

Legal Ethics and Marijuana: Personal Conduct

Drew L. Kershen

Earl Sneed Centennial Professor of Law Emeritus

University of Oklahoma, College of Law

ALA Portland - October 27, 2018

Date of Preparation: August 1, 2018

Personal Conduct - The Basic Dilemma

- ▶ Rule 8.4. Misconduct: It is professional misconduct for a lawyer to:
 - ▶ (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.
- ▶ Thirty states have legalized medicinal marijuana under state regulatory regimes.
- ▶ Nine states have legalized recreational marijuana under state regulatory regimes.
- ▶ Controlled Substances Act, 21 U.S.C. § 801 et seq.
 - ▶ Marijuana is a Schedule I drug - no recognized lawful uses - illegal to possess, grow, sell, distribute, interstate transport

Personal Use and Business Ownership

- ▶ States where legal
 - ▶ Not all criminal conduct reflects adversely - but all crimes, not just crimes related to law practice, count as crimes
 - ▶ Legal use of cannabis does not, per se, reflect adversely - e.g., Colorado and Washington but see New Mexico
 - ▶ Use outside the regulatory system does reflect adversely
 - ▶ Ownership of a lawful marijuana business - Washington says does not reflect adversely
 - ▶ State Ethics Opinions ignore federal crimes, depend on non-enforcement; Rule 8.4 does not do so
- ▶ Attorney oath
- ▶ Federal Courts in states where legal
 - ▶ Federal courts usually adopt the Ethics Rules of state where located
 - ▶ Unsurprisingly, federal courts have not accommodated state legalization
 - ▶ Possession for personal use, especially medical vs. Ownership of a business -
 - ▶ Felonies under federal law - felonies almost always reflect adversely
- ▶ Attorneys who use or own
 - ▶ Federal license at substantial risk
 - ▶ Federal prosecution is risk at all times depending on federal enforcement priorities

Personal Conduct - Collateral Consequences

- ▶ Guns and ammunition
 - ▶ 18 U.S.C. § 922(g)(3) - no person who is an unlawful user of or addicted to any controlled substance may possess or receive any firearm or ammunition.
 - ▶ Bureau of Alcohol, Tobacco, Firearms and Explosive (ATF) Form 4473 -
 - ▶ Question 11.e: Asks if you use marijuana. Must answer the question truthfully
 - ▶ Holder of a medical marijuana license must answer "yes."
 - ▶ Cannot purchase firearm or ammunition
 - ▶ Violation of these statutes and ATF regulations - "reflect adversely" ??
 - ▶ Rule 8.4 does not require conviction or even charge of crime; acquittal is no defense
 - ▶ Wilson v Lynch, 835 F.3d 1083 (9th Cir. 2016) - no adverse history
- ▶ Legal Malpractice Coverage:
 - ▶ "This policy does not apply: a) to any claim arising out of any ... criminal ... act or omission ... committed by, at the direction of, or with the knowledge of any insured."

Personal Conduct - Substance Abuse, Addiction

Personal Responsibility

- ▶ Rule 1.16: "... lawyer shall not represent ... or ... shall withdraw ... if (a)(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."
- ▶ Rule 1.1: Competence
- ▶ Lawyer Assistance Program

Law Firm and Other Lawyers

- ▶ Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers
 - ▶ "reasonable efforts" "all lawyers in the firm conform to RPC"
- ▶ Rule 5.3 - Non-lawyers
 - ▶ Employee Assistance Programs
- ▶ Rule 8.3: Reporting Professional Misconduct
 - ▶ "substantial question" "fitness" "inform the appropriate professional authority"

References

- ▶ American Bar Association, Model Rules of Professional Conduct 2017
- ▶ Washington State Bar Association, Opinion 201501 (2015)
- ▶ Colorado Bar Association, Formal Opinion 124 (April 23, 2013, amended December 10, 2012)
- ▶ New Mexico Bar Association, Formal Opinion 2016-1 (August 2016) (issued after State Supreme Court advised in letter that the Court would not approve explicit amendments to RPC 1.2(d) and 8.4 (a)).
- ▶ Phil Cherner, Marijuana and Your License to Practice Law: A Trip through the Ethical Rules, Halfway to Decriminalization, 41 J. LEGAL PROF. 19-35 (2017)



Thank you.

dkershen@ou.edu