.2(d) (or its predecessor, DR 7-102(A)(7), which contained generally the same language[4]) has been applied to sanction lawyers who affirmatively counseled their clients to engage in conduct that was knowingly fraudulent or otherwise in violation of state law, but not in a conflict-of-laws circumstance. *E.g.*, *In re Burns*, 139 Ariz. 487, 679 P.2d 510 (1984) (by urging his client to take settlement funds and not pay an Air Force lien for medical services, lawyer "encouraged his client to commit fraud on the United States government"); *In re Nulle*, 127 Ariz. 299, 620 P.2d 214 (1980) (lawyer violated DR 7-102(A)(7) by effectively advising corporate client's president to falsely represent himself as the sole owner on a liquor-license application thus violating state law).

III. Medical Marijuana Laws in Other Jurisdictions

Of the other jurisdictions that have legalized medical marijuana[5], it appears that only Maine has addressed the intersection of state-authorized medical marijuana and legal ethics.[6] In Maine Op.

---

consent statute does not generally authorize law enforcement to administer a test to determine alcohol concentration without a warrant, unless the arrestee expressly agrees to the test.

[4] DR 7-102(A)(7) provided that in representing a client, a lawyer "shall not…[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

[5] Alaska, California, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. *Medical Marijuana, 15 Legal Medical Marijuana States and DC, Laws, Fees, and Possession Limits*, http://medicalmarijuana.procon.org (last visited Feb. 15, 2011).

[6] The Oregon Supreme Court dealt with a discipline case involving a lawyer who advised a client about a medical-marijuana dispensary but the opinion does not address whether the lawyer's conduct violated Oregon's version of ER 1.2(d). The opinion also does not disclose whether the Oregon State Bar, in prosecuting the lawyer, raised the issue. In *In re Smith*, 348 Or. 535, 236 P.3d 137 (2010), the Oregon court suspended for 90 days a lawyer for misconduct in representing a former employee of a medical-marijuana clinic who attempted to physically take over the clinic. The court concluded that the lawyer gave the client frivolous advice; lied about having authority for the client's acts from a governmental entity; and engaged in a criminal act by accompanying the client when she attempted to occupy the clinic. The lawyer met the client when he was a patient at the same clinic. Oregon's Rule

199 (July 7, 2010), the Professional Ethics Commission of the Maine Bar Board of Overseers also warned lawyers about this issue. Maine's version of ER 1.2(d) is the same as Arizona's, except for one word immaterial to this analysis.[7]

Maine concluded:

> Maine and its sister states may well be in the vanguard regarding the medicinal use and effectiveness of marijuana. However, the Rule which governs attorney conduct 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.

IV. Analysis

As noted above, no prior Arizona ethics opinions or cases have addressed the novel issue presented by the adoption of the Act — whether a lawyer may ethically "counsel" or "assist" a client under the following conditions: (1) the client's conduct complies with a state statute expressly authorizing the conduct at issue; (2) the conduct may nonetheless violate federal law; (3) the federal government has issued a formal "memorandum" that essentially carves out a safe harbor for conduct that is in "clear and unambiguous compliance" with state law, at least so long as other factors are not present (such as unlawful firearm use, or "for profit" commercial sales); and (4) no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds.

In these circumstances, we decline to interpret and 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. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.

A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay

---

1.2(c), Oregon Rules of Professional Conduct, is identical to ER 1.2(d) except that Oregon prohibits a lawyer counseling a client to engage or assist to engage in conduct the lawyer knows is "*illegal* or fraudulent," rather than "*criminal* or fraudulent."

[7] Arizona's rule allows a lawyer to discuss with a client the legal consequences of "*any* proposed course of conduct." Maine's rule allows a lawyer to discuss with a client the legal consequences of "*the* proposed course of conduct."

between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

Accordingly, we believe the following is a reasonable construction of ER 1.2(d)'s prohibitions in the unique circumstances presented by Arizona's adoption of the Act:

- If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the Act expressly permits; and
- The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and
- The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then
- The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.

This opinion and its construction of ER 1.2(d) are strictly limited to the unusual circumstances occasioned by the adoption of the Act. Any judicial determination regarding the law, a change in the Act or in the federal government's enforcement policies could affect this conclusion. The Committee cannot render opinions based on pure questions of law or on questions involving solely the lawyer's exercise of judgment or discretion. Committee on the Rules of Professional Conduct Statement of Jurisdiction § 9(a), (c). This opinion does not address whether specific conduct is preempted by federal law; whether the Act is or is not available to the client as a defense for a violation of federal law; or whether the lawyer's assistance to the client may expose the lawyer to criminal prosecution under federal law.

CONCLUSION

Lawyers may ethically advise clients about complying with the Arizona Medical Marijuana Act, including advising them about compliance with Arizona law, assisting them to establish business entities, and formally representing clients before a governmental agency regarding licensing and certification issues, but only in the narrow circumstances set forth in this opinion and only if lawyers strictly adhere to those requirements.