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Professional Liability

Roundup of This Year's Significant Advisory Ethics Opinions

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As the year rounds to a close, it is worth our time to review some of the more significant advisory ethics opinions from the last year. Both the Philadelphia and Pennsylvania bar associations publish a number of advisory opinions each year. While not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania, these opinions represent the thoughtful interpretation of our Rules of Professional Conduct by the attorneys who form the Pennsylvania Bar Association committee on legal ethics and professional responsibility and Philadelphia Bar Association's professional guidance committee. The opinions of each committee are published in searchable databases on their websites. As in many years past, this year included a joint opinion between the two committees. The Pennsylvania Bar Association published an additional 14 informal opinions. The Philadelphia Bar Association published two other opinions.

Legal Services Related to Marijuana

Joint Formal Opinion 2015-100 relates to "Providing Advice to Marijuana-Related Businesses." As the opinion notes, while many local jurisdictions throughout the United States have, to a greater or lesser degree, legalized (or decriminalized) marijuana for various purposes, it is still an illegal Schedule I drug under federal law. As of today, 23 states and the District of Columbia have legalized medical marijuana in some form or another, and four states and the District of Columbia have legalized some form of recreational use of marijuana. In Pennsylvania, efforts to legalize medical marijuana use have repeatedly stalled.

This creates a problem for attorneys with clients interested in engaging in marijuana-related business. The first question raised is the propriety of a Pennsylvania attorney providing advice to a client about the law of other jurisdictions. The opinion notes that under Rule of Professional Conduct 5.5(a), "a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." The opinion, citing to Restatement (Third) of the Law Governing Lawyers (2000), notes it is well established that there is no general prohibition against an attorney advising a client "about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising the client about the application of that law, or drafting legal

documents intended to have legal effect in the other state." Naturally, a lawyer should only engage in this type of representation if the lawyer has adequate familiarity with the relevant law. The advisory opinion also warns the lawyer must determine whether the proposed services constitute the practice of law under the law of the applicable jurisdiction.

Once the lawyer determines he or she may provide the general type of service, the more interesting question is whether the service will violate Rule of Professional Conduct 1.2. Pursuant to Rule 1.2: "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."

Comment 9 to Rule 1.2 states: "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."

As the opinion notes, this rule distinguishes between counseling and assisting the client in criminal or fraudulent conduct, which is prohibited, and discussing the legal consequences of any proposed course of conduct or assisting a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, which is permitted. The lawyer must therefore determine if the proposed course of action is criminal or fraudulent, and if so, the lawyer may not "counsel or assist" the client in the endeavor, but may provide an opinion about the likely consequences of the action.

This conclusion, which is inescapable under the rule, leaves an attorney in the position of violating the disciplinary rules if the attorney provides assistance to a client for conduct that is criminal under federal law, but legal under the law of the local jurisdiction.

As the opinion notes: "Given that it is a federal crime to manufacture, distribute, dispense, or possess marijuana, Pa. RPC 1.2(d) forbids a lawyer from counseling or assisting a client in such conduct by, for example, drafting or negotiating contracts for the purchase, distribution or sale of marijuana. The fact that the proposed client conduct is permitted by state law, and federal law enforcement may not target those operating in compliance with state law, does not change the analysis, as the rule makes no distinction between laws that are enforced and laws that are not."

In a somewhat unusual move, the joint opinion recommends an amendment to Rule 1.2. The two committees recommended adding a comment to the rule that attorneys "may counsel or assist a client regarding conduct 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."

Referral Fees From Financial Advisers

The Philadelphia Bar Association's Opinion 2015-2 addresses the ethical propriety of a

"strategic partnership" with a financial services provider. The attorney contemplated a relationship where she would refer certain of her clients to a financial services provider to set up a portfolio. The attorney would be paid a portion of the fees on an ongoing basis. The attorney was aware of new amendments to the Rules of Professional Conduct, effective at the end of February, which include new Rule 5.8(b)(1), which provides:

"A lawyer shall not recommend or offer an investment product to a client or any person with whom the lawyer has a fiduciary relationship, or invest funds belonging to such a person in an investment product, if the lawyer or a person related to the lawyer:

(1) has an interest in compensation paid or provided by a person other than the client or person with whom the lawyer has a fiduciary relationship."

Comment 2 to Rule 5.8(b)(1) provides that, "Clients who place their trust in their lawyer and assume or expect that the lawyer will protect them from harm are likely to feel deceived if substantial sums of money are lost on investments pursued at the lawyer's recommendation or prompting and the lawyer ... either receives compensation or a pecuniary benefit from a person other than the client ... even when the reason for the loss is limited to unexpected market conditions."

Rule 5.8(c)(1) provides in part that: "For purposes of this rule: (1) the term 'investment product' includes ... services 'as an investment manager or investment adviser.'" The committee found: "It is clear that the new rule, given both the prohibition in 5.8b1 and the definition of 'investment product' in 5.8c1, prohibits an attorney from recommending or offering an investment product under the circumstances described in this inquiry."

Other Opinions

The Philadelphia Bar Association's other published opinion deals with how to handle unattributable funds in an Interest on Lawyers Trust Accounts account. The Pennsylvania Bar Association's informal opinions cover a range of topics, including a number of different conflict of interest opinions, and an opinion regarding whether it is necessary to withdraw when a client makes misstatements on bankruptcy filings (yes, if the client does not agree to correct).

As I have noted previously, while these opinions are not precedential, they contain a wealth of information on various ethics issues. They are an excellent starting point for any ethical dilemmas that may arise in your practice. •

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