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Legalized Marijuana: Taking the Lead on Drug Policy Reform

By Anne M. Daly



Remember the ethics portion of the bar exam? While you may have hoped to never see another bar question, here are two ethics questions relevant in our community for you to ponder:

1. Sam is a lawyer in King County. He has been in practice for several years and has a stellar reputation. He is a solo practitioner and relies heavily on word of mouth for clients.

Mary is a potential client who is referred to Sam. In their initial meeting, Mary informs Sam that she would like his help in setting up a legal marijuana distribution business in King County. She needs advice on banking and tax issues, insurance, employment, zoning, regulatory compliance, and corporate structure.

While the marijuana business contemplated by Mary is legal in Washington, it is illegal under federal law to possess or distribute marijuana in any state. If Sam advises and assists Mary, is he subject to disciplinary action under the Rules of Professional Conduct?

2. Cathy is an attorney in a large law firm in King County. Cathy works long hours; she is often in the office by 6:30 a.m. and there until late in the evening. Lately, Cathy has been working on a highly stressful and time-sensitive matter. Cathy finds that she is having a hard time relaxing enough to sleep at night.

She sees her doctor, who offers sleeping pills. After reading about the side effects of the pills, Cathy is leery of taking them. One of Cathy's friends suggests she try marijuana. Cathy decides to do so as an alternative to the sleeping pills.

Cathy smokes her marijuana in the privacy of her home to help her relax. Recreational use of marijuana by an adult is legal in Washington. Recreational use of marijuana by an adult in any state is illegal under federal law. Is Cathy subject to disciplinary action under the RPCs for her personal use of marijuana?

To answer either question, one should first turn to the RPCs. They offer no guidance. One might next look for an advisory ethics opinion for direction. There is none.

Both Sam and Cathy run the risk of disciplinary sanctions even though their conduct would be legal under state law. So, where does this leave Sam and Cathy or any of the more than 14,000 lawyers in King County who could easily find themselves in a similar predicament?

KCBA is taking the lead in seeking answers to these questions. Since 2001, KCBA has been a leader on drug policy reform. KCBA has been recognized numerous times in connection with its Drug Policy Project (for our history on drug policy reform, go to www.kcba.org/druglaw). It is only natural that KCBA be the leader in navigating the challenges that the adoption of I-502 presents to Washington attorneys.

Through our ABA Delegate Tom Fitzpatrick, KCBA began looking for a solution to the conflict between state and federal law more than six months ago. KCBA adopted a resolution for presentation at the ABA's House of Delegates meeting in August. KCBA had hoped to have WSBA's support for this resolution. However, WSBA declined in May to support the resolution or to establish a joint work group to look for solutions to this problem.

Instead, WSBA offered to refer the matter to its Committee on Professional Ethics, which was not scheduled to meet until this month. Such a delay likely would result in no changes being made to the RPCs until September 2015 under the timeline provisions of GR 9, Supreme Court Rulemaking. As a result, KCBA withdrew its resolution to the ABA and began to look at other possible ways to solve this problem prior to I-502's December 1 implementation date.

At our August and September meetings, the KCBA Board of Trustees adopted a proposed comment to RPC 8.4 (Misconduct) that would address the issue of a lawyer who engages in legal state action, such as Cathy's personal use of marijuana. The comment recognizes that a lawyer's use of marijuana 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. Such violations may subject the lawyer to discipline. However, consuming marijuana in and of itself - like the consumption of alcohol - would not be misconduct.

Additionally, the Board voted to support the creation of a new RPC to address the conflict between state and federal law. The new rule would create a safe harbor for attorneys like Sam and provides that a lawyer shall not be in violation of the RPCs 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 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.

The brain behind these two proposals is an ad hoc committee convened to make recommendations addressing the conflict between state and federal law. Former KCBA President Mark Fordham chairs this committee. Joining him are Fitzpatrick, our ABA delegate; Alison Holcomb of the ACLU; and James Yand, an attorney with Miller Nash. This ad hoc committee drafted the proposed comments to the RPCs as well as the proposed, new RPC adopted by the Board. Copies of KCBA's recommendations and related materials are online at www.kcba.org/502ethics.

The ad hoc committee is now drafting an advisory ethics opinion that will be taken up by the board at a future meeting. I am very proud of the work done by this ad hoc committee and the strong leadership that Mark and Tom have provided. They have my utmost respect and sincere thanks for their efforts on this issue.

In addition to the strong work of our ad hoc committee, Andy Prazuch and I met with Chief Justice Barbara Madsen, Attorney General Bob Ferguson and Gov. Jay Inslee's Chief Counsel Nick Brown on this issue. All three expressed interest in our work and have asked that we share our proposed RPC changes with them.

KCBA will be forwarding our proposed RPC comments and new rule to the Washington Supreme Court and will call on the justices to amend the RPCs to offer ethical guidance to attorneys as they advise clients and conduct their own affairs now that I-502 is the law in Washington.

The KCBA Young Lawyers Division also has voted to support the drafting of an advisory ethics opinion and to support changes to the RPCs to create a safe harbor for attorneys and clarity in the RPCs.

We now face another challenge in moving these proposed rule changes forward - the timeline set forth in GR 9. Without going into great detail, our proposed changes could not go into effect until September 1, 2014, under the normal rulemaking process. GR 9 does have a provision for expedited consideration that allows the process to be accelerated. As I-502 takes full effect on December 1, I believe acceleration is warranted. Attorneys need guidance and clarity now, not in a year or more.

It is your turn to lead on this issue. I ask that you contact our Supreme Court justices and encourage them to expedite the rulemaking process on KCBA's proposed RPC 8.6 and the proposed comment to RPC 8.4. It is critical that attorneys have direction sooner rather than later. Please help make this happen. It's the right thing to do.

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