ETHICAL CONSIDERATIONS IN ADVISING CLIENTS IN THE BRAVE NEW (POST-I-502) WORLD

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By

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Introduction

In the brave new world in which Washington lawyers find themselves, following passage of I-502, how are we to both assist our clients in implementing new state law that legalizes marijuana and navigate the dilemma created by the ethical rules, which prohibit assisting or counseling illegal activity when marijuana is still illegal under federal law?

1. Background

I-502 is the latest societal acknowledgement of a change in attitude toward marijuana usage that has been long in coming. Nineteen states and the District of Columbia[2] currently have some form of legalized marijuana for medical purposes. At the November 2012 general election, voters in Washington State and Colorado approved initiatives providing for state regulation of the production, processing, distribution, and sale of marijuana for recreation purposes and the taxation of marijuana sold for such purposes. Recent polling by the Pew Research Center indicates a majority of Americans now favor some form of legalization and/or decriminalization of marijuana. It is possible that other jurisdictions may join Washington and Colorado in ending marijuana prohibition and replacing it with comprehensive schemes to regulate and tax this product now legal under state law.

Creating regulations for legal marijuana is a challenging task. Regulations have to deal with what is and is not permissible under the new laws, preventing the product from being diverted and used in ways that are not permissible, insuring that marijuana that enters the market is not contaminated and a threat to health, where legal cannabis business may be located, tax reporting and compliance, and a host of other issues. Governments embarking on this process need the assistance of counsel in fashioning the regulatory regime.

Because of the changing legal landscape, investors and those interested in owning or operating need the assistance of lawyers to understand the legal landscape and how to make their businesses compliant with laws and regulations for a cannabis industry legal under state or territorial law.

2. The Problem

Lawyers who are called upon to assist clients, including governments implementing a legal marijuana regime, face an ethical dilemma in responding to their clients' needs. The reason is federal law still criminalizes the possession and use of marijuana. 21 U.S.C. § 812(c) Schedule 1(c)(10) lists marijuana as a Schedule 1 drug, making it unlawful to possess, sell or distribute it. *See* 21 U.S.C. § 841(a). Accordingly, whether any facilitation, assistance, or advice toward those who do possess, sell or distribute marijuana would run afoul of federal criminal conspiracy laws, such as 18 U.S.C. § 371, is a perplexing problem for Washington lawyers in

[2] Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

this brave new post-I-502 world. The dilemma is manifest in the federal conspiracy laws and model rules discussed below.

(a) Federal Conspiracy Statutes

Overview

Under 18 U.S.C. § 371, it is a crime to conspire to commit "any offense" against the United States or to defraud the United States.[3] A conspiracy is distinct from the substantive crime contemplated by the conspiracy and is charged as a separate offense.[4] The Supreme Court has described the gravity of the conspiracy offense as follows:

> [f]or two or more to ... combine together to commit ... a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

Pinkerton v. United States, 328 U.S. 640, 644, 66 S. Ct. 1180, 90 L.Ed. 1489 (1946) (quoting *United States v. Rabinowich*, 238 U.S. 78, 88 (1915)).

In addition to § 371, specific provisions in numerous federal statutes also proscribe conspiracy.[5] These provisions attach to the particular substantive offenses specified in the statute in which they appear. Section 371, on the other hand, applies generally to any conspiracy where the goal is to "commit any offense against the United States, or to defraud the United States" and criminalizes any agreement to violate a civil or criminal federal law. 18 U.S.C. § 371.

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[3] 18 U.S.C. § 371 states in full:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[4] *See Pinkerton v. United States*, 328 U.S. 640, 643, 66 S. Ct. 1180, 90 L.Ed. 1489 (1946) (stating "conspiracy is a partnership in crime" distinct from any substantive offense); *United States v. Kubick*, 205 F.3d 1117, 1129 (9th Cir. 1999) (crime of conspiracy is entirely separate from completed substantive offense completed pursuant to the conspiracy, and it is appropriately punished as a separate offense).

[5] Relevant here, *see* 21 U.S.C. § 846 (conspiracy to violate Controlled Substances Act); and 21 U.S.C. § 963 (conspiracy to import or export controlled substance).

Conspiracy is one of the most commonly charged federal crimes and is construed broadly by courts.[6] Because the essential features of a conspiracy—secrecy and concealment—make conspiracies difficult to prosecute, the law lessens the government's burden of proving the essential elements by requiring only a showing of the "essential nature of the plan and [the conspirators'] connections with it" to ensure that conspirators do not "go free by their very ingenuity."[7]

Elements

Criminal conspiracy has four elements that the prosecution must prove beyond a reasonable doubt.[8] A conspiracy exists where there is: (i) an agreement between at least two parties; (ii) to achieve an illegal goal; (iii) where the parties possess knowledge of the conspiracy with actual participation in the conspiracy; and (iv) where at least one conspirator committed an overt act in furtherance of the conspiracy.[9]

Regarding the first element—agreement to commit an unlawful act—the government need not prove a formal agreement.[10] The existence of a conspiratorial agreement may be demonstrated through circumstantial evidence or may be inferred from the defendants' actions.[11] Knowledge of, and participation in, a conspiracy satisfies the agreement prong in the absence of an express agreement.[12] However, "a defendant's mere presence at the scene of a criminal act or association with conspirators does not constitute intentional participation in the conspiracy, even if the defendant has knowledge of the conspiracy."[13]

As for the second element—illegal goal—, the government must establish that the aim of the conspiracy was to defraud or hinder a lawful federal government objective (the "defraud

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[6] *See Krulewitch v. United States*, 336 U.S. 440, 445-47, 69 S. Ct. 716, 93 L.Ed. 790 (1949) (Jackson, J., concurring) (describing conspiracy as "elastic, sprawling and pervasive offense").

[7] *Blumenthal v. United States*, 332 U.S. 539, 557, 68 S. Ct. 248, 92 L.Ed. 154 (1947).

[8] *See United States v. Cartwright*, 359 F.3d 281, 286 (3rd Cir. 2004) (elements of a conspiracy may be proven entirely by circumstantial evidence, but each element must be proved beyond a reasonable doubt).

[9] 18 U.S.C. § 371; *United States v. Rahseparian*, 231 F.3d 1257, 1276 (10th Cir. 2000) (setting forth elements of conspiracy); *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000) (same).

[10] *See United States v. Henley*, 360 F.3d 509, 513 (6th Cir. 2004) (stating that proof of formal agreement is not required to establish conspiracy and that a "tacit or material understanding between the parties is sufficient").

[11] *United States v. Mickelson*, 378 F.3d 810, 821 (8th Cir. 2004) (holding that, because the details of a conspiracy are often "shrouded in secrecy," the existence of a conspiracy may be proven by inference from the parties' actions).

[12] *United States v. Helbling*, 209 F.3d 226, 238 (3rd Cir. 2000) (noting that agreement could be inferred from defendant's knowledge of and participation in crime).

[13] *United States v. Jones*, 371 F.3d 363, 366 (7th Cir. 2004).

clause") or to violate a federal law (the "offense clause").[14] The defraud clause reaches "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of [the] government."[15] The "offense" clause of § 371 is not limited to offenses committed against the United States or its agents; it applies to any conspiracy that does or is intended to violate federal law.[16] Concert of action is sufficient to prove this element, and thus it is not necessary that the conspirators intend for the conspiracy to violate federal law or know that the conspiracy will violate federal law.[17]

The third element is that the defendant knew of the conspiratorial agreement and voluntarily participated in it.[18] The defendant's knowing participation in the conspiracy can also be inferred from circumstantial evidence.[19] Acts committed by the defendant that furthered the objectives of the conspiracy are often sufficient to demonstrate that the defendant was a knowing

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[14] 18 U.S.C. § 371. Virtually any method used to defraud the United States will suffice for the purposes of the statute. *See United States v. Clark*, 139 F.3d 485, 488-89 (5th Cir. 1998) (stating that the defraud clause of § 371 reaches any conspiracy designed to impair, obstruct, or defeat the lawful function of any department of the government).

[15] *Tanner v. United States*, 483 U.S. 107, 128, 107 S. Ct. 2739, 97 L.Ed.2d 90 (1987) (quoting *Dennis v. United States*, 384 U.S. 855, 861, 86 S. Ct. 1840, 1844, 16 L.Ed.2d 973 (1966)). *See also, United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989) (holding that § 371 "criminalizes any willful impairment of a legitimate function of government"); *United States v. Ballistrea*, 101 F.3d 827, 831 (2nd Cir. 1996) (finding conspiracy to defraud under § 371 not only applies to depriving government of money or property, but is also designed to protect integrity of United States and its agencies).

[16] *See United States v. Brandon*, 17 F.3d 409, 422 (1st Cir. 1994) (holding the offense clause applies generally to federal offenses and conspiracy need not be aimed at United States or its agents); *United States v. Falcone*, 960 F.2d 988, 990 (11th Cir. 1992) (holding an offense against United States encompasses all offenses against laws of United States, not just offenses targeted at United States).

[17] *See United States v. Virgen-Moreno*, 265 F.3d 276, 284 (5th Cir. 2001) (stating each element of conspiracy may be inferred from circumstantial evidence and that agreement may be inferred from concert of action); *United States v. Williams*, 264 F.3d 561, 577 (5th Cir. 2001) (proof of a conspiracy may be established by circumstantial evidence and may be inferred from concert of action).

[18] *See United States v. Falcone*, 311 U.S. 205, 210-11, 61 S Ct. 204, 85 L.Ed. 128 (1940) (holding in order to prove participation in conspiracy, government must prove defendant was aware his actions would further conspiracy); *United States v. Ceballos*, 340 F.3d 115, 123 (2d Cir. 2003) (stating that in order to convict a defendant of conspiracy the government must prove that defendant knew of and joined the conspiracy with the intent to commit the offenses that were its objectives); *United States v. Oleson*, 310 F.3d 1085, 1089 (8th Cir. 2002) (explaining that in order to convict on a conspiracy charge the government must show that the defendant knowingly joined the conspiracy).

[19] *United States v. Leonard*, 61 F.3d 1181, 1187 (5th Cir. 1995) (holding defendant's knowing involvement in conspiracy can be established through circumstantial evidence).

participant.[20] Defendant's deliberate avoidance of knowledge does not preclude a finding of intent with respect to the conspiracy.[21]

The fourth element of a federal conspiracy charge is the performance of an overt act in furtherance of the conspiracy.[22] The purpose of the overt act requirement is to demonstrate that the conspiracy was operative, rather than a mere scheme in the minds of the actors. The overt act need not be unlawful, nor need it be the substantive offense charged in the indictment.[23] Furthermore, the defendant need not personally have committed the overt act but may be held liable for the acts of a co-conspirator.[24] Certain types of conspiracies, however, do not require such an overt act. Notably, the drug conspiracy statute, 21 U.S.C. § 846, does not require proof of an overt act.[25]

Further, the *Pinkerton* rule sets out a theory of vicarious liability whereby the reasonably foreseeable overt acts of one co-conspirator committed in furtherance of the conspiracy are attributable to the other conspirators.[26] Courts generally find a defendant liable for acts committed by his co-conspirators both prior to and during the defendant's participation.[27]

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[20] *See United States v. Pulido-Jacobo*, 377 F.3d 1124, 1131 (10th Cir. 2004) (jury may presume that defendant is a knowing participant in a conspiracy when he acts in furtherance of it).

[21] *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994) (stating knowledge of a fact may be inferred from willful blindness to existence of that fact); *United States v. Faulkner*, 17 F.3d 745, 767-68 (5th Cir. 1994) (holding that deliberate ignorance instruction is appropriate when defendant claims lack of guilty knowledge but evidence supports inference of deliberate indifference).

[22] *United States v. Beverly*, 369 F.3d 516, 532 (6th Cir. 2004) (holding government must prove that one of the conspirators committed at least one overt act in furtherance of the conspiracy).

[23] *United States v. Brackett*, 113 F.3d 1396, 1400 (5th Cir. 1997) (stating overt acts in furtherance of conspiracy need not be criminal in nature); *United States v. Hickok*, 77 F.3d 992, 1006 (7th Cir. 1996) (an overt act need not be a completed offense or the ultimate goal of the conspiracy, it need only be an action taken in furtherance of the conspiracy by one or more of the conspirators).

[24] *See United States v. Solis*, 299 F.3d 420, 446-47 (5th Cir. 2002) (a party to a conspiracy may be criminally liable for an act committed by a co-conspirator even if the party has no knowledge of the act and does not participate in it).

[25] *United States v. Shabani*, 513 U.S. 10, 11, 115 S. Ct. 382, 130 L.Ed.2d 225 (1994) (holding with regard to violations of drug conspiracy statute, 21 U.S.C. § 846, proof of overt act is not required). The drug conspiracy statue provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

[26] *Pinkerton v. United States*, 328 U.S. at 646-47 (1946) (establishing vicarious liability in conspiracy cases); *United States v. Newsome*, 322 F.3d 328, 338 (4th Cir. 2003) (holding that under conspiracy law, a defendant is liable for all the acts of a co-conspirator that were in furtherance of the conspiracy and reasonably foreseeable).

[27] *See United States v. O'Campo*, 973 F.2d 1015, 1022-23 (1st Cir. 1992) (holding the defendant criminally liable for acts of co-conspirators prior to involvement in conspiracy but not for prior substantive offenses committed in furtherance of the conspiracy).

However, a defendant cannot be held criminally liable for substantive offenses committed by others involved in the conspiracy before he joined or after he withdrew from the conspiracy.[28]

Withdrawal From Conspiracy

Defenses to conspiracy include withdrawal from the conspiracy. To effectively withdraw from a conspiracy, a conspirator must do more than merely cease participation, the conspirator must commit "[a]ffirmative acts inconsistent with the object of the conspiracy and [communicate them] in a manner reasonably calculated to reach co-conspirators."[29] To prevent any overt act in furtherance of the conspiracy from being attributed to a co-conspirator, he must unequivocally withdraw.[30] The burden of proof regarding the withdrawal is on the defendant.[31]

Applying the federal conspiracy statute in the present context to a Washington lawyer giving legal advice to his client regarding I-502 yields a perplexing dilemma. Clearly, any legal advice or assistance to a client that would facilitate the possession, use, or distribution of marijuana as contemplated by I-502, would run afoul of the federal criminal conspiracy statute because such advice would concern conduct that remains unlawful under federal law despite the fact that such conduct is now permissible under Washington law. The same rationale would conceivably apply to government lawyers who assist state or local governments in formulating regulations to allow state legal marijuana enterprises. It was these types of concerns that Governor Gregoire articulated in vetoing medical marijuana legislation that created a state registry based upon the assertion that in doing so state employees might be liable for federal criminal violations.

Recently the Department of Justice indicated that it was not going to enjoin Washington for proceeding with its new approach to marijuana, mitigating the possibility now that anyone will be prosecuted. However, marijuana remains illegal and any change in administration or

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[28] *See United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997) (finding a co-conspirator is liable only for foreseeable acts of others done in furtherance of conspiracy committed during defendant's period of membership); *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992) (holding no liability for substantive offenses after withdrawal).

[29] *United States v. United States Gypsum Co.*, 438 U.S. 422, 464, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978); *see Pinkerton v. United States*, 328 U.S. at 646 (1946) (stating non-participation in substantive offense of conspiracy is not sufficient to disavow from conspiracy); *United States v. Febus*, 218 F.3d 784, 796 (7th Cir. 2000) (holding the defendant is still part of conspiracy despite decade-long absence from conspiracy because defendant did not affirmatively act to abandon conspiracy); *United States v. Diaz*, 176 F.3d 52, 98 (2nd Cir. 1999) (in order to support withdrawal, defendant had to prove some act that affirmatively established that he disavowed his criminal association).

[30] *United States v. Bullis*, 77 F.3d 1553, 1562 (7th Cir. 1996) (finding conduct by defendant after withdrawal is relevant to whether withdrawal is complete and in good faith).

[31] *Smith v. United States*, ___ U.S. ___, 133 S. Ct. 714, 720-21, 184 L.Ed.2d 570 (2013) (burden of establishing the affirmative defense of withdrawal rests upon the defendant).

approach opens up the possibility that federal prohibition of the Washington approach and criminal prosecutions cannot be definitively ruled out in the future.

(b) Model Rules of Professional Conduct

The other horn of the dilemma that Washington lawyers find themselves hoisted upon is the resulting violation of professional conduct rules. Model Rule 1.2(d) provides:

> 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.

Model Rule 8.4 "Misconduct" also has provisions that could implicate a lawyer counseling and assisting a client on legalized marijuana, or also because of personal conduct by the lawyer in possessing or selling marijuana, because of marijuana's continued illegal status under federal law. The rule defines misconduct in the following ways potentially applicable in dealing with state legal marijuana:

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (d) engage in conduct that is prejudicial to the administration of justice.

While these rules directly address lawyer conduct, any supervisory lawyer approving the work of a subordinate who assists clients in regard to state legal marijuana laws also has a potential exposure under Model Rule 5.3.

3. Solutions?

As noted, any legal advice or assistance to a client that would facilitate the possession, sale, or distribution of marijuana as contemplated by I-502 runs afoul of the federal criminal conspiracy statute, and thus would violate the noted professional conduct rules. So what are Washington attorneys to do?

(a) The Colorado Approach – Change The Ethical Rules

The Colorado Bar, faced with the same dilemma, has proposed changing the state's professional conduct rules. The proposed rule changes build upon the work of, and attempt to address issues noted by, the Colorado Bar Association's Ethics Committee in writing its Formal Opinion No. 124 – A Lawyer's Medical Use of Marijuana. That opinion struggles with some of the same or comparable legal and ethical issues present here.

After studying the professional conduct challenges of state law legalization of marijuana in Colorado, a special subcommittee to the Colorado Supreme Court's Standing Rules Committee has submitted majority and minority reports regarding possible changes to state ethics rules. The proposed rule changes are being considered as these materials are being prepared.

While Colorado wrestles with changes to its professional conduct rules, what is Washington to do? One option would be for Washington to embark on a similar path, discussed more fully below. However, this state by state approach undermines ethics rule uniformity which leads to a hodgepodge of results and conflicting obligations within law firms with offices in different states. The national leader in setting ethical standards, the American Bar Association, has not dealt with the issue.

(b) Proposed ABA Resolution – Time Out

In the interim, the King County Bar Association proposed that the ABA adopt the following resolution at the 2013 ABA Annual Meeting in August:

> RESOLVED, That the American Bar Association urges lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel and assist clients about compliance with state and territorial laws legalizing the possession and use of marijuana

This resolution essentially urges restraint in prosecutorial discretion while these issues can be fully vetted and solutions adopted by the profession and the courts.

When proposing the resolution, the KCBA asked the Washington State Bar Association to support it. The WSBA Board of Governors, after an executive session, refused to do so. Exactly why the WSBA refused to do so is not entirely clear. It is known that the Office of Disciplinary Counsel expressed a concern of whether it was appropriate for the ABA to issue any statement relating to disciplinary prosecutorial discretion. In light of the fact that the ABA writes these rules and the sanctions for their violation, and issues Criminal Justice Standards dealing with prosecutorial discretion in a criminal law context, the assertion that the ABA has no proper rule here is baffling. The Oregon Bar supported the KCBA proposed resolution, as did other bar associations.

In light of the WSBA opposition to the ABA resolution, the KCBA decided to withdraw it from consideration by the ABA House of Delegates and to seek a cooperative approach with the WSBA. The KCBA wrote to the WSBA, noted that regulations were coming this fall and clients needed legal advice, and asked that the WSBA designate three members of the Board of Governors to work with the KCBA officers to develop a joint approach to these issues, and that the WSBA task its ABA delegates to work with the KCBA delegate for a joint approach to the ABA. The WSBA declined to do so. Rather it indicated the matter should be taken up in the regular course of its committee dealing with the rules which would not meet until October.

(c) KCBA Leadership

In light of the WSBA's lack of action on this issue, the KCBA appointed a task force chaired by former KCBA President Mark Fordham to make recommendations on how to proceed. The task force recommended three basic approaches. First, have the KCBA propose RPC rule changes to the Washington Supreme Court; issue guidance to lawyers under the existing rules with something analogous to an ethics opinion; and work with interested jurisdictions as to how the ABA can best assist with these issues.

The KCBA has now adopted some proposed rule changes to be sent to the Washington Supreme Court. Modeled along the Colorado approach, a new RPC 8.6 is proposed as follows:

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of Washington state law and implementing regulations is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal law.

In addition, the KCBA is proposing a new comment to RPC 8.4, the language being finalized as this paper is written. It will be approximately as follows:

> Pursuant to Rule 8.6, conduct of a lawyer that by virtue of a specific provision of Washington state law and implementing regulations is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal law. This comment specifically addresses the Washington State Initiative Measure No. 502, approved by the voters on November 6, 2012. The phrase "standing alone" clarifies that a lawyer's use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline.

Once received, the Washington Supreme Court will refer the proposed rules to its Rules Committee. It is anticipated the WSBA will be asked comment and public comment will be allowed. If you agree that these rule changes are needed, please let your views be known to the WSBA and the Court.

In addition, the KCBA is moving ahead with consideration of guidance to lawyers which it hopes to consider at its October meeting of the KCBA Board. As this paper is written, what will be proposed is not known. However, a few jurisdictions have considered the issue in the context of medical marijuana. The most comprehensive treatment is ethics opinion EO 11-01 from the Arizona State Bar. The KCBA is likely to look to it for guidance as it develops its own policy statement.

The Arizona opinion notes its legal marijuana (medical) was adopted by popular vote, as is Washington's new approach. The opinion suggests that proper implementation of the legislation requires legal services to enable the conduct that was expressly authorized. If lawyers are prohibited from assisting clients, then the autonomy of the state its power to effectuate the vote of its citizens will be severely undermined. The opinion notes that assisting clients in novel and unclear areas is one of the most important roles for lawyers. Thus, it urges a permissive interpretation of existing rules.

It is also likely that in performing services for clients, the lawyer will have the duty to make sure the client is informed that marijuana remains illegal under federal law.

The KCBA will continue to solicit input from other jurisdictions as it decides whether to ask for ABA involvement, and what the request should be. It might forward a resolution for the House of Delegates to charge the Ethics and Disciplinary Committees to report back on how to address the ethical issues that arise from conflicting state and federal legal requirement.

Conclusion

Washington lawyers advising their clients on the implementation of I-502 presently face the specter of possible federal criminal prosecution as well as potential discipline for violation of the professional conduct rules. While we can do little individually to assuage the first risk, together as a Bar we can begin the discussion about how best to alter the professional responsibility landscape to address the second risk. The brave new world awaits.