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KCBA Ethics Advisory Opinion on I-502 & Rules of Professional Conduct

October, 2013

The King County Bar Association proposed on October 4, 2013, given unresolved attorney ethics questions after Washington State voters approved Initiative 502 (marijuana legalization), that the Washington State Supreme Court consider amendments to the Rules of Professional Conduct. While that RPC proposal is under consideration by the Court, the KCBA Board of Trustees has adopted an ethics advisory opinion to assist the bar in the interim as attorneys consider practice issues under the existing RPCs.

Questions presented:

1. Should an attorney who assists clients to engage in conduct that is permitted by I-502 and its implementing regulations, but is forbidden by federal law, be subjected to professional discipline in Washington?
2. Should an attorney who has an ownership interest in or is employed by a marijuana dispensary and/or occasionally possesses marijuana, both in a manner expressly permitted by I-502 but forbidden by federal law, be subjected to professional discipline in Washington?

Background and hypothetical facts

On November 6, 2012, Washington voters approved Initiative 502 (“I-502”) by a margin of 55.7% to 44.3%.¹ When undertaken in proper compliance with Washington law, the manufacture of marijuana, sale of marijuana, and possession of marijuana in certain amounts by adults is no longer criminalized by state law.² Colorado passed a similar law in its November 2012 general election.³

¹ Washington Sec’y of State, November 2012 General Election Results, Initiative Measure 502 Concerns marijuana, available at <http://vote.wa.gov/results/20121106/Initiative-Measure-No-502-Concerns-marijuana.html> (last accessed Oct. 6, 2013).

² I-502 §§ 4(1)-(3); 20(3). The Washington State Bar Association does not offer ethical opinions that address the substance of the underlying law, and this KCBA opinion follows that practice. *See, e.g.*, WSBA Advisory Op. 2107 (2006) (noting that the Committee does not provide statutory analysis or interpretation, but including statutory references in order to aid discussion of potential professional ethics issues). References to the substance of I-502 or its regulations is intended to aid in discussion of the law’s effect on an attorney’s ethical responsibilities, and not to opine on the substance of the law.

³ *See* Colorado const. amend. 64 (adding recreational use amendment to Article 18 of Colorado constitution).

I-502 required the state liquor control board to adopt rules regarding the procedures and criteria necessary to implement several goals of the new initiative.⁴ By law, the liquor control board must do so by December 1, 2013, and the agency's most recent update says that it is on track to implement the regulations by that date.⁵

Meanwhile, on August 29, 2013, Deputy Attorney General James M. Cole issued a memorandum for all United States Attorneys regarding enforcement under the federal Controlled Substances Act ("CSA") in light of new state laws such as Washington's.⁶ The "Cole Memorandum" stated that the goals of federal marijuana policy had typically been addressed by state enforcement when consistent with eight important federal goals, including keeping marijuana out of the hands of children and keeping marijuana proceeds out of the hands of criminal organizations.⁷ The Cole Memorandum recognized that, when a state regulatory system accomplishes these goals, "consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."⁸ The same day, Attorney General Eric Holder informed the governors of Washington and Colorado that the Department of Justice would not immediately file suit seeking to invalidate the states' respective recreational marijuana laws.⁹

The CSA continues to criminalize the sale and possession of marijuana,¹⁰ as the Cole Memorandum expressly recognizes.¹¹ Attorneys in Washington, therefore, may face ethical dilemmas based on this inconsistency between federal and state law. The remainder of this advisory opinion considers two hypothetical attorneys: Attorney A, who assists a client with the panoply of legal issues associated with setting up a marijuana distribution business in compliance with Washington law, and Attorney B, who maintains an ownership interest in a marijuana dispensary and occasionally possesses marijuana (and does both in full compliance with Washington law).

⁴ I-502 § 10.

⁵ *Id.*

⁶ Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> ("Cole Memorandum").

⁷ *Id.* at 1-2. The eight recognized federal law enforcement priorities recognized in the Cole Memorandum are: (i) preventing distribution to minors; (ii) preventing marijuana revenue from reaching criminal organizations; (iii) preventing the diversion of legal marijuana to states where it is illegal; (iv) preventing state-authorized marijuana activities from serving as a front for other illegal activity (including trafficking of other drugs); (v) preventing violence and the use of firearms related to marijuana commerce; (vi) preventing drugged driving and other adverse health consequences related to marijuana; (vii) preventing the growth of marijuana on public lands; and (viii) preventing marijuana possession or use on federal property.

⁸ *Id.* at 3.

⁹ News Release, Joint Statement from Gov. Inslee and AG Ferguson regarding update from AG Ferguson on implementation of Washington's voter-approved marijuana law (Aug. 29, 2013), *available at* <http://www.atg.wa.gov/pressrelease.aspx?id=31361>.

¹⁰ 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812(c).

¹¹ Cole Memorandum at 4 ("This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws related to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA.").

Analysis

A. Ethical implications of offering client counseling and advice regarding I-502

Will Attorney A be in violation of his ethical obligations if he assists a client in complying with I-502, in a manner that will necessarily violate the text of the CSA? The KCBA believes that subjecting an attorney to professional misconduct on this basis would be wholly inconsistent with the purpose of the rule and the public policy of the state.¹²

Washington Rule of Professional Conduct (“RPC”) 1.2(d) states:

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.

While the latter portion of the rule offers a safe harbor for “discuss[ing] the legal consequences of any proposed course of conduct” and assisting the client to “make a good faith effort to determine the validity, scope, meaning, or application of the law,” this safe harbor may not offer sufficient protection to those attorneys who wish to actually assist a client in complying with I-502 and its regulations. To be sure, an attorney could advise a client on the relationship between I-502 and federal law and the likelihood of enforcement of federal law as set forth in the Cole Memorandum, which resembles an attempt to determine the meaning and applicability of existing law. A client, however, would normally demand much more assistance in navigating the complicated regulatory field of I-502. A client who requests help with I-502 compliance, such as Attorney A’s client, cannot honestly be said to seek only to determine the reach of I-502 or the CSA: Attorney A’s client seeks to form a marijuana distribution business.¹³ If Attorney A restricted his advice to an explanation of the interplay of I-502 and federal law, he might be ethically safe, but he would not be helpful to his client.

This opinion must, therefore, address the substance of RPC 1.2(d), namely the provisions against “counsel[ing]” or “assist[ing]” a client in conduct that the lawyer knows is criminal. While the rule on its face does not seem to distinguish between violations of state and federal law, the analysis is complicated by the novel circumstance where federal and Washington laws conflict as they do here. Three state associations have discussed the analogous situation where an attorney sought to assist clients with complying with state medical marijuana laws, arriving at different conclusions.

The Maine Professional Ethics Commission concluded in 2010 that representing or advising clients under Maine’s Medical Marijuana Act would “involv[e] a significant degree of risk which

¹² This advisory opinion is limited to conduct that is *expressly permitted* by positive state law, or for which state law *expressly provides* an affirmative defense. This opinion does not address violations of the professional rules premised solely on the violation of federal law, where state law is silent or did not form basis for the relevant underlying misconduct. Indeed, it is likely that conduct of the latter type will frequently be the proper subject of attorney discipline. See, e.g., *In re Disciplinary Proceeding Against Smith*, 170 Wn.2d 721, 246 P.3d 1224 (2011) (affirming attorney’s disbarment for conviction of conspiracy to commit federal securities fraud and wire fraud).

¹³ See Sam Kamin and Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 Oregon L. Rev. 869 (2013) (addressing this argument) (hereinafter “*Outlaws or Crusaders?*”).

needs to be carefully evaluated.”¹⁴ The Commission recognized that the federal government had deprioritized enforcement of the CSA in medical marijuana cases, but reasoned that Maine’s rule “does not make a distinction between crimes which are enforced and those are not.” As long as the federal law and Maine’s RPCs remain unchanged, attorneys needed to determine “whether the particular legal service being requested rises to the level of assistance in violating federal law.” If so, the attorney risks violating RPC 1.2. The Connecticut Bar Association Professional Ethics Committee reached a similar conclusion to that of the Maine commission: while an attorney could safely advise a client on the requirements of state and federal marijuana law, advice and services in aid of functioning marijuana enterprises could run afoul of RPC 1.2(d).¹⁵ Like the Maine commission, the Connecticut committee reasoned that “[w]hether or not the CSA is enforced, violation of it is still criminal in nature. . . . Lawyers may not assist clients in conduct that is in violation of federal criminal law.”

In 2011, however, the State Bar of Arizona reached the opposite conclusion.¹⁶ Unlike the Maine and Connecticut opinions, the Arizona opinion declined to read its Ethics Rule 1.2 to forbid attorney assistance regarding conduct prohibited by the CSA yet compliant with state law. To do so, the bar reasoned, would “depriv[e] clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits.” In addition to recognizing the desirability of making legal services available, the bar noted that Arizona’s act had not yet been held invalid or preempted by federal law. The bar advised that an attorney could ethically perform legal services related to the state’s Medical Marijuana Act so long as (i) the conduct was expressly permitted under the Act, (ii) the lawyer advised the client on potential federal law implications and consequences, and (iii) the client, having received full disclosure, elected to proceed with a course of action specifically permitted by the Act.

The KCBA favors the State Bar of Arizona approach, and would urge this state to follow the same approach regarding client advice and counseling about compliance with I-502. While the KCBA does not agree with all components of the Arizona opinion,¹⁷ its emphasis on the client’s need for legal assistance to comply with state law accurately reflects the reality that Washington clients face in navigating the new Washington law. The initial proposed implementing regulations for I-502, for example, have added 49 new sections in the Washington Administrative Code encompassing 42 pages of text.¹⁸ These regulations are consistent with I-502’s express goal of removing the marijuana economy from the province of criminal organizations and bringing it into a “tightly regulated, state-licensed system.”¹⁹ In building this complex system, the voters of Washington could not have envisioned it working without

¹⁴ Maine Prof. Ethics Comm’n, Op. 199 (July 7, 2010).

¹⁵ Conn. Bar Ass’n, Prof. Ethics Comm’n, Informal Op. 2013-12, *Providing Services to Clients Seeking Licenses under the Connecticut Medical Marijuana Law* (Jan. 16, 2013).

¹⁶ State Bar of Az. Ethics Op. 11-01 (Feb. 2011).

¹⁷ The Arizona opinion emphasizes that no court has held its state’s act to be invalid or preempted. To the extent that this suggests that the effectiveness of the CSA may be diminished or affected by the contrary state law, or that a court would need to hold otherwise before it was clear, the KCBA does not make such an assumption. *See generally* Alec Rothrock, *Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer’s Professional Health?*, 89 *Denver U. L. Rev.* 1047 (2012) (criticizing Arizona opinion’s discussion of interplay between state and federal law as “a misunderstanding of federalism,” and stating that “the federal law remains unchanged and in full force in every corner of Arizona”).

¹⁸ WSR 13-14-124.

¹⁹ I-502 § 1.

attorneys. As the State Bar of Arizona recognized, disciplining attorneys for working within such a system would deprive the state’s citizens of legal services “necessary and desirable to implement and bring to fruition that conduct expressly permitted under state law.”

While the Maine and Connecticut opinions may be more faithful to the plain text of their rules, both founder on addressing the importance of legal assistance to those who wish to engage in the conduct that state law permits. Moreover, neither opinion fully grapples with the diminished federal desire to enforce marijuana activities done in unambiguous compliance with state law. Under the current federal directive, the CSA will not ordinarily be enforced against an individual or business when the activity does not threaten federal enforcement objectives, which may be demonstrated by “the operation [being] demonstrably in compliance with a strong and effective state regulatory system.”²⁰ Because federal enforcement policy is tied to compliance with state law, an attorney advising a client on complying with I-502 and the Cole Memorandum’s objectives would be *helping* a client avoid federal prosecution, even if technically counseling or assisting the client to violate the letter of federal law. This state should reject a formalistic reading of RPC 1.2(d) that would prohibit such conduct.

Even if officials in this state were to follow the Maine and Connecticut opinions and find a technical violation of RPC 1.2(d) under the circumstances presented here, a separate rationale should counsel against attorney discipline: estoppel. Assuming that federal law could provide the predicate to a violation of Washington’s RPC 1.2(d), attorney discipline is state-based, and the state should interpret its own rules in accordance with the state policy that favors strong regulation of legalized marijuana and, by inference, attorney assistance in this regime. Now that the state has established such a regime, it has no legitimate interest in disciplining attorneys who operate within the confines of that same regime.²¹

The proper scope of RPC 1.2(d) as applied here is a novel question, and the KCBA hopes to avoid such close determinations by amendments to the text of the rule to make clear that Attorney A’s conduct is permitted by the RPCs. In the meantime, however, the KCBA believes that an attorney who fully advises the client of the federal law implications of I-502 and the CSA (including the policies reflected in the Cole Memorandum) may assist the client, so long as the counseled or assisted conduct is expressly permitted by I-502.

B. Ethical implications of personal conduct in compliance with I-502

Will Attorney B commit professional misconduct solely by her ownership interest in a marijuana dispensary and her personal possession of marijuana? Assuming she is compliant with I-502, the KCBA believes she would not, as her actions are unrelated to her honesty, trustworthiness, or fitness as a lawyer.

RPC 8.4(b) states that “[i]t is professional misconduct for a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects[.]” Attorney B would face a similar dilemma to Attorney A, because her ownership interest in a marijuana dispensary and her personal possession of marijuana may be permitted in Washington, but remain technically “criminal acts” under the CSA.

²⁰ See Cole Memorandum at 3.

²¹ See *Marijuana Lawyers: Outlaws or Criminals*, *supra* note 13, at 929 (arguing that state that legalizes marijuana should be estopped from disciplining lawyers who act within this framework).

Regardless of the criminal nature of the acts, however, Washington requires “some nexus between the lawyer’s conduct and those characteristics relevant to law practice” prior to imposing discipline for violating a law.²² The Colorado Bar Association Ethics Commission found the absence of such a nexus to the mere use of medical marijuana in Formal Opinion No. 124, concluding that such use would not violate the Colorado rule without “additional evidence that the lawyer’s conduct adversely implicates the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” Here, absent other factors, there is no nexus between Attorney B’s conduct that is permitted by I-502, and her honesty, trustworthiness, or fitness as a lawyer. If Attorney B’s business activities or personal possession of marijuana made her unfit to practice, or caused her to violate other provisions of the RPCs, she would properly be subject to discipline under other RPC provisions.

Although the KCBA believes that the existing ethics rules regarding an attorney’s personal conduct with respect to marijuana provide clearer protection to attorneys than the existing rules regarding client advice, it has requested amendments to the RPCs and comments to make clear that Attorney B’s conduct, standing alone, would not subject her to professional misconduct.

C. Advisory nature of opinion

While the KCBA does not believe that an attorney should be subjected to professional discipline for engaging in the conduct described in this opinion, like the WSBA, its opinion does not have the force of law. The Washington Supreme Court is the ultimate arbiter of whether an attorney’s conduct violates the RPCs.²³ Indeed, given the disagreement between professional ethics tribunals in other states and the novel nature of issues presented by I-502, an attorney must proceed with caution in undertaking the activities addressed in this opinion.

Approved by the King County Bar Association Board of Trustees, October 16, 2013.

²² *Matter of Disciplinary Proceeding Against Curran*, 115 Wn.2d 747, 768, 801 P.2d 962 (1990) (attorney could not be disciplined under RPC 8.4(b) following vehicular homicide, because no nexus existed between that crime and the lawyer’s fitness as an attorney).

²³ Wash. State Bar Ass’n, *Advisory Opinions: About Advisory Opinions*, available at <http://www.wsba.org/Resources-and-Services/Ethics/Advisory-Opinions> (last accessed Oct. 6, 2013) (“[T]he Board recognized the Washington Supreme Court’s opinion in *In re Disciplinary Proceeding Against DeRuiz*, 152 Wn.2d 558, 99 P.3d 881 (2004), which emphasized that ethics opinions issued by the Bar Association are advisory only, and that the Court is the ultimate arbiter of the Rules of Professional Conduct.”).