IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of an Amendment to Rule of Professional Conduct 1.2 Regarding Medical Marijuana	))))	ADKT NO. 0495

In accordance with Nevada Rule on the Administrative Docket (NRAD) 3.2, the Board of Governors of the State Bar of Nevada hereby petitions this Honorable Court to amend Rule of Professional Conduct ("RPC") 1.2 (Scope of Representation and Allocation of Authority Between client and Attorney) regarding an attorney's ethical ability to counsel, assist, and represent clients in the regulation, enforcement, and operation of medical marijuana dispensaries under state law. This rule change is fully set forth in **Exhibit 1** hereto, pp. 10-12.

PROCEDURAL HISTORY

Nev. Const. art. 4, § 38, which was added in 2000, directs the legislature to enact legislation for the use by patients of "a plant of the genus Cannabis" for the treatment of certain enumerated medical conditions.

In 2013, the Nevada Legislature passed Senate Bill 374, which provides for the registration of nonprofit medical marijuana dispensaries and establishes a number of regulatory duties primarily on the part of the Division of Public and Behavioral Health of the Department of Health and Human Services. Those

duties include, *inter alia*, prescribing an application form for medical marijuana dispensary applicants (Sec. 10); collecting fees (Sec. 12); setting forth rules pertaining to the safe and healthful operation of dispensaries (Sec. 20); and setting forth rules establishing the minimum requirements for oversight of dispensaries (Sec. 20). SB 374 also contemplates that local governments may enact zoning regulations pertaining to medical marijuana dispensaries (Sec. 10).

Although the State of Nevada has enacted the above-referenced law regarding medical marijuana, the sale, possession, or use of marijuana remains a violation of the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq*. A reading of SB 374 makes clear that many of the activities imposed on state and local governments, such as collecting fees, setting forth rules pertaining to safe and healthful operation of facilities, and general oversight, would tend to facilitate or promote acts that are likely criminal under the CSA.

Currently, Nevada Rules of Professional Conduct 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.

RPC 1.2(d) makes no distinction between state and federal law in contemplation of what is "criminal" conduct. Thus, to the extent an attorney is

involved in drafting regulations or ordinances or advising clients on how to proceed with such activities, the attorney would therefore be acting in violation of Rule 1.2(d).

As local governments embraced the task of enacting ordinances and regulations for medical dispensaries within their jurisdictions, city attorneys are faced with assisting their clients with implementing a regulatory scheme of producing, selling, and taxing medical marijuana and licensing individuals for the production possession and sale of marijuana, albeit for medical purposes. Several of these city attorneys sought guidance from the Standing Committee on Professional Ethics and Responsibility ("Standing Committee"). *See*, **Exhibit 2**, collected letters from City Attorneys, pp. 13-20.

In addition, the State Bar has received several informal inquiries to its ethics hotline from practicing attorneys who have been approached by clients seeking legal advice and representation in order to own and operate licensed medical dispensaries. Thus, there is a pressing need by local government and the public for legal assistance to implement Nevada law but an inability of the Nevada bar to respond ethically under RPC 1.2(d) since such advice and assistance would constitute a federal crime.

The Board of Governors met by special meeting and voted to amend RPC 1.2(d) by adding the following language (in **bold italics text**) as follows:

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

. . .

(d) 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. ***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 Nevada 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.***

The entire text of RPC 1.2, with the proposed amended language, is set forth in **Exhibit 1,** pp. 11-12.

Shortly thereafter, the Standing Committee, after reviewing the rule and current ethics opinions from other states that had legalized marijuana use, concluded preliminarily that RPC 1.2(d), by its plain language, prohibits an attorney from counseling or assisting a client to engage in the medical marijuana commerce, agreeing with the conclusions reached by the Ethics Committees of Maine, Connecticut, and Colorado.

However, in light of the urgent need for both legal assistance to the public and ethical guidance to Nevada attorneys, the Standing Committee, pursuant to SCR 224(2) recommended an amendment to RPC 1.2(d) and the

adoption of a new rule, RPC 8.6. *See*, **Exhibit 3**, *Recommendation to the Board of Governors for Amendment and Addition to the Nevada Rules of Professional Conduct (Medicinal Use of Marijuana)*, February 27, 2014, pp. 21-30.

In sum and substance, the two proposals achieve the same effect. The Board's proposed amendment is a single step that incorporates the language above into RPC 1.2(d). The Standing Committee proposal is a two-step measure that: (1) amends RPC 1.2(d) to add an exception specific to conduct pursuant to Art. 4, § 38 of the Nevada Constitution, and (2) adds a new RPC 8.6 that contains the same language as the Board's measure.

DISCUSSION

RPC 1.0A (Guidelines for Interpreting the Nevada Rules of Professional Conduct) states that,

> (a) The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.
>
> . . .
>
> (d) . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.

While it is true that there has never been a discipline prosecution in Nevada (or any of the 19 states that have legalized marijuana commerce and use) for

violating RPC 1.2(d) in connection with medical marijuana, this does not moot the issue. The plain fact remains that federal law criminalizes the cultivation, sale, distribution, and use of marijuana for almost any purpose. *See*, CSA, 21 U.S.C. §§ 801-904. Marijuana is a Schedule 1 controlled substance. *Id.* at § 812(b)(1). *See, also, U.S. v. Oakland Cannabis Buyers' Coop*, 532 U.S. 483, 491 (2005) (No medical necessity exception to CSA prohibition); *Gonzales v. Reich*, 545 U.S. 1, 29 (2005) (Federal government may prohibit marijuana use despite valid state laws authorizing medical use).

The Arizona and King County (Seattle, WA) Bar ethics opinions, in approving attorney counsel and assistance for state marijuana activities, rely upon three memoranda from the U.S. Department of Justice (Ogden and Cole memos) that articulate the current prosecutorial policy of the federal government. But as the Nevada Standing Committee noted,

> Contrary to Arizona's interpretation of the Ogden memo, the Committee believes the three DOJ memoranda cannot be read to provide much in the way of a safe harbor for attorneys actively involved in assisting or advising clients regarding medical marijuana dispensaries, as this statement from the Ogden memo makes clear: "Of course, no State can authorize violations of federal law ..."

Exhibit 3, Draft Opinion, p. 29. This point is reiterated in the most recent DOJ memorandum from 2013:

> As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of

> investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance here 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.

Id. at p. 30.

Both Colorado and Washington State have legalized recreational marijuana use. Both have pending proposed amendments to allow attorneys to counsel and assist clients in regulatory compliance and commerce in marijuana cultivation, possession, and sale. *See*, **Exhibits 4** (pp. 31-43) and **5** (pp. 44-49), respectively. Both states' amendments contemplate a new RPC 8.6 (as proposed by Nevada's Standing Committee) rather than direct amendment to RPC 1.2(d).

The Colorado Bar Association Ethics Committee, in particular, found that Colorado's RPC 1.2(d) (identical to Nevada's) squarely prohibits attorneys from assisting clients in establishing medical dispensaries. "The Committee concludes that the plain language of [RPC] 1.2(d) prohibits lawyers from assisting clients in structuring or implementing transactions which by themselves violate federal law." Colorado Bar Association Ethics Committee Formal Op. 125 – the Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (adopted April 23, 2012; Addendum dated October 21, 2013) (addendum endorsing rule change).

However, Nevada law is limited to medical marijuana use and the public need is for legal counsel and assistance in establishing the regulatory scheme and medical dispensaries. The Nevada bar requires guidance in navigating RPC 1.2(d) from both the public and private. Rather than add another rule, proposed RPC 8.6, which is at odds with all the other rules, the Board proposes directly amending the rule at issue, RPC 1.2(d), with the same language that other jurisdictions seek to adopt.

This is also the most expeditious and direct method to address the urgent need. Numerous attorneys have cited the plain language of RPC 1.2(d) as preventing them from assisting cities and citizens in implementing and participating in medical dispensaries, thereby frustrating the legislative directive. As the State Bar of Arizona noted with respect to its medical marijuana Act:

> it is important that lawyers have the ability to counsel and assist their clients about activities that are in compliance with the Act — and traditionally at the heart of the lawyer's role — by assisting clients in complying with the Act's requirements through the performance of such legal services as: establishing medical-marijuana dispensaries; obtaining the necessary licensing and registrations; representing clients in proceedings before Arizona agencies responsible for implementing the Act; and representing governmental entities to draft rules and regulations or otherwise counsel the governmental entity with respect to its rights and obligations under and concerning the Act.

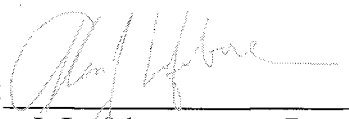
State Bar of Arizona Formal Ethics Op. 11-01 (2/2011).

CONCLUSION

In order to expeditiously and directly provide attorneys with ethical guidance, and the public with urgent legal assistance, the Board of Governors of the State Bar of Nevada respectfully requests that this Honorable Court adopt the proposed amendment to RPC 1.2(d).

RESPECTFULLY SUBMITTED this 10th day of March 2014.

STATE BAR OF NEVADA
BOARD OF GOVERNORS



By: _____
Alan J. Lefebvre, Esq., President
Nevada Bar No. 848
State Bar of Nevada
600 E. Charleston Blvd.
Las Vegas, NV 89104

EXHIBIT 1

EXHIBIT 1

Proposed Amendment to RPC 1.2

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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. ***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 Nevada 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.***

EXHIBIT 2

OFFICE OF THE CITY ATTORNEY
BRADFORD R. JERBIC
CITY ATTORNEY

LAS VEGAS, NEVADA

October 23, 2013

David Clark, Bar Counsel
State Bar of Nevada
600 E. Charleston Blvd.
Las Vegas, NV 89104

Dear Mr. Clark:

I am writing to seek an opinion concerning the general parameters within which a public attorney may, consistent with the Nevada Rules of Professional Conduct, represent or advise clients under Nevada's new Medical Marijuana Act (Senate Bill 374 from the 2013 Legislative Session).

I am currently the City Attorney for the City of Las Vegas. My many responsibilities include providing legal advice to the Las Vegas City Council, The Mayor, the City Manager and all City staff (collectively, my "clients"). My duties also include drafting all ordinances for the City of Las Vegas.

Nevada recently enacted legislation permitting the creation of dispensaries for the purpose of providing qualified patients with marijuana for medical treatment. Questions have arisen regarding the role which Nevada attorneys may ethically play because of the interplay of Nevada's new law with the Federal prohibition against the distribution of marijuana. On October 19, 2009, of the current United States Deputy Attorney General, David W. Ogden, issued a memorandum (the "Ogden letter," Attachment 1), that, in relevant part, directs the United States Attorneys:

As a general matter, pursuit of [illegal drug prosecution] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.

The Ogden letter, however, makes clear that the Federal law against the distribution of marijuana is still in effect. It recognizes that "no State can authorize violations of federal law: and that

> This guidance regarding resource allegation does not 'legalize' marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil or criminal matter.

Following the Ogden letter, several states have enacted laws providing for the distribution and cultivation of medical marijuana. In Nevada, Senate Bill 374, in relevant part,

> ...provides for the registration of medical marijuana establishments authorized to cultivate or dispense marijuana or manufacture edible marijuana products or marijuana-infused products for sale to persons authorized to engage in the medical use of marijuana...

On June 29, 2011, Deputy Attorney General James Cole issued a second memorandum on the commercial cultivation, sale, distribution and use of medical marijuana (the "Cole letter," Attachment 2)[1]. The Cole letter states:

> The Ogden letter was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

My question is whether and how a public attorney might act in regard to clients whose intention may be to engage in conduct which is permitted by state law and which might not, currently, be prosecuted under federal law, but which nonetheless is a federal crime. Specifically, if my client desires to allow medical marijuana dispensaries in the City of Las Vegas, I and my office will be tasked with drafting the ordinance changes necessary to permit the zoning, licensing and fees for the operation of a medical marijuana dispensary.

The Nevada Rules of Professional Conduct 1.2(d) provides that:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer

[1] On August 29, 2013, Deputy Attorney General Cole issued a third memorandum regarding marijuana enforcement. The memorandum does not add much to the discussion, however, it is included herein as Attachment 3.

> knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of the 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.

I, therefore, respectfully request your guidance on this issue. If you require additional information, please let me know.

Sincerely yours,

BRADFORD R. JERBIC
City Attorney

RENO CITY ATTORNEY'S OFFICE

JOHN J. KADLIC
City Attorney

TRACY L. CHASE
Chief Civil Deputy

DANIEL WONG
Chief Criminal Deputy

February 19, 2014

Standing Committee on Professional
Responsibility and Ethics
State Bar of Nevada
600 E. Charleston Blvd.
Las Vegas, NV 89104

Dear Committee Members:

As the City Attorney for the City of Reno, I am writing concerning Rule 1.2(d) of the Nevada Rules of Professional Conduct as it relates to the implementation of Nevada Constitution Art. 4, Sec. 38 and Senate Bill 374 regarding medical marijuana dispensaries.

NRCP 1.2(d) clearly provides that a lawyer shall not counsel a client to engage or assist a client in conduct which the lawyer knows is criminal. That rule does not distinguish between lawyers who provide advice to public entities and those that provide advice to private clients whether they are individuals or business entities.

Controlled substances and their classification are governed by the Controlled Substances Act (21 U.S.C. sec. 801, et seq.) ("CSA"). Marijuana is a schedule I controlled substance under the CSA. The question of whether medical marijuana is exempt from the provisions of the CSA was answered by the United States Supreme Court in *United States v. Oakland Cannabis Buyer's Cooperative et al.*, 532 U.S. 483 (2001) wherein the Court found that there was no medical necessity exception to the CSA as to medical marijuana.

All medical marijuana dispensaries regardless of which state they are in are in violation of the CSA. The only reason they have been allowed to exist is that the U.S. Department of Justice has

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chosen not to enforce federal law. That decision is set forth in the Ogden Memorandum (October 19, 2009), the Cole Memorandum (June 29, 2011) and the second Cole Memorandum (August 29, 2013). Further the Obama administration acting through the U.S. Department of Justice recently announced that it will allow banks to do business with licensed marijuana companies with a reduced fear of criminal prosecution if the banks meet a series of conditions.

SB 374 requires the State to develop regulations for medical marijuana dispensaries. Those regulations are now in the draft stage. Once those regulations have been adopted, counties and cities will begin the process of creating ordinances and regulations to implement those regulations. As it stands now, because of NRPC 1.2(d) lawyers whether they be public or private will not be able to assist public bodies in implementing SB 374 by providing legal advice.

On behalf of the City of Reno, guidance is requested on whether the City Attorney's Office can provide legal advice to the City of Reno regarding the implementation of SB 374. That guidance can be through amending NRPC 1.2(d) to allow for lawyers to provide legal advice to implement SB 374. It could also come through a decision by the State Bar of Nevada not to pursue sanctions against lawyers, whether they be public or private, when they provide advice in implementing SB 374.

I look forward to your response in this regard. If you require any additional information, please let me know.

Sincerely,

John J. Kadlic
Reno City Attorney

JJK:jz
cc: Mayor, City Council and City Manager

City Attorney's Office• Sandra D. Morgan, City Attorney

2250 Las Vegas Blvd. N., Suite 810 • North Las Vegas, Nevada 89030-6307
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February 24, 2014

Alan J. LeFebvre, Esq.
Kolesar & Leatham
400 S. Rampart Blvd., #400
Las Vegas, NV 89145

Re: Petition in Support of Rule Change regarding Medical Marijuana

Dear Mr. LeFebvre:

The City of North Las Vegas would like to join in the petition to the Nevada State Bar supporting a rule change to allow lawyers to ethically advise their clients on the medical marijuana issue. Thank you for the opportunity to participate in this petition.

If you need additional information, please contact me.

Sincerely,

/s/ Sandra Douglass Morgan

Sandra Douglass Morgan
City Attorney

SDM/tmb

cc: Brad Jerbic (bjerbic@lasvegasnevada.com)
Josh Reid (Josh.Reid@cityofhenderson.com)
Mary Ann Miller (Mary-Anne.Miller@ccdanv.com)

CITY ATTORNEY'S OFFICE
CITY OF HENDERSON
240 Water Street
P.O. Box 95050 MSC 144
Henderson, NV 89009-5050
Tel. 702-267-1200
Fax 702-267-1201

JOSH M. REID, CITY ATTORNEY

VIA Email

February 24, 2014

Alan J. Lefebvre, Esq.
President, Nevada State Bar
KOLESAR and LEATHAM
400 S. Rampart Blvd., Suite 400
Las Vegas, Nevada 89145

Re: Change to Rule 1.2

Dear Mr. Lefebvre:

The purpose of this letter is to show my support for an amendment of Rule 1.2 of the Nevada Rules of Professional Conduct in order to allow Nevada attorneys representing governments and individuals to advise their clients with regard to the implementation of SB 374. As Brad Jerbic, City Attorney for the City of Las Vegas, pointed out in his letter to you dated February 18, 2014, Rule 1.2 in its current form chills the ability of attorneys representing Nevada governmental entities to advise their clients with regard to SB 374. The State Bar of Nevada should not force government attorneys to sit on the sidelines with no ability to advise their clients with regard to this important matter. Accordingly, I support the amendment to Rule 1.2 purposed by City Attorney Jerbic and respectfully request that this amendment be made as soon as possible.

Sincerely,

Josh M. Reid
City Attorney

Cc: Bradford Jerbic, City Attorney for the City of Las Vegas

EXHIBIT 3

Standing Committee on Ethics and Professional Responsibility

Recommendation to the Board of Governors for
Amendment and Addition to the Nevada Rules of Professional Conduct
(Medicinal Use of Marijuana)
February 27, 2014

Whereas: Senate Bill 374 of the 77th (2013) Legislative Session established laws, as mandated by Nev. Const. Art. 4, Sec. 38, pertaining to the medical use of marijuana and legalized medical marijuana establishments authorized to cultivate or dispense marijuana or manufacture edible marijuana products or marijuana-infused products for sale to persons authorized to engage in the medical use of marijuana.

Whereas: Nevada law authorizes and permits certain activities pertaining to medical marijuana, but such activities remain a violation of the federal Controlled Substances Act.

Whereas: The Standing Committee on Ethics and Professional Responsibility ("Committee") has received several requests for opinion on the subject of whether any violations of ethical duties established under the Nevada Rules of Professional Conduct ("RPC") would arise from a lawyer rendering advice or legal assistance to a client in accordance with Nevada law on medical marijuana.

Whereas: RPC 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."

Whereas: Absent amendment and/or addition to the RPC, the Committee is constrained to issue an advisory opinion substantially identical to the draft opinion set forth as ***Exhibit A***.

Whereas: The Committee believes that it is in the best interest of Nevada to amend the RPC in order to permit a Nevada lawyer to advise and render service to a client on issues permitted under Nevada law and to engage in conduct permitted under Nevada law.

Whereas: SCR 224(2) authorizes this committee to recommend amendments and additions to the RPC to the State Bar Board of Governors.

Accordingly, It is Hereby Resolved: That the committee recommends to the Board of Governors the following Amendment to RPC 1.2(d) and the following addition of RPC 8.6.

Recommended Amendment to Rule 1.2(d): "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. ***It shall not constitute a violation of this rule for a lawyer to counsel or assist a client in an effort to comply with the mandate of Nev. Const. Art. 4, Sec. 38, or the exercise of any right conferred thereunder, notwithstanding any conflicting provision of federal law.***"

Recommended Addition of Rule 8.6: "***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 Nevada 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.***"

Respectfully submitted,

Standing Committee on Ethics
and Professional Responsibility

Alan D. Freer, Chair
February 27, 2014

EXHIBIT A

Proposed Opinion Under Current Nevada Rules of Professional Conduct

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. ___
Issued on ___

BACKGROUND

The Committee has received requests from public attorneys inquiring into the ethical limits on their duties to their clients under circumstances in which state and federal law may conflict.

QUESTION

Would an ethical violation result if public attorneys, in the course of their representation of state or local governmental entities, rendered legal advice and drafted state regulations or local ordinances regulating the operation of medical marijuana dispensaries pursuant to the Nevada Constitution, Article 4, Section 38, and the recently enacted Senate Bill 374, from the 77th (2013) legislature, given that the sale, possession, and use of marijuana continue to be violations of the federal Controlled Substances Act?

ANSWER

No violations will result from merely discussing the legal consequences of any proposed course of conduct with a client or counseling or assisting a client to make a good faith effort to determine the validity, scope, meaning or application of a law. NRPC 1.2(d). However, acts going beyond providing such legal advice may amount to assisting a client in conduct the attorney knows is a violation of federal law and would thus be violations of Rule 1.2(d).

AUTHORITIES

a. Article 4, Section 38, of the Constitution of the State of Nevada

b. Nevada Rules of Professional Conduct 1.2(d)

c. Maine Bd. of Bar Overseers Professional Ethics Comm'n, Op. 199, July 7, 2010.

d. Conn. Bar Association, Prof. Ethics Commission, Informal Op. 2013-02, *Providing Legal Services to Clients Seeking Licenses under the Connecticut Medical Marijuana Law* (Jan. 16, 2013)

e. Colorado Bar Association Ethics Committee Formal Opinion 125—The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (Adopted October 21, 2013; Addendum dated October 21, 2013)

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

g. King County Bar Association Ethics Advisory Opinion on I-502 & Rules of Professional Conduct (October, 2013)

h. Memorandum from David W. Ogden, Deputy Attorney General, for Selected United States Attorneys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (October 19, 2009), (*available at* http://blogs.justice.gov/main/archives/192)

i. Memorandum from James M. Cole, Deputy Attorney General, for United States Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), (*available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf)

j. Memorandum from James M. Cole, Deputy Attorney General, for All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), (*available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf)

DISCUSSION

Nevada Rules of Professional Conduct 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.

Article 4, Section 38, of the Constitution of the State of Nevada, which was added to the Constitution in the year 2000, directs the Legislature to enact legislation for the use by patients of "a plant of the genus Cannabis" for the treatment of certain enumerated medical conditions. Senate Bill 374 from the 77th (2013) legislative session, provides for the registration of nonprofit medical marijuana dispensaries and establishes a number of regulatory duties primarily on the part of the Division of Public and Behavioral Health of the Department of Health and Human Services. Those duties include, inter alia, prescribing an application form for medical marijuana dispensary applicants (Sec. 10); collecting fees (Sec. 12); setting forth rules pertaining to the safe and healthful operation of dispensaries (Sec. 20); and setting forth rules establishing the minimum requirements for oversight of dispensaries (Sec. 20). SB 374 also

contemplates that local governments may enact zoning regulations pertaining to medical marijuana dispensaries (Sec. 10).

Although the State of Nevada has enacted the above-referenced law regarding medical marijuana, the sale, possession, or use of marijuana remains a violation of the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq. A reading of SB 374 makes clear that many of the activities imposed on state and local governments, such as collecting fees, setting forth rules pertaining to safe and healthful operation of facilities, and general oversight, would tend to facilitate or promote acts that may be criminal under the CSA. Rule 1.2(d) makes no distinction between state and federal law. To the extent a public attorney is involved in drafting regulations or ordinances or advising clients on how to proceed with such activities, the public attorneys would therefore be acting in violation of Rule 1.2(d).

At least five other states have considered the ethical consequences of advising clients regarding state medical marijuana laws. The Board of Overseers of the State of Maine Bar issued an opinion in 2010 recognizing that conduct associated with medical marijuana facilities constitutes a violation of federal law:

> Here, the proposed client conduct is known to be a violation of federal criminal law. In those circumstances, the role of the attorney is limited. While attorneys may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law, the Rule forbids attorneys from counseling a client to engage in the business or to assist a client in doing so.

Maine Bd. of Bar Overseers Professional Ethics Comm'n, Op. 199 (July 7, 2010).

The State of Connecticut Bar Association Professional Ethics Commission reached a similar conclusion in 2013:

> It is our opinion that lawyers may advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act. Lawyers may not assist clients in conduct that is in violation of federal criminal law. Lawyers should carefully assess where the line is between those functions and not cross it.

Conn. Bar Association, Prof. Ethics Commission, Informal Op. 2013-02, *Providing Legal Services to Clients Seeking Licenses under the Connecticut Medical Marijuana Law* (Jan. 16, 2013).

Also in agreement is the Colorado Bar Association Ethics Committee:

> Nevertheless, unless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a

> lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client's past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d).

Colorado Bar Association Ethics Committee Formal Opinion 125—The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (Adopted October 21, 2013; Addendum dated October 21, 2013).

At least two bar associations, however, have ruled that attorneys are not in violation of their respective rules of professional conduct for advising or assisting clients as long as they are advising or assisting on matters that are in compliance with state law:

> Accordingly, we believe the following is a reasonable construction of ER 1.2(d)'s prohibitions in the unique circumstances presented by Arizona's adoption of the Act:
>
> • If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the Act expressly permits; and
> • The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and
> • The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then
> • The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.

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

The King County, Washington, Bar Association (KCBA), rejecting the conclusions of the Maine and Connecticut opinions, adopted Arizona's approach:

> 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, 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.

King County Bar Association Ethics Advisory Opinion on I-502 & Rules of Professional Conduct (October, 2013).

The KCBA acknowledged in its opinion that "the Maine and Connecticut opinions may be more faithful to the plain text of their rules ..." Opinion on I-502 (October, 2013), Id. It is not within the authority of this committee to decide whether SB 374 is or ought to be made an exception to a standing and clearly expressed rule of professional conduct. Accordingly, this committee finds the reasoning of the Maine, Connecticut, and Colorado bar associations to be more persuasive in providing guidance on this question than that of the Arizona and King County opinions.

The Arizona and King County opinions are based, in part, on three memoranda issued by the Department of Justice in 2009, 2011, and 2013, setting forth the Department's prosecutorial policy regarding medical marijuana in light of recent state legislation. These memos may be referred to as the Ogden memo; the Cole memo (2011); and the Cole memo (2013). They were intended to provide guidance to federal prosecutors regarding the prioritization of criminal cases. The Arizona Bar Association interpreted the 2009 Ogden memo as providing safe harbor from prosecutions:

> ... [T]he federal government has issued a formal "memorandum" that essentially carves out a safe harbor for conduct that is in "clear and unambiguous compliance" with state law, at least so long as other factors are not present (such as unlawful firearm use, or "for profit" commercial sales) ...

State Bar of Az. Ethics Op. 11-01, Supra.

Arizona qualified its decision authorizing lawyers to advise and assist clients regarding medical marijuana by observing that the opinion was subject to revision in the event of a change in enforcement policy by the Department of Justice:

> Any judicial determination regarding the law, a change in the Act or in the federal government's enforcement policies could affect this conclusion.

State Bar of Az. Ethics Op. 11-01, Supra.

Contrary to Arizona's interpretation of the Ogden memo, the Committee believes the three DOJ memoranda cannot be read to provide much in the way of a safe harbor for attorneys actively involved in assisting or advising clients regarding medical marijuana dispensaries, as this statement from the Ogden memo makes clear: "Of course, no State can authorize violations of federal law ..." The Cole memo (2011) further clarifies the absence of a safe harbor:

> The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.

The most recent Cole memo (2013) gives similar clarification of the purpose of the memos and the complete absence of a safe harbor from enforcement of federal law:

> As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance here 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.

The plain language of Rule 1.2(d) must guide this committee, without regard to the discretionary policies of prosecutors. As the Maine Board of Bar Overseers stated:

> However, the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law.

CONCLUSION

A public 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 laws regarding medical marijuana. NRPC 1.2(d). However, acts going beyond providing such legal advice may amount to assisting a client in conduct the attorney knows is a violation of federal law and would accordingly be violations of Rule 1.2(d).

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

EXHIBIT 4

HOLLAND&HART

Marcy G. Glenn
Phone 303-295-8320
Fax 303-975-5475
mglenn@hollandhart.com

October 18, 2013

The Honorable Nathan B. Coats
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

The Honorable Monica Márquez
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

Re: **Proposed New CRPC 8.4, Comment [2A]; and New CRPC 8.6**

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). Enclosed is a proposed new Comment [2A] to existing Colorado Rule of Professional Conduct (CRPC) 8.4; and a proposed new CRPC 8.6. Both the proposed comment and rule address different aspects of the limited legalization of marijuana in Colorado.

The Standing Committee began considering the possibility of marijuana-related amendments to the CRPC in February 2012. At the Standing Committee's direction, a subcommittee studied the issue and presented its recommendations to the full Standing Committee at its May 3, 2013, July 26, 2013, and October 11, 2013 meetings.[1] At the October 11, 2013 meeting, a majority of the Standing Committee voted to recommend for the Court's adoption the new proposed comment and rule.

A majority of the Standing Committee believes that both proposals should be adopted to address the peculiar circumstances that exist due to the legality of certain marijuana-related conduct under Colorado law, but the illegality of the same conduct under federal law. The proposed comment and rule would address the inconsistent state and federal law as follows:

[1] Colorado Court of Appeals Judge John Webb chaired the Subcommittee, and the following Standing Committee members served on the Subcommittee: Federico Alvarez; Michael Berger; Gary Blum; Ronald Nemirow; Alexander Rothrock; Marcus Squarrell; James Sudler; and Eli Wald. Though not official Subcommittee members, Anthony van Westrum and Marcy Glenn also participated actively in the Subcommittee's work.

Proposed Comment [2A] to CRPC 8.4:

> A lawyer's "medical use" or "personal use" of marijuana that, by virtue of any of the following provisions of the Colorado Constitution, is either permitted or within an affirmative defense to prosecution under state criminal law, and which is in compliance with legislation or regulations implementing such provisions, 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 criminal law: (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(1)(b); (2) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(4); or (3) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, Subsection 16(3).

The purpose of this proposed new comment is to protect a lawyer from discipline under CRPC 8.4(b), if the lawyer engages in personal or medical use of marijuana that is permitted under the identified provisions of the Colorado Constitution, and otherwise complies with Colorado law. CRPC 8.4(b) provides that it 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." Because the personal and medical use of marijuana that is lawful under Colorado law nevertheless violates federal law, Colorado lawyers currently risk discipline under CRPC 8.4(b) even if they comply fully with Colorado law. The proposed new comment is intended to eliminate that risk, but only with respect to the personal or medical use of marijuana. The Standing Committee considered, and a majority rejected, extending this protection to any form of commercial conduct that is permitted under Colorado law, such as a lawyer's operation of marijuana-related facilities.

Proposed New Rule 8.6:

> Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for counseling or assisting a client to engage in conduct that, by virtue of (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, or (2) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, the lawyer reasonably believes to be either permitted or within an affirmative defense to prosecution under state criminal law, and which the lawyer

reasonably believes is in compliance with legislation or regulations implementing such provisions, solely because that same conduct, standing alone, may violate federal criminal law.

This proposed rule is intended to allow Colorado lawyers to provide legal services to clients on issues concerning marijuana-related activities that are lawful under Colorado law, even though those activities violate federal law. Under CRPC 1.2(d), a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, . . ." Absent the safe harbor recommended in the proposed rule, a lawyer who advises a client on legal issues related to, for example, the operation of a marijuana dispensary, risks violating CRPC 1.2(d). As a result of this risk, it appears that numerous Colorado lawyers are unwilling to provide legal services to persons and entities engaged in conduct that is lawful under Colorado law because that conduct remains unlawful under federal law. The result appears to be that many Colorado citizens and businesses are being denied the benefit of legal counsel on important personal and business conduct. A majority of the Standing Committee believes that the public interest is best served by removing the current barrier to representation of clients whose conduct is reasonably believed to comply with Colorado law related to marijuana.

As noted above, a majority of the Standing Committee voted to recommend these proposed amendments to the CRPC. However, other Standing Committee members, including representatives of the Office of Attorney Regulation Counsel, do not support these recommendations. I also note that Proposed Comment [2A] to CRPC 8.4 is consistent with the views expressed by the Colorado Bar Association Ethics Committee in its Formal Opinion 124, "A Lawyer's Medical Use of Marijuana" (April 23, 2012). That committee has approved in principle an addendum to Formal Opinion 124 that would extend its rationale to a lawyer's personal use of marijuana, in a manner compliant with Colorado law. That committee also has communicated to the Standing Committee its support of a rule that insulates an attorney from discipline for providing legal advice on marijuana-related conduct that is lawful under Colorado law, solely because that conduct also violates federal law.

I am enclosing separate documents setting forth the proposed new comment and rule. I have emailed Word versions of the enclosures, with this cover letter, to Chris Markman. The Standing Committee respectfully asks the Court to favorably consider the proposed changes.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc

Enclosure
cc: Chris Markman, Esq. (via email, w/enclosures)
Standing Committee on the Colorado Rules of Professional Conduct (via email, w/enclosures)

PROPOSED COMMENT [2A] TO CRPC 8.4

A lawyer's "medical use" or "personal use" of marijuana that, by virtue of any of the following provisions of the Colorado Constitution, is either permitted or within an affirmative defense to prosecution under state criminal law, and which is in compliance with legislation or regulations implementing such provisions, 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 criminal law: (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(1)(b); (2) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(4); or (3) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, Subsection 16(3).

PROPOSED NEW RULE 8.6

Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for counseling or assisting a client to engage in conduct that, by virtue of (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, or (2) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, the lawyer reasonably believes to be either permitted or within an affirmative defense to prosecution under state criminal law, and which the lawyer reasonably believes is in compliance with legislation or regulations implementing such provisions, solely because that same conduct, standing alone, may violate federal criminal law.

HOLLAND&HART LLP
THE LAW OUT WEST

Marcy G. Glenn
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December 11, 2013

The Honorable Nathan B. Coats
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

The Honorable Monica Márquez
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed New Comment [12A] to CRPC 1.2

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee), which is recommending an additional amendment to the Colorado Rules of Professional Conduct (CRPC) – a new Comment [12A] to CRPC 1.2 – to be considered in conjunction with the two marijuana-related amendments that the Standing Committee proposed in October 2013.

As you know, on October 18, 2013, I forwarded to your attention a proposed new Comment [2A] to CRPC 8.4 and a new CRPC 8.6, for the Court's consideration. Proposed CRPC 8.6 is intended to allow Colorado lawyers to provide legal services to clients on issues concerning marijuana-related activities that are lawful under Colorado law, even though those activities violate federal law. The proposed new rule is intended to override the application of CRPC 1.2(d), which provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal," under narrow circumstances.

When the Standing Committee approved proposed new Comment [2A] to CRPC 8.4 and new CRPC 8.6, at the October 11, 2013 meeting, it had previously approved in concept a proposed new comment to CRPC 1.2, which would cross-reference proposed new CRPC 8.6. However, the Standing Committee inadvertently failed to approve that proposed new comment to CRPC 1.2.

At its December 6, 2013 meeting, a majority of the Standing Committee approved for submission to the Court the following proposed Comment 12[A] to CRPC 1.2:

> **Comment [12A].** Paragraph (d) should be read in conjunction with Rule 8.6.

This proposed comment, if adopted by the Court, would alert the reader to the existence of proposed CRPC 8.6, which limits CRPC 1.2(d) in the context of advice on issues concerning

marijuana-related activities that are lawful under Colorado law. If the Court adopts CRPC 8.6, the Standing Committee believes that this cross-reference is non-controversial but important.

The Standing Committee is sensitive to the fact that its previously proposed marijuana-related amendments have already been posted on the Court's website, and that the Court has set a February 25, 2014 deadline for submission of comments, and a hearing on March 6, 2014. We do not believe that this relatively minor additional proposed amendment should impede the Court's consideration of all three proposed amendments on the current schedule.

I am enclosing the November 29, 2013 supplemental report prepared by the subcommittee that took the lead in drafting all the marijuana-related proposals, concerning proposed Comment [12A] to CRPC 1.2. I have separately emailed to you a Word version of the proposed comment, in accordance with the Court's Submission Policy for Committee Rule Changes (June 2012). The Standing Committee respectfully asks the Court to favorably consider the proposed changes.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
Enclosure
cc: Chris Markman, Esq. (via email, w/enclosures)
Jenny Moore, Esq. (via email, w/enclosures)

TO: MARCY GLENN

FROM: AMENDMENT 64 SUBCOMMITTEE

RE: CROSS REFERENCING COMMENT IN RULE 1.2

DATE: NOV. 29, 2013

The subcommittee's initial report mentioned the desirability of a comment in Rule 1.2 cross-referencing Proposed Rule 8.6, but did not suggest specific language. The subcommittee's supplemental reports did not reiterate this suggestion.

With apologies for having overlooked this detail, the subcommittee requests that the Standing Committee recommend to the Supreme Court approval of the following new comment to existing Rule 1.2:

> **Comment [12A]** Paragraph (d) should be read in conjunction with Rule 8.6.

Members Berger, Blum, Alvarez, Nemirow, Squarrell, and Webb support this proposal. So do members Sudler and Rothrock, but reserving their prior objections to the proposed rule. Member Wald proposes the following language, as either a final sentence to existing Comment 12 (his preference) or a new Comment [12A]: "In

appropriate circumstances, paragraph (d) should be read in conjunction with Rule 8.6."

At least two considerations favor adding such a comment. First, the need for proposed Rule 8.6 arises from the "assist a client" phrase in Rule 1.2(d), and existing Comment [12] addresses paragraph (d). Second, because Rule 8.6 would, if adopted by the Supreme Court, be unique to Colorado, uniformity favors alerting readers familiar with the ABA Model Rules of a local variation.

The majority does not believe that the phrase "In appropriate circumstances" adds anything, because proposed Rule 8.6 was narrowly drawn to reference the two marijuana amendments to our state constitution. The majority also believes that uniformity warrants a separate comment, rather than language in the existing comment, which might be overlooked.

Respectfully submitted,

_____/s/_____

John R. Webb

Colorado Rules of Professional Conduct

Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

COMMENT

[12A] PARAGRAPH (D) SHOULD BE READ IN CONJUNCTION WITH RULE 8.6.

Colorado Rules of Professional Conduct

Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

COMMENT

[12A] Paragraph (d) should be read in conjunction with Rule 8.6.

EXHIBIT 5

KCBA KING COUNTY BAR ASSOCIATION

Justice... Professionalism... Service... Since 1886

October 4, 2013

The Honorable Barbara Madsen, Chief Justice
The Honorable Charles Johnson, Rules Committee Chairman
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, Washington 98504

Dear Justices Madsen and Johnson:

Enclosed please find a request by the King County Bar Association for expedited consideration of suggested changes to the Rules of Professional Conduct for attorneys who advise clients on issues where state law conflicts with federal law. Our suggested changes are specifically in response to Washington Initiative 502, which deals with the legalization of marijuana.

Founded in 1886, the King County Bar Association represents over 14,000 attorneys, judges, law professors, and law students in King County. Our mission is to support our diverse membership by promoting a just, collegial, and accessible legal system and profession; to work with the judiciary to achieve excellence in the administration of justice; and to serve our local community through organized pro bono legal services.

KCBA has engaged in a comprehensive legal analysis and education program about drug policy reform since 2001. We have published numerous reports, studies, and recommendations, hosted expert policy forums and educational programs, and convened leading authorities in the legal and medical professions, educators, and the law enforcement community including judges, defenders, and prosecutors. We endorsed I-502 and have been carefully considering legal practice issues related to its implementation.

Two areas of concern to us are the ethical dilemmas members of the bar face (1) when advising clients about state laws that might be seen as in conflict with federal laws and (2) when personally using marijuana.

At its August meeting, the KCBA Board of Trustees 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 and would provide that a lawyer would 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.

In addition, the Board subsequently voted to support a proposed comment to RPC 8.4 (Misconduct) that would also address the issue of a lawyer who engages in legal state action, such as 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.

Under the Court's regular rulemaking process, attorneys would be without guidance on these issues until September of 2014 -- well after I-502's scheduled December 1, 2013 implementation date. Attorneys who in good faith wish to advise clients on Washington State law should not face the possibility of ethics complaints. We owe them and their clients timely guidance in this area.

Given the concerns resulting from the deadline approved by the voters of Washington State, KCBA respectfully asks the Court to act on our request under the expedited consideration provisions of GR 9. If action cannot be completed by December 1, we ask that the Court adopt a temporary moratorium on disciplinary action by the Washington State Bar Association related to these issues until the Court can complete its consideration of our proposal.

We stand ready to provide additional information and offer any support that would be helpful to the Court.

Sincerely,

Anne Daly

Anne M. Daly
President, King County Bar Association

cc: Patrick Palace, President, Washington State Bar Association
Paula Littlewood, Executive Director, Washington State Bar Association
Andrew J. Prazuch, Executive Director, King County Bar Association

GR 9 COVER SHEET

Suggested Change
RULES OF PROFESSIONAL CONDUCT (RPC)
Rules 8.4 and 8.6 -- MISCONDUCT

Submitted by the King County Bar Association

A. **Name of Proponent:**
King County Bar Association

B. **Spokesperson:**
Anne M. Daly, President, King County Bar Association, 1200 Fifth Avenue, Suite 600, Seattle, WA 98101 (telephone 206-267-7061)

C. **Purpose:**
Removes from misconduct violation any work by an attorney when advising a client about a state law that might be in violation of a federal law, and expresses that an attorney who personally uses marijuana as permitted under state law would not be subject to discipline only for that reason.

D. **Hearing:**
A hearing is not requested.

E. **Expedited Consideration:**
KCBA believes that exceptional circumstances justify expedited consideration of the suggested rule, notwithstanding the schedule set forth in GR9(i). The new marijuana law becomes effective in just two months, on December 1, 2013, which could result in attorneys operating without clear RPC guidance in this important area.

SUGGESTED RULE CHANGES

RULES OF PROFESSIONAL CONDUCT

Recommended by the King County Bar Association

Proposed Additional Comment to Rule 8.4:

[7] As provided by 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 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. The phrase "standing alone" is further addressed in Comment [2] to Rule 8.6.

New Rule 8.6

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.

Comments to New Rule 8.6

1. This rule specifically addresses Washington State Initiative Measure No. 502, approved by the voters on November 6, 2012.

2. The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer's personal conduct, or advice to clients, includes, but is not limited to activity, permitted by Washington state law, and that conduct in total contravenes federal laws other than those involving- manufacture, distribution, dispensation, or possession of marijuana, or prohibiting financial transactions involving the proceeds of marijuana sales, or prohibiting involvement of property, real or personal, in marijuana-related transactions, or prohibiting acquisition of property with proceeds of marijuana-related transactions, or conspiracy to do any of the above.