IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

OCT 03 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

IN THE MATTER OF AN AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.2 REGARDING MEDICAL MARIJUANA	)	ADKT 0495

STATE BAR OF NEVADA BOARD OF GOVERNORS' SUPPLEMENTAL INFORMATION IN SUPPORT OF PROPOSED COMMENT ADDITION TO RULE OF PROFESSIONAL CONDUCT 8.4(b) REGARDING MEDICAL MARIJUANA

On September 9, 2015, the Nevada Supreme Court held a Public Hearing on the Administrative Docket to consider the State Bar of Nevada, Board of Bar Governors' proposed addition of comment to Nevada Rule of Professional Conduct 8.4(b) regarding medical marijuana, as follows:

> [1] Because use, possession, and distribution of marijuana in any form still violates federal law, attorneys are advised that engaging in such conduct may result in federal prosecution and trigger discipline proceedings under SCR 111.

At the hearing, public comment was received concerning Rules of Professional Conduct and ethics opinions in the states of Colorado and Washington – the two states which were first to have legalized both medical and recreational marijuana possession, use, sale, distribution and production. The information provided to the Court during the public hearing was conflicting. The State Bar, therefore, submits this supplemental information for purposes of

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clarifying the record before the Court concerning current professional conduct guidelines in those states.

A. Washington

1. Rule of Professional Conduct Amendment – December 2014

In December 2014, the Washington Supreme Court adopted a comment to Washington Rule of Professional Conduct 1.2 to address the special circumstances presented by Washington Initiative 502 which legalized marijuana for all purposes in that state.

> **Washington 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.
>
> *Comment*: [*adopted effective December 9, 2014*] Special Circumstances Presented by Washington Initiative 502 (Laws of 2013, ch.3). [18] At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them. [Comment [18] adopted effective December 9, 2014.]

See ***Exhibit 1.***

To date, there have been no further amendments to the Rules of Professional Conduct in Washington on this issue.

2. Ethics Opinions

(a) Washington State Bar Advisory Opinion No. 201501, July 2015.

In July 2015, the Washington State Bar issued Advisory Opinion No. 201501, which states that lawyers do **not** violate Washington Rules of Professional Conduct when they:

1) Advise clients concerning the interpretation of, and compliance with Washington marijuana laws;

2) Provide advice and assistance in the formation and operation of a marijuana business in Washington;

3) Personally own or operate an independent marijuana business which complies with Washington state law; or

4) Purchase or consume medical or retail marijuana, so long as consumption does not otherwise affect the lawyer's substantive competence or fitness to practice law.

*See **Exhibit 2**.*

(b) King County [Washington] Bar Association Ethics Advisory Opinion on I-502, October 2013.

Approximately two years prior to the Washington State Bar's issuance of Ethics Opinion No. 201501, in October 2013, the King County [Washington] Bar

Association issued an Ethics Advisory Opinion concerning voter approved Initiative 502 (marijuana legalization in Washington state). The purpose of the King County advisory opinion was to ask the Washington Supreme Court to consider amendments to the Rules of Professional Conduct concerning Initiative 502.

*See **Exhibit 3**.*

As noted above, nearly a year later in December 2014, the comment to Washington Rule of Professional Conduct 1.2 was added by the Washington Supreme Court, addressing a lawyer's legal advice concerning compliance with Initiative 502, and six months thereafter, the Washington State Bar issued its Advisory Opinion No. 201501.

B. <u>Colorado</u>

1. Rule of Professional Conduct Amendment – March 2014

In March 2014, Colorado amended its RPC 1.2 (Scope of Representation), to add the following comment:

> **Colorado Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)**
> . . .
> *Comment (added and effective March 24, 2014):*
> [14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations,

> orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

*See **Exhibit 4**.*

To date, there have been no further amendments to the RPC's in Colorado on this issue.

2. Ethics Opinions

(a) Colorado State Bar Ethics Committee Formal Opinion No. 124, April 2012.

On April 23, 2012, the Colorado Bar Association Ethics Committee issued Formal Opinion 124 which addresses the question of whether a lawyer's cultivation, possession and consumption of small amounts of marijuana solely to treat a debilitating *medical* condition, violates Colorado Rules of Professional Conduct. Via the December 10, 2012, addendum,[1] the opinion was extended to a lawyer's use of marijuana for either medicinal or recreational purposes. In sum, the advisory opinion states that so long as the lawyer is not impaired while practicing, the lawyer does not commit professional misconduct. The opinion notes, however, in the final paragraph on page 8, that:

> *Formal Ethics Opinions [of the Colorado State Bar] are issued for advisory purposes only, and are not in any way biding on the Colorado Supreme Court, the Presiding*

[1] *See **Exhibit 5***, final paragraph of the Opinion on page 8 following the Notes.

> *Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.*

See ***Exhibit 5.***

(b) Colorado Judicial Ethics Advisory Opinion No. 2014-01, July 2014

By contrast, the Colorado Judicial Ethics Advisory Board issued an Advisory Opinion on July 31, 2014, (Opinion No. 2014-01) which states that a *judge's* use of marijuana for *any* purpose is not a "minor" violation of criminal law and, therefore, violates Rule 1.1 of the Code of Judicial Conduct.

See ***Exhibit 6.***

C. Nevada

1. Rule of Professional Conduct Amendment – May 2014

(a) RPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Substantially similar to the comment added to Colorado RPC 1.2 in March 2014, the comment added to Nevada RPC 1.2 in May 2014, states:

> **Nevada Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)**
>
> . . .
>
> *Comment (adopted May 7, 2014)*: A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada constitution, article 4, Section 38, and NRS chapter 453A, and may assist a client in conduct the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer

> shall also advise the client regarding related federal law and policy.

As in Colorado, this comment clarifies that a lawyer may advise a client regarding their state's law and regulation concerning marijuana, but directs that the lawyer must also advise the client concerning related federal law and policy.

(b) Suggested creation of Rule of Professional Conduct 8.6

In February 2014, the Nevada Standing Committee on Ethics and Professional Responsibility proposed that the Nevada Supreme Court create a new Rule of Professional Conduct to be enumerated Rule 8.6. It was proposed to provide as follows:

> 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.

*See **Exhibit** 7.*

The State Bar has not recommended the addition of a Rule 8.6 as proposed by the Nevada Standing Committee on Ethics and Professional Responsibility, although there was comment at the September 9, 2016, public hearing suggesting that this Court should consider such an addition to the Nevada Rules of Professional Conduct.

As to Washington and Colorado, while it appears that in both states a similarly enunciated Rule 8.6 was proposed, to date neither state has actually adopted such a rule.

RESPECTFULLY SUBMITTED this 23rd day of September, 2016.

STATE BAR OF NEVADA
BOARD OF GOVERNORS

By _____

Vernon E. Leverty, President Elect
Nevada Bar No. 1266
State Bar of Nevada
3100 W. Charleston Blvd., Suite 100
Las Vegas, Nevada 89102

EXHIBIT LIST

Exhibit 1 – Washington Rule of Professional Conduct 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Exhibit 2 – Washington State Bar Advisory Opinion No. 201501, July 2015

Exhibit 3 – King County [Washington] Bar Association, Ethics Advisory Opinion on I-502, October 2013

Exhibit 4 – Colorado Rule of Professional Conduct 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Exhibit 5 – Colorado State Bar Ethics Committee Formal Opinion No. 124, Adopted April 23, 2012, Addendum December 10, 2012

Exhibit 6 – Colorado Judicial Ethics Advisory Board, Advisory Opinion No. 2014-01, July 31, 2014

Exhibit 7 – 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

EXHIBIT 1

EXHIBIT 1

RPC 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 dec objectives of representation and, as required by RPC 1.4, shall consult with the cl they are to be pursued. A lawyer may take such action on behalf of the client as is out the representation. A lawyer shall abide by a client's decision whether to sett case, the lawyer shall abide by the client's decision, after consultation with the entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appoin endorsement of the client's political, economic, social or moral views or activitie

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

(d) A lawyer shall not counsel a client to engage, or assist a client, in con criminal or fraudulent, but a lawyer may discuss the legal consequences of any prop client and may counsel or assist a client to make a good faith effort to determine or application of the law.

(e) [Reserved.]

(f) A lawyer shall not purport to act as a lawyer for any person or organizat reasonably should know that the lawyer is acting without the authority of that pers lawyer is authorized or required to so act by law or a court order.

[Originally effective September 1, 1985; amended effective October 1, 2002; October September 1, 2011.]

Comment

Allocation of Authority between Client and Lawyer

[1] [Washington revision] Paragraph (a) confers upon the client the ultimate purposes to be served by legal representation, within the limits imposed by law and

obligations. The decisions specified in paragraph (a), such as whether to settle a made by the client. See RPC 1.4(a)(1) for the lawyer's duty to communicate with the With respect to the means by which the client's objectives are to be pursued, the l client as required by RPC 1.4(a)(2) and may take such action as is impliedly author representation. See also RPC 1.1, comments [6] and [10] as to decisions to associ

[Comment 1 amended effective September 1, 2016.]

[2] On occasion, however, a lawyer and a client may disagree about the means client's objectives. Clients normally defer to the special knowledge and skill of t the means to be used to accomplish their objectives, particularly with respect to t matters. Conversely, lawyers usually defer to the client regarding such questions a and concern for third persons who might be adversely affected. Because of the varie which a lawyer and client might disagree and because the actions in question may im tribunal or other persons, this Rule does not prescribe how such disagreements are however, may be applicable and should be consulted by the lawyer. The lawyer should and seek a mutually acceptable resolution of the disagreement. If such efforts are a fundamental disagreement with the client, the lawyer may withdraw from the repres Conversely, the client may resolve the disagreement by discharging the lawyer. See

[3] At the outset of a representation, the client may authorize the lawyer tc client's behalf without further consultation. Absent a material change in circumsta a lawyer may rely on such an advance authorization. The client may, however, revoke

[4] In a case in which the client appears to be suffering diminished capacity by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to aff cause is controversial or the subject of popular disapproval. By the same token, re constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreem terms under which the lawyer's services are made available to the client. When a la insurer to represent an insured, for example, the representation may be limited to insurance coverage. A limited representation may be appropriate because the client representation. In addition, the terms upon which representation is undertaken may might otherwise be used to accomplish the client's objectives. Such limitations may client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limitation must be reasonable under the circumstances. If, for example, a client's securing general information about the law the client needs in order to handle a cc

uncomplicated legal problem, the lawyer and client may agree that the lawyer's serv brief telephone consultation. Such a limitation, however, would not be reasonable i sufficient to yield advice upon which the client could rely. Although an agreement does not exempt a lawyer from the duty to provide competent representation, the lim considered when determining the legal knowledge, skill, thoroughness and preparatic the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accc Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

See also Washington Comment [14].

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a fraud. This prohibition, however, does not preclude the lawyer from giving an hones consequences that appear likely to result from a client's conduct. Nor does the fac a course of action that is criminal or fraudulent of itself make a lawyer a party t is a critical distinction between presenting an analysis of legal aspects of questi recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, t especially delicate. The lawyer is required to avoid assisting the client, for exam documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing may not continue assisting a client in conduct that the lawyer originally supposed discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insuffici the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, c like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special c beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to th must not participate in a transaction to effectuate criminal or fraudulent avoidanc (d) does not preclude undertaking a criminal defense incident to a general retainer lawful enterprise. The last clause of paragraph (d) recognizes that determining the a statute or regulation may require a course of action involving disobedience of th the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects the Rules of Professional Conduct or other law or if the lawyer intends to act cont instructions, the lawyer must consult with the client regarding the limitations on 1.4(a)(5).

Additional Washington Comments (14-17)

Agreements Limiting Scope of Representation

[14] An agreement limiting the scope of a representation shall consider the ap representation. (The provisions of this Comment were taken from former Washington R [11] to Rule 4.2 for specific considerations pertaining to contact with a person ot lawyer to whom limited representation is being or has been provided.

[Comment [14] amended effective April 14, 2015.]

[Comments originally effective September 1, 2006.]

Acting as a Lawyer Without Authority

[15] Paragraph (f) was taken from former Washington RPC 1.2(f), which was dele effective September 1, 2006. The mental state has been changed from "willfully" to constructive knowledge. See Rule 1.0A(f) & (j). Although the language and structur the former version in a number of other respects, paragraph (f) does not otherwise Washington law interpreting former RPC 1.2(f).

[Comment [15] adopted effective September 1, 2011.]

[16] If a lawyer is unsure of the extent of his or her authority to represent person's diminished capacity, paragraph (f) of this Rule does not prohibit the lawy accordance with Rule 1.14 to protect the person's interests. Protective action take does not constitute a violation of this Rule.

[Comment [15] adopted effective September 1, 2011.]

[17] Paragraph (f) does not prohibit a lawyer from taking any action permitted court rules, or other law when withdrawing from a representation, when terminated b continue representation by a tribunal. See Rule 1.16(c).

[Comment [15] adopted effective September 1, 2011.]

Special Circumstances Presented by Washington Initiative 502 (Laws of 2013, ch. 3)

[18] At least until there is a change in federal enforcement policy, a lawyer the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) conduct that the lawyer reasonably believes is permitted by this statute and the ot orders, and other state and local provisions implementing them.

[Comment [18] adopted effective December 9, 2014.]

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EXHIBIT 2

EXHIBIT 2

WSBA

Advisory Opinion: 201501
Year Issued: 2015
RPC(s): RPC 1.1, 1.2, 1.2(d), 1.8(a), 8.4, 8.4(b), 8.4(i), 8.4(k), 8.4(n)
Subject: Providing Legal Advice and Assistance to Clients Under WA State Retail Marijuana Law, I-502, and the Cannabis Patient Protection Act; Lawyer Participation in Retail and Medical Marijuana Business; Lawyer Purchase of Marijuana in Compliance with State Law

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FACTS:

A. Background Facts Regarding I-502 and the Cannabis Patient Protection Act

In November 2012, Washington voters passed Washington Initiative Measure No. 502 ("I-502"), which allows creation of a system for the production, processing, and retail sale of marijuana for recreational use under state law.[n.1] As stated in Section 1 of I-502, one purpose of I-502 was "to stop treating adult marijuana use as a crime and to try a new approach that * * * (3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol." Since 2012, much governmental and private effort has been devoted to the establishment of a licensing and regulatory system for the retail marijuana business under the jurisdiction of what is now known as the Washington State Liquor and Cannabis Board (the "WSLCB").

In April 2015, the Washington State Legislature passed and Governor Inslee signed the Cannabis Patient Protection Act (the "CPPA"), which substantially updated prior Washington law regarding medical uses of marijuana. [n.2] The CPPA is effective July 24, 2015.

Both I-502 and the CPPA were adopted in the shadow of the federal Controlled Substances Act, 21 USC §§ 801-904 (the "CSA"), which, on its face, prohibits the production, possession, sale, and use of marijuana for any purpose. [n.3] Under the CSA, and the "Supremacy Clause" contained in Article VI, Section 2 of the United States Constitution, federal authorities may prosecute people in Washington for violating the CSA, even if their conduct complies with state law, because a state law cannot override federal law. [n.4]

In spite of the tension between Washington state law on the one hand and the CSA on the other, both the Washington Attorney General and the United States Attorney General have devoted considerable time and effort to crafting Washington state law provisions regarding I-502 and what is now the CPPA subject to certain federal guidelines described further below. See, e.g., Press Release, Joint statement from Gov. Inslee and AG Ferguson regarding update from AG Eric Holder on implementation of Washington's voter-approved marijuana law (Aug. 29, 2013), available at http://www.atg.wa.gov/news/news-

releases/joint-statement-gov-inslee-and-ag-ferguson-regarding-update-ag-eric-holder; Press Release, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), available at http://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy. In addition:

• The Washington Governor and Attorney General have testified about the care that will be taken to implement I-502 in a way that will not conflict with federal priorities. See, e.g., Written Testimony of Washington Governor Jay Inslee and Washington Attorney General Bob Ferguson (Sep. 10, 2013), available at http://www.governor.wa.gov/sites/default/files/documents/testimony_20130910.pdf. In addition, one of the principal reasons for the adoption of the CPPA was to provide additional state-level regulation that was not present under prior Washington medical marijuana law. [n.5]

• The federal government has issued several public statements over the years to the effect that, while reserving ultimate federal authority, it does not wish to impede retail sales of medical or recreational marijuana pursuant to a state regulatory system unless the sales implicate other federal concerns such as money-laundering, sales to minors, sales outside of the state regulatory system and the like. See, e.g., Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys, re Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf (underlining in original); Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys, re Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) (underlining in original), available at http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf; Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, re Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf (underlining in original) ("Cole Memorandum").

• The executive branch of Washington State Government—including Washington's Governor, Washington's Attorney General, and the WSLCB—is actively involved in implementing both I-502 and what is now the CPPA.

• Since at least the adoption of I-502, neither the United States Attorney General nor any of the United States Attorneys in Washington have sought to impair or impede the operation of I-502 and what is now the CPPA. [n.6]

Although the CSA itself has not been amended insofar as medical and retail marijuana sales are concerned, there has been one additional federal development. Pursuant to the Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. § 538 (2014), Congress has prevented the Justice Department from using any funds made available to the Department of Justice by the Act "to prevent [Washington or any other state with medical marijuana laws] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." In other words, it appears that Congress has, at least for the time being, prohibited the Department of Justice from enforcing the CSA in a manner that prevents implementation of state law-based medical marijuana provisions such as are reflected in the CPPA.

B. Proposed Lawyer Conduct

Lawyer A wishes to give Client A legal advice about how to comply with I-502 and/or the CPPA.

Lawyer B wishes to advise Client B to form a business entity and then provide legal advice and assistance to Client B in the formation and operation of that entity so as to comply with I-502 and/or the CPPA.

Lawyer C wishes personally to own and operate a business in compliance with I-502 and/or the CPPA and any regulations issued thereunder.

Lawyer D wishes to purchase marijuana in compliance with I-502 and/or the CPPA.

Lawyer E is a government lawyer engaged in the implementation of and I-502 and/or the CPPA. Lawyer E also wishes to purchase marijuana in compliance I-502 and/or the CPPA.

QUESTIONS:

1. May Lawyer A advise Client A about the interpretation of and compliance with I-502 and the CPPA without violating the Washington Rules of Professional Conduct (the "RPCs")?

2. May Lawyer B provide legal advice and assistance to Client B in the formation and operation of a business entity so as to comply with I-502 and the CPPA without violating the RPCs?

3. May Lawyer C own and operate an independent business in compliance with I-502 and the CPPA without violating the RPCs?

4. Assuming that Lawyer D's need for and consumption of medical or retail marijuana do not otherwise affect Lawyer D's substantive competence or fitness to practice as a lawyer, may Lawyer D purchase and consume marijuana in compliance with I-502 and the CPPA without violating the RPCs?

5. May Lawyer E engage in the implementation of I-502 the CPPA and, if Lawyer E's competence and fitness to practice as a lawyer is not affected, purchase marijuana subject to I-502 and the CPPA without violating the RPCs?

CONCLUSIONS:

1. Yes, qualified.

2. Yes, qualified.

3. Yes, qualified.

4. Yes, qualified.

5. Yes, qualified.

DISCUSSION:

A. Lawyer A: Giving Legal Advice to Client A About I-502 and the CPPA

Pursuant to the RPCs, Lawyer A is entitled to advise Client A about whether particular conduct would or would not violate I-502 or the CPPA regardless of whether that conduct would violate the CSA. RPC 1.2(d) provides that:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows [n.7] 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.

Absent a limiting construction or exception to this rule (such as is contained in Washington Comment [18] to RPC 1.2, which is discussed in Section B below), a lawyer cannot advise or recommend (i.e., counsel) a client to engage in any conduct that the lawyer knows is criminal or fraudulent and also cannot materially help the client engage in (i.e., assist) any conduct that the lawyer knows is criminal or fraudulent. In addition, it makes no difference whether the conduct in question is criminal or fraudulent at a federal level or at a state level. On the other hand, Client A is entitled to receive, and Lawyer A is entitled to give, advice about whether Client A's "proposed course of conduct" would violate Federal or state law even if it is a foregone conclusion that the conduct violates federal criminal law—as long as Lawyer A does not go further and advise or recommend that Client A engage in conduct that Lawyer A knows violates federal criminal law and does not help Client A violate federal criminal law. As noted in RPC 1.2 cmt. 9, RPC 1.2 does not prohibit analyzing the consequences of a client's proposed course of conduct:

Paragraph (d) * * * does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

This analysis does not extend, however, to allowing Lawyer A knowingly to advise Client A about how to violate or conceal any violations of I-502 or the CPPA. Similarly, this portion of the analysis does not allow Lawyer A knowingly to advise Client A about how to violate or conceal any violations of the CSA. See RPC 1.2 cmts 10 [n.8], 13 [n.9]. That is because such advice would constitute counseling and/or assisting Client A in criminal conduct. In addition, and pursuant to the duty of competent representation that Lawyer A owes to Client A under RPC 1.1, [n.10] Lawyer A must advise Client A not only about the direct or indirect risks to Client A under state law as a result of engaging in a state-regulated

marijuana business but about the direct or indirect risks to Client A as a result of the CSA. [n.11]

B. Lawyer B: Advising Client B to Engage in Business Under I-502 and the CPPA or Assisting Client B in Doing So

Unlike Lawyer A and Client A, Lawyer B proposes to advise Client B to engage in business consistently with I-502 and the CPPA notwithstanding what is assumed to be ostensibly controlling federal law to the contrary and to assist Client B in doing so. In other words, Lawyer B's conduct goes beyond the mere expression of a legal opinion as to what is or is not lawful as a matter of state law. Lawyer B's conduct thus requires us to take several further steps and to consider whether or how to apply the prohibitions contained in RPC 1.2 (d), which are discussed above in Section A. In addition, and since Lawyer B's conduct in advising or assisting Client B could itself be considered to be a violation of the CSA, it is also necessary to look at RPC 8.4, which provides in pertinent part that:

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;

* * * *

(i) commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or
dismissal thereof preclude the commencement of a disciplinary proceeding * * *.

* * * *

(k) violate his or her oath as an attorney [in which an attorney swears to abide by the laws of both the state and United States. APR 5(e)]

* * * *

(n) engage in conduct demonstrating unfitness to practice law;

At least for as long as the federal government continues to take the same approach to I-502 and the CPPA, Lawyer B's conduct and legal advice does not violate these rules. Although, as noted below, our opinion relies substantially upon Washington Comment [18] to RPC 1.2, which is discussed later in this section, we believe it appropriate to begin with a more general analysis of the circumstances that we believe provide the foundation for that comment.

As a general matter, and as noted in Official Comment 14 to the Preamble and Scope of the Washington Rules of Professional Conduct:

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.

RPC 1.2(d) and 8.4(b), (i), (k), and (n) are designed to ensure that lawyers do not undermine the rule of law, whether through assisting clients in or their own acts of criminal behavior. [n.12] In this unprecedented situation, it would be the failure to allow lawyers to advise their clients rather than allowing them to do so, that would undermine the rule of law. The State of Washington has expressly approved the activities in question, and the United States Department of Justice has expressly adopted a policy that "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity." (Cole Memorandum.) In a memorandum to United States Attorneys, the United States Deputy Attorney General has stated:

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with these laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address these priorities * * *

(Cole Memorandum.)

The State of Washington has, without question, enacted regulatory measures expressly directed at addressing just these federal concerns. Moreover, the predominant purpose of lawyer discipline is to protect the public. See, e.g., In re Disciplinary Proceeding Against Kuvara, 149 Wash.2d 237, 257, 66 P.3d 1057 (2003) (quoting In re Disciplinary Proceeding Against Noble, 100 Wash.2d 88, 95, 667 P.2d 608 (1983)). Washington voters approved I-502 and the Legislature passed and the Governor signed the CPPA. Given as well the clear and sustained efforts being made by federal authorities to allow the implementation of these laws as long as stated federal concerns (e.g., about the risk of sales to minors or the risk of unregulated sales or other criminal conduct such as money laundering) are adequately addressed, it is plain that the Washington public does not need protection against lawyers who choose to provide legal advice and assistance to clients regarding compliance with I-502 and the CPPA, consistently with those federal concerns. [n.13] To the contrary, the Washington public needs protection to assure that the boundaries of I-502 and the CPPA are enforced, and that requires allowing lawyers to do their work. Clients who wish to comply with I-502 and the CPPA necessarily require assistance with, for example, drafting contracts, forming limited liability companies, retaining employees, and performing several other business functions that benefit from sound legal advice. RPC 1.2(d) and 8.4(b), (i), (k), and (n) exist to ensure that lawyers do not undermine the rule of law, whether through assisting clients in or their own acts of criminal behavior. [n.14]

This analysis is consistent with the logical basis for Washington Comment [18] to RPC 1.2, which was adopted by the Washington Supreme Court in November 2014, and which provides that:

Special Circumstances Presented by Washington Initiative 502 (Laws of 2013, Ch. 3):

[18] At least until there is a subsequent change of federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, Ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders and other state and local provisions implementing them.

Although this comment is limited by its terms to I-502, we conclude that the comment is, and necessarily must be, broad enough to cover legal advice and assistance with regard to the CPPA as well. Nonetheless, three caveats must be noted.

First, the "safe harbor" established by Comment 18 to RPC 1.2 will only last for as long as present federal enforcement policies last. If, for example, the federal government were to disavow its present positions and announce that it would thereafter prosecute any and all violators including but not limited to those purporting to act pursuant to I-502 or the CPPA, it could well be that any protections offered by Comment 18 would be at an end.

Second, and as we already noted with respect to Lawyer A, Lawyer B must, as a matter of the duty of competent representation under RPC 1.1, advise Client B about the full range of legal risks that can result from participation in a state law-regulated marijuana business.

Third, a lawyer has a different range of freedom of action when assisting clients with regard to I-502 or the CPPA than when assisting clients in other legally gray areas. As already noted, for example, the general state of mind requirement for a violation of RPC 1.2(d) is that the lawyer know that the conduct in question is illegal. Under Comment 18 to RPC 1.2, a lawyer who knows that the conduct in question would violate the CSA is not in violation of the RPCs if, but only if, the lawyer reasonably believes that state law authorizes the conduct on or in connection with which the lawyer is assisting the client. In other words, a lawyer who reasonably believes that state law authorizes the conduct in question is not in violation of the RPCs even if the lawyer knows that the conduct would violate the CSA.

C. Lawyer C: Engaging in Businesses Under I-502 or the CPPA

Subject to exceptions not pertinent hereto, lawyers are generally free to engage in businesses to the same extent as other members of the public. Since Lawyer C's business under I-502 or the CPPA is separate and apart from Lawyer's practice of law, we see no reason to prohibit Lawyer C from engaging in businesses pursuant to I-502 or the CPPA to the same extent that non-lawyers may so long as Lawyer C is in compliance with the Rules of Professional Conduct. In our opinion, it would be inappropriate to interpret RPC 8.4(b) (criminal acts reflecting adversely on honesty, trustworthiness, or fitness to practice), RPC 8.4(i)(disregard for the rule of law), RPC 8.4(k)(oath of office swearing to abide by both state and federal law), or RPC 8.4(n)(conduct demonstrating unfitness to practice law) as prohibiting activities permitted by I-502 or the CPPA unless and until there is a change in federal enforcement policy that puts compliance with I-502 or the CPPA in jeopardy.

If however, if Lawyer C does plan to enter into such a business with one or more of Lawyer C's clients, Lawyer C would have to comply with RPC 1.8(a), which provides that:

A lawyer shall not enter into a business transaction with a client or

knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

See, e.g., LK Operating, LLC v. Collection Grp., LLC, 181 Wash.2d 48, 331 P.3d 1147 (2014); In re Disciplinary Proceeding Against Hall, 180 Wash.2d 821, 329 P.3d 870 (2014).

For substantially the same reasons noted in Section B, it is also our opinion that a lawyer going into a business with a client that complies with I-502 and the CPPA would not, without more, constitute either a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," RPC 8.4(b), or an "act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law," RPC 8.4(i). Where, as here, all involved parties are working to appropriately implement I-502 and the CPPA, this conduct does not reflect adversely on a lawyer's fitness to practice, does not involve moral turpitude and does not reflect disregard for the rule of law. It also is not a violation of the lawyer's oath of office.

D. Lawyer D: Purchasing Marijuana Under I-502 or the CPPA

Our analysis of the first three questions leads us to conclude as well that subject to the same limitations and as long as Lawyer D is able to provide competent legal advice and otherwise comply with the RPCs, Lawyer D may purchase and consume marijuana consistently with I-502 and the CPPA to the same extent that non-lawyers may generally do so.

In this context, we again see no substantial public purpose in considering conduct unrelated to the practice of law in which members of the public are free to engage a violation of the RPCs. [n.15] At the risk of repetition, it would be inappropriate in our opinion to interpret RPC 8.4(b) (criminal acts reflecting adversely on honesty, trustworthiness, or fitness to practice), RPC 8.4(i) (disregard for the rule of law), RPC 8.4(k) (oath of office swearing to abide by both state and federal law), or RPC 8.4(n) (conduct demonstrating unfitness to practice law), as prohibiting activities permitted by I-502 or the CPPA unless and until there is a change in federal enforcement policy that puts compliance with I-502 or the CPPA in jeopardy.

E. Lawyer E: Government Lawyer Implementing I-502 and the CPPA or Purchasing Marijuana Pursuant Thereto

Without question, the implementation of I-502 and what is now the CPPA has required and will continue to require a great deal of cooperation between government lawyers and lawyers in private practice. Given our conclusion that a private practice lawyer's actions in support of a client's business or the lawyer's own business or interests under I-502 or the CPPA does not violate the RPCs as long as done consistently with this opinion and with federal guidelines, we also conclude that the parallel actions of government lawyers do not violate the RPCs. [n.16]

F. Final Observations

This opinion does not state or imply that lawyers are free in any other circumstance to disregard the law or to disregard conflicts between federal and state law. [n.17] It does, however, conclude that the extraordinary, and in our view unprecedented, combination of factors present here, including the Washington Supreme Court's express recognition of these special circumstances in Comment 18 to RPC 1.2, requires an extraordinary and unprecedented analysis under the RPCs. We also caution that Comment 18 expressly notes that if the federal government changes its position and again seeks to enforce the CSA against the kinds of activities made lawful under I-502 and the CPPA as a matter of state law, the application of the RPCs may have to be reconsidered.

Endnotes:

1. The full text of I-502 can be found online at http://lcb.wa.gov/publications/Marijuana/I-502/i502.pdf. Technically speaking, I-502 amended or added sections to Chapters 69.50 RCW, 46.61 RCW, 46.20 RCW and 46.04 RCW.

2. See, Senate Bill (SB) 5052 2015-16, Sec. 2. Legislative history available at http://app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=5052; see also Final Bill Report 2SSB 5052 (2015), available at http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bill%20Reports/Senate/5052-S2%20SBR%20FBR%2015.pdf. For further information on pre-CPPA Washington law regarding medical marijuana, see Vitaliy Mkrtchyan, Initiative 692, Now and Then: The Past, Present, and Future of Medical Marijuana in Washington State, 47 Gonz. L. Rev. 839 (2012); Cannabis Action Coalition v. City of Kent, No. 90204-6 (Wash. filed May 21, 2015), 180 Wn. App. 455, 322 P.3d 1246 (2014); RCW 69.51A.030 (making health care professionals not subject to criminal or professional penalties or liabilities for advising or authorizing the medical use of cannabis); Washington State Department of Health, Medical Marijuana Authorization Guidelines (2014), available at http://www.doh.wa.gov/Portals/1/Documents/2300/2014/631053.pdf.

3. See, e.g., 21 USC §§ 841(a)(1), 844(a); Gonzales v. Raich, 545 US 1, 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (upholding, against a Commerce Clause challenge, the constitutionality of the CSA as applied to medical marijuana sales under California law); cf. Gonzales v. Oregon, 546 US 243, 266-268, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006) (CSA does not authorize the United States Attorney General to prohibit doctors from issuing assisted suicide prescriptions pursuant to the Oregon Death with Dignity Act).

4. See, e.g., Mutual Pharmaceutical Co., Inc. v. Bartlett, 570 US __ (2013), Docket No. 12-

142, 133 S. Ct. 2466, 2472-73, 186 L. Ed. 2d 607 (2013).

5. See SB 5052, Sec. 2.

6. For additional Federal memoranda on this subject, see Monte Wilkinson, Director, Executive Office of U.S. Attorneys, Policy Statement Regarding Marijuana Issues in Indian Country, October 28, 2014; James M. Cole, Deputy U.S. Attorney General, Memorandum re: Guidance Regarding Marijuana Related Financial Crimes, February 14, 2014; Department of the Treasury, Financial Crimes Enforcement Network, Guidance re: BSA Expectations Regarding Marijuana-Related Businesses, February 14, 2014.

7. RPC 1.0(f) provides that:

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

8. RPC 1.2 cmt. 10 provides that:

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

9. RPC 1.2 cmt. 13 provides that:

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

10. RPC 1.1 provides that:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

11. Cf. Montana Caregivers Ass'n, LLC v. U.S., 841 F.Supp. 2d 1147, 1148 (D. Mont. 2012) (although plaintiff's conduct may have been legal under state marijuana laws, it was illegal under the federal Controlled Substances Act). Without in any way attempting a full list of the potential legal consequences of a CSA violation, we note that the consequences could include not only the risk of federal criminal prosecution but also a host of civil law

questions such as the potential effect of illegality under the CSA on the enforcement of marijuana-related contracts.

12. Cf. Restatement (Third) of the Law Governing Lawyers § 23, cmt. c (2000) ("Lawyers who exercise their skill and knowledge so as to * * * obstruct the legal system subvert the justifications of their calling").

13. The Congressional decision to prohibit the Department of Justice from using any funds to prevent state law medical marijuana systems strongly suggests that, at least as to medical marijuana, Congress is of the same view.

14. If lawyers could not give legal advice to clients about how to conform their conduct to the requirements of I-502 and the CPPA as well as related federal concerns, then no one could do so. See, e.g., RCW 2.48.180 (broadly defining the unauthorized practice of law); RPC 5.5(a) ("A lawyer shall not * * * assist another" in the unauthorized practice of law).

15. If, on the other hand, Lawyer D's consumption of marijuana causes Lawyer D to engage in conduct otherwise prohibited by the RPCs, Lawyer D would be no less subject to discipline than a lawyer whose impermissible performance is caused by excessive consumption of alcohol. Cf. In re Disciplinary Proceeding Against Curran, 115 Wash.2d 747, 801 P.2d 962 (1990).

16. We assume that government attorneys will comply with any and all conflict of interest statutes or regulations that apply to investment in or ownership of businesses which are regulated by their government clients.

17. For related authorities and discussions, see Colorado Supreme Court Rule Change 2014 (05) (March 24, 2014) (adopting new comment 14 to Colorado RPC 1.2); Nevada Supreme Court Order Adopting Comment [1] to Nevada RPC 1.2, May 7, 2014; Amendments to Connecticut RPC 1.2 & RPC 8.4 Comment, approved June 19, 2014; Amendments to Oregon RPC 1.2(d) [adopted 2/19/15]; State of Arizona Ethics Op. 11-01 (2011) (lawyer may counsel or assist client in legal matters permissible under medical marijuana act); Colorado Judicial Ethics Advisory Board Op. 2014-01 (judge's use of marijuana); Colorado Bar Association Formal Ethics Op. 125 (2013) (The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities)[withdrawn 5/17/2014]; Colorado Bar Association Formal Opinion 124 (2012) (A Lawyer's Medical Use of Marijuana); Connecticut Bar Association Informal Opinion 2013-02 (Providing Legal Services to Clients Seeking Licenses Under The Connecticut Medical Marijuana Law); Maine Ethics Op. #199 (2010) (Advising clients concerning Maine's Medical Marijuana Act); We reach a different end result than North Dakota Ethics Opinion No. 14-02 (Aug. 12, 2014), available at http://www.sband.org/UserFiles/files/pdfs/ethics/Opinion%2014-02.pdf.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of

Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 3

EXHIBIT 3

KCBA KING COUNTY BAR ASSOCIATION

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

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

October, 2013

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

Questions presented:

1. Should an attorney who assists clients to engage in conduct that is permitted by I-502 and its implementing regulations, but is forbidden by federal law, be subjected to professional discipline in Washington?

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

Background and hypothetical facts

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

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

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

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

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

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

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

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[4] I-502 § 10.

[5] *Id.*

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

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

[8] *Id.* at 3.

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

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

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

Analysis

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

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

> Washington Rule of Professional Conduct ("RPC") 1.2(d) states:
>
> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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

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

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

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

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

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

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

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

[14] Maine Prof. Ethics Comm'n, Op. 199 (July 7, 2010).
[15] Conn. Bar Ass'n, Prof. Ethics Comm'n, Informal Op. 2013-12, *Providing Services to Clients Seeking Licenses under the Connecticut Medical Marijuana Law* (Jan. 16, 2013).
[16] State Bar of Az. Ethics Op. 11-01 (Feb. 2011).
[17] The Arizona opinion emphasizes that no court has held its state's act to be invalid or preempted. To the extent that this suggests that the effectiveness of the CSA may be diminished or affected by the contrary state law, or that a court would need to hold otherwise before it was clear, the KCBA does not make such an assumption. *See generally* Alec Rothrock, *Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health?*, 89 Denver U. L. Rev. 1047 (2012) (criticizing Arizona opinion's discussion of interplay between state and federal law as "a misunderstanding of federalism," and stating that "the federal law remains unchanged and in full force in every corner of Arizona").
[18] WSR 13-14-124.
[19] I-502 § 1.

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

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

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

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

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

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

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

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[20] *See* Cole Memorandum at 3.

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

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

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

C. Advisory nature of opinion

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

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

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

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

EXHIBIT 4

EXHIBIT 4

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 decisions 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 or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(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.

Source: (a), (c), and comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; comment [14] added and effective March 24, 2014; Comments [5A] and [5B] added, effective April 6, 2016.

COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[5A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[5B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, sees. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.p

EXHIBIT 5

EXHIBIT 5

124 A Lawyer's Medical Use of Marijuana

Adopted April 23, 2012, Addendum December 10, 2012

Introduction

The CBA Ethics Committee (Committee) has been asked to opine whether a lawyer who, under Colorado law, may cultivate, possess, and use small amounts of marijuana solely to treat a debilitating medical condition may do so without violating the Colorado Rules of Professional Conduct (Colorado Rules, Rule, or Colo. RPC). The Committee first summarizes the relevant federal law criminalizing possession and use of marijuana. Next, the Committee summarizes Colorado law applicable to the medical use of marijuana. The Committee then identifies ethics rules and case law that frame its analysis of when a lawyer's medical use of marijuana may violate the Colorado Rules.

The Committee has tried to analyze the ethics issues without being drawn into the public debate about the value or efficacy of medical marijuana. There are strong opinions for and against the medical use of marijuana. The conflict between federal and state law is just one example.

The Committee recognizes that the public discourse about the use of marijuana, even medical marijuana, frequently considers the issue of impairment. Use and misuse of marijuana—or, for that matter, any other psychoactive substance, including alcohol, prescription medications, and certain over-the-counter drugs—even when permitted by law, can affect a lawyer's reasoning, judgment, memory, or other aspects of the lawyer's physical or mental abilities. A lawyer's medical use of marijuana, like the use of any other psychoactive substance, raises legitimate concerns about a lawyer's professional competence and ability to comply with obligations imposed by the ethics rules. Consequently, this opinion includes a discussion of the Colorado Rules and relevant ethics opinions addressing lawyer impairment.

Our conclusion is limited to the narrow issue of whether personal use of marijuana by a lawyer/patient violates Colo. RPC 8.4(b). This opinion does not address whether a lawyer violates Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation, possession, or use by third parties of medical marijuana under Colorado law.

Syllabus

Federal law treats the cultivation, possession, and use of marijuana for any purpose, even a medical one, as a crime. Although Colorado law also treats the cultivation, possession, and use of marijuana as a crime, it nevertheless permits individuals to cultivate, possess, and use small amounts of marijuana for the treatment of certain debilitating medical conditions. Cultivation, possession, and use of marijuana solely for medical purposes under Colorado law, however, does not guarantee an individual's protection from prosecution under federal law. Consequently, an individual permitted to use marijuana for medical purposes under Colorado law may be subject to arrest and prosecution for violating federal law.

This opinion concludes that a lawyer's medical use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b).1 Rather, to violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

A lawyer's use of medical marijuana in compliance with Colorado law may implicate additional Rules, including Colo. RPC 1.1, 1.16(a)(2), and 8.3(a). Colo. RPC 1.1 is violated where a lawyer's use of medical marijuana impairs the lawyer's ability to provide competent representation. If a lawyer's use of medical marijuana materially impairs the lawyer's ability to represent the client, Rule 1.16(a)(2) requires the lawyer to withdraw from the representation. If another lawyer knows that a lawyer's use of medical marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.

Analysis

A. Federal Law

The federal government regulates marijuana possession and use through the Controlled Substances Act, 21 USC § 811 (CSA). The CSA classifies "marihuana" as a Schedule I controlled substance. 21 USC § 812(b). Federal law prohibits physicians from dispensing a Schedule I controlled substance, including marijuana, by prescription. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (no medical necessity exception to CSA prohibition of marijuana). The CSA makes it a crime, among other things, to possess and use marijuana even for medical reasons. Id.; 21 USC §§ 841 to 864. In Gonzales v. Raich, 545 U.S. 1 (2005), the U.S. Supreme Court recognized the authority of the federal government to prohibit marijuana for all purposes, even medical ones, despite valid state laws authorizing the medical use of marijuana.2

B. Colorado Law

The Colorado Uniform Controlled Substances Act of 1992 (UCSA) substantially mirrors the federal CSA. See CRS §§ 18-18-101 to -605. Colorado's UCSA, like the federal CSA, treats marijuana as a "controlled substance." See CRS § 18-18-102(5). Like federal law, Colorado law criminalizes the possession and use of marijuana. See CRS § 18-18-406.

Unlike federal law, however, the Colorado Constitution provides that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition." Colo. Const. art. XVIII, § 14(4)(a). An individual must obtain "written documentation" from a physician stating that he or she has been diagnosed with a debilitating medical condition that might benefit from the medical use of marijuana. *Id.* at § 14(3)(b)(I). A "debilitating medical condition" is defined as:

-(I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;

-(II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or

-(III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

Id. at § 14(1)(a).

"Medical use" is defined as:

-The acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians. . . .

Id. at § 14(1)(b).

The Colorado statutes codify the medical use exemption for marijuana in the Constitution. A Colorado patient is exempted from application of Colorado law criminalizing cultivation, possession, and use of marijuana if the individual can establish that the cultivation, possession, or use was solely for medical purposes as permitted by Colorado law. *See* CRS §12-43.3-102(b).

C. Colo. RPC

Colo. RPC 1.1 requires lawyers to represent their clients using "the legal knowledge, skill, thoroughness and preparation reasonably necessary" for the task.

Colo. RPC 1.16 prohibits a lawyer from representing a client where the lawyer's "physical or mental condition materially impairs the lawyer's ability" to do so.

Colo. RPC 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[.]" Colo. RPC 8.4(b) sets out a two-part test. First, there must be evidence of a criminal act. Second, the evidence must establish that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See, e.g., People v. Andersen*, 58 P.3d 537, 541 (Colo. OPDJ 2000) (stating in *dictum* that not all convictions of the criminal laws necessarily justify the conclusion that Colo. RPC 8.4(b) has also been violated).

D. Misconduct

All lawyers admitted to practice law in Colorado take an oath that they will support the U.S. and Colorado Constitutions. They also swear to faithfully and diligently adhere to the Colo. RPC at all times. Unfortunately, the Colo. RPC do not provide lawyers with clear guidance on proper ethical conduct when federal and Colorado laws conflict as they do in the unique circumstance regarding an individual's medical use of marijuana.

The Supremacy Clause of the U.S. Constitution unambiguously provides that if there is any conflict between federal and state law, federal law prevails. *Gonzales v. Raich*, 545 U.S. 29. Consequently, even if a lawyer is permitted to cultivate, possess, and use small amounts of marijuana under Colorado law solely for medical use, such medical use may nevertheless constitute a violation of federal criminal law.

The Committee concludes, however, that a Colorado lawyer's violation of federal criminal law prohibiting the cultivation, possession, and use of marijuana where the lawyer's cultivation, possession, or use is for a medical purpose permitted under Colorado law does not necessarily violate Colo. RPC 8.4(b). The Committee reads Colo. RPC 8.4(b) as requiring a nexus between the violation of law and the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See People v. Hook*, 91 P.3d 1070, 1073-74 (Colo. OPDJ 2004) (the fact that a lawyer may have committed the felony of illegal discharge of a firearm does not by itself determine the professional discipline he should receive); *People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (linking a lawyer's discharge of a firearm directly over his wife's head during an argument to a "critical failure of judgment" and "a contempt for the law which was at odds with [his] duty to uphold the law").

Colorado has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. No controlling judicial authority has yet held that Colorado law permitting medical use of marijuana for persons suffering from debilitating conditions is unconstitutional, preempted, void, or otherwise invalid. Consequently, even if a lawyer's cultivation, possession, or use of medical marijuana to treat a properly diagnosed debilitating medical condition under Colorado law may constitute a federal crime, the Committee does not see a nexus between the lawyer's conduct and his or her "honesty" or "trustworthiness," within the meaning of Colo. RPC 8.4(b), provided that the lawyer complies with the requirements of Colorado law permitting and regulating his or her medical use of marijuana. The Committee also does not see a nexus between the lawyer's conduct and his or her "fitness as a lawyer in other respects," provided that (a) again, the lawyer complies with the requirements of Colorado law permitting his or her medical use of marijuana, and (b) in addition, the lawyer satisfies his or her obligation under Colo. RPC 1.1 to provide competent representation. *E.g., Iowa Sup. Ct. v. Marcucci*, 543 N.W.2d 879, 882 (Iowa 1996) ("The term 'fitness' as used in [Rule 8.4(b)] . . . embraces more than legal competence.").

Although not directly on point, cases addressing parenting time, where medical use of marijuana is an issue, similarly prohibit restrictions on parenting time simply because a parent is permitted to use and uses medical marijuana pursuant to state law. *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo.App. 2010) (before parenting time could be restricted, requiring evidence that use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested a risk of harm).

E. Impairment

Colo. RPC 1.16's prohibition against representing a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" reflects the position that allowing lawyers who do not possess the requisite capacity to make professional judgments and/or follow the standards of ethical conduct harms clients, undermines the integrity of the legal system, and denigrates the legal profession.

Under the Rules, not every debilitating medical condition, treatment regimen, use of medicine, or combination of these factors, will result in mental impairment adversely affecting a lawyer's professional behavior. To violate Rule 1.16, the condition and/or treatment must "materially impair[]" the lawyer's ability to represent a client. *See* Colo. RPC 1.16(a)(2). *See also* American Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 03-429, "Obligations With Respect to Mentally Impaired Lawyer in the Firm" (2003). In that circumstance, a lawyer must not undertake or continue representation of a client.

Every lawyer has a personal responsibility to ensure that the lawyer's physical condition or the substances the lawyer ingests or consumes do not adversely affect the lawyer's ability to follow the ethics rules. Impaired and unimpaired lawyers alike are required, among other things, to act competently. Colo. RPC 1.1. If a lawyer cannot do that because of a substantial impairment, Colo. RPC 1.16(a)(2) requires the lawyer to withdraw from the representation and take "reasonably practical" steps to protect the client's interests. Colo. RPC 1.6(d). As for the lawyer, there are sources of assistance to help deal with the impairment.3

Unfortunately, some lawyers will be unaware of, or will deny, the fact that their ability to represent clients is materially impaired. They may be unwilling or unable to take appropriate action to decline representation or withdraw. *See* ABA Formal Op. 03-429 at 3. When the materially impaired lawyer is unable or unwilling to deal with the consequences of that impairment, the firm's partners and the impaired lawyer's supervisors have obligations under Colo. RPC 5.1(a) and (b) to take reasonable steps to ensure that the impaired lawyer complies with the ethics rules.4

If the firm's lawyers believe they have prevented the impaired lawyer from substantially violating any ethical rules while the impaired lawyer was practicing in the firm, the firm's lawyers have no duty to report the lawyer's condition to the authorities. *See* ABA Formal Op. 03-429 at 4-5. However, if the firm's lawyers believe that the impaired lawyer has violated the ethical rules in a way that raises a substantial question about the lawyer's fitness to practice law, they are required to report the lawyer's condition to the appropriate disciplinary authority. *See* ABA Formal Op. 03-429 at 5; Colo. RPC 8.3(a).

Colo. RPC 8.3(a) addresses the more general obligation of any lawyer with knowledge that another lawyer's conduct has violated the ethics rules. The rule requires a lawyer to report another lawyer to "the appropriate professional authority" when the lawyer "knows" that the other lawyer's violation of the ethics rules raises a "substantial question as to that [other] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A lawyer outside the firm who is aware of another lawyer's impairment and who knows that another lawyer has violated the ethical rules in a manner that raises a "substantial question" regarding the lawyer's "honesty, trustworthiness, or fitness as a lawyer" has a duty to report the violation to the appropriate authority. Only those violations that raise a "substantial question" as to the lawyer's ability to represent clients, however, must be reported.

"Substantial" refers to the seriousness of the offense, not to the amount of evidence of which the lawyer is aware. Colo. RPC 8.3, cmt. [3]. An impaired lawyer's failure to refuse or terminate representation of clients ordinarily raises a "substantial question" about the lawyer's fitness as a lawyer. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 03-431 "Lawyer's Duty to Report Another Lawyer Who May Suffer From Disability or Impairment" n.6 (2003).

"Knows" refers to actual knowledge, which may be inferred from circumstances. Colo. RPC 1.0(f). The reporting lawyer may know of the impaired lawyer's misconduct through first-hand observation or through a third party. *See* ABA Formal Op. 03-431 at n.12. The "actual knowledge" standard can be difficult to apply. On one hand, knowledge that a lawyer uses medical marijuana or drinks heavily, for instance, does not necessarily reflect knowledge that the lawyer is impaired in his or her ability to represent clients. *See* ABA Formal Op. 03-431 at 3. On the other hand, behavior such as frequently missing court deadlines, failing to make requisite filings, failing to perform tasks agreed to be performed, or failing to address issues that would be raised by competent counsel may supply the requisite knowledge that another lawyer is impaired. *Id.* at 2. In determining whether a lawyer "knows" of another lawyer's impairment that has caused a violation of the ethics rules, the lawyer with the potential reporting obligation is not expected to be able to identify impairment with the precision of a medical professional. *Id.* at n.10.

Before deciding whether to report the other lawyer to the appropriate disciplinary authority under Colo. RPC 8.3, a lawyer may consider raising the issue with the impaired lawyer or the impaired lawyer's firm, or may consider reporting the affected lawyer's impairment to an approved lawyer's assistance program. If the lawyer speaks with the seemingly impaired lawyer, that lawyer may be able to explain the circumstances giving rise to the other lawyer's conclusion regarding impairment. However, the impaired lawyer's denial or explanation may not remove the need to report if the first lawyer continues to conclude that the other lawyer has violated the Rules in a manner that raises a substantial question regarding the other lawyer's fitness to represent clients. ABA Formal Op. 03-431 at text following n.13.

If, after analysis of the appropriate Colo. RPC, a lawyer feels compelled to report a substantially impaired lawyer to the appropriate disciplinary authority, he or she should consider the ethics issues surrounding client confidentiality. *Id.* at n.16. If information relating to the representation will be disclosed, the reporting lawyer should consider whether there is a need to get the client's permission to disclose this information. *See* Colo. RPC 1.6. *See also* ABA Formal Ops. 03-429 and 03-431.

The Committee cannot speak to how the Colorado Supreme Court Office of Attorney Regulation Counsel or other disciplinary authorities may regard the lawful use of medicinal marijuana by attorneys under either the Colorado Rules or other disciplinary rules. *See* CRCP 251.5(b) (grounds for discipline).

Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.

Notes

1. Under Colo. RPC 8.4(b), 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."

2. As of October 2011, sixteen states and the District of Columbia allowed the use of medical marijuana. "U.S. Attorneys in California Set Crackdown on Marijuana," *New York Times* A-9 (Oct. 8, 2011); "Echoes of Prohibition in Nation's Pot Policies," *The Denver Post* 9-B (Oct. 8, 2011).

3. The Colorado Lawyer Assistance Program (COLAP) provides "[i]mmediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice." CRCP 254(2)(a).

4. Colo. RPC 5.1(a) and (b) describe the obligation of managerial and supervisory attorneys to ensure ethical conduct within the firms they manage and by the lawyers they supervise. Lawyers with managerial authority have an affirmative obligation to make reason-able efforts to establish internal policies and procedures designed to give reasonable assurance that all lawyers in the firm, not just impaired lawyers, fulfill the requirements of the Rules. Supervisory lawyers are obliged to make reasonable efforts to ensure that the conduct of the lawyers they supervise conforms with the Rules. [n]

Addendum: On December 10, 2012, subsequent to the adoption of Opinion 124, Amendment 64 to the Colorado Constitution took effect. That Amendment, COLO. CONST. art. XVIII, §16, permits the use of marijuana for non-medicinal, or recreational purposes, subject to the parameters of the Amendment and implementing legislation and regulations. The conclusions stated in this Opinion, and the underlying analysis, apply equally to a lawyer's use of marijuana for medicinal and recreational purposes.

EXHIBIT 6

EXHIBIT 6

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2014-01
(Finalized and effective July 31, 2014)

ISSUE PRESENTED:

Colorado has decriminalized the use and possession of medicinal and small amounts of recreational marijuana, subject to some limitations. Colo. Const. Art. XVIII, sections 14 and 16; § 18-18-406(2)(a), (4), (5)(a), (b), C.R.S.; see also §§ 12-43.3-101 – 1001, C.R.S. However, the possession and use of marijuana for any purpose is still a crime under federal law. See Controlled Substances Act, 21 U.S.C. §§ 801 – 904.

In light of the fact that certain marijuana-related conduct is not a crime under Colorado law but remains a crime under federal law, the requesting judge requested an opinion addressing whether a judge who engages in the personal recreational or medical use of marijuana (as opposed to commercial use) in private and in a manner compliant with the Colorado Constitution and all related state and local laws and regulations violates Rule 1.1 of the Code of Judicial Conduct, or any other provision of the Canons.

CONCLUSION:

Because the use of marijuana is a federal crime, a judge's use of marijuana for any purpose is not a "minor" violation of criminal law and therefore violates Rule 1.1 of the Code of Judicial Conduct.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Rule 1.1 of the Code of Judicial Conduct provides:

> (A) A judge shall comply with the law, including the Code of Judicial Conduct.
>
> (B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.
>
> (C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority in writing of such conviction. . . . This obligation to self-report convictions is a parallel but independent obligation of judges admitted to the Colorado bar to report the same conduct to the Office of Attorney Regulation pursuant to C.R.C.P. 251.20.

The Terminology section defines "law" as encompassing "court rules and orders as well as statutes, constitutional provisions, and decisional law."

DISCUSSION:

Rule 1.1(A) requires judges to comply with the law. Although neither the Rule nor the Terminology section specifies that Rule 1.1 requires compliance with federal as well as state law, it is beyond dispute that judges are required to comply with federal laws. See Jud. Disc. & Disability Comm'n v. Thompson, 16 S.W.3d 212 (Ark. 2000) (judge disciplined for failure to pay federal income taxes); In re Ballance, 643 S.E.2d 584 (N.C. 2007) (same); In re Gallagher, 654 N.E.2d 353 (Ohio 1995) (judge charged with federal drug crimes prohibited from acting as a judge while charges were pending); In re Hamer, 537 S.E.2d 552 (S.C. 2000) (former judge publicly reprimanded following conviction of federal crimes). Indeed, the supreme court Committee to Consider Revisions to the Colorado Code of Judicial Conduct (Committee), which was tasked with considering revisions to the Code following adoption of the revised ABA Model Code in 2007, considered but declined to propose language in what is now Rule 1.1(B) specifying that the rule prohibits violations of "federal and state law," because "citing only federal or state criminal law might be too narrow and limiting to reach . . . violations of local or municipal law . . . that are in substance similar to misdemeanors under the criminal code." Committee to Consider Revisions to the Colorado Code of Judicial Conduct, Minutes of Apr. 22, 2008, Meeting, p. 2.

Federal law prohibits the use of marijuana for any purpose. See 21 U.S.C. §§ 802, 812(c), 841, 844. Because Colorado judges are required to comply with federal law, a judge's use of marijuana in compliance with Colorado law nevertheless violates the law within the meaning of Rule 1.1(A). Cf. Coats v. Dish Network, L.L.C., 303 P.3d 147, 150-51, 155-58 (Colo. App. 2013) ("[B]ecause activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law . . . , for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be 'lawful' under the ordinary meaning of that term.") (cert. granted Jan. 27, 2014); People v. Watkins, 282 P.3d 500, 503-06 (Colo. App. 2012) (mandatory probation condition that a probationer not commit any criminal offense includes federal offenses, and because marijuana use for any purpose is a federal offense, it is an "offense" within the meaning of the probation statute, despite the fact that if it is not a criminal offense under state law); Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 975-77 (Colo. App. 2011) (employee terminated for testing positive for marijuana in violation of employer's policy prohibiting illegal drug use may be denied unemployment compensation benefits even if the worker's use of marijuana is "medical use" as defined in article XVIII, section 14 of the Colorado Constitution; "the illegality of marijuana use under federal law made its presence in any worker's system inappropriate under employer's policy").

However, the fact that a judge's use of marijuana violates the law within the meaning of Rule 1.1(A) does not resolve the requesting judge's question, because not every violation of the law constitutes a violation of the Code. Under Rule 1.1(B), "[c]onduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a

judge must comply with the law." The issue, then, is whether a judge's personal marijuana use is a "minor" violation of the law within the meaning of Rule 1.1(B). We conclude that it is not.

Initially, we note that Rule 1.1(A) is identical to Rule 1.1 of the Model Code, but Rule 1.1(B) appears to be unique to Colorado. The supreme court adopted it at the Committee's recommendation as part of the 2010 Code.[1] Neither the Rule nor the Terminology section defines "minor," but the minutes memorializing the Committee's discussion regarding the reasons for proposing the rule, the scope of the self-reporting requirement in Rule 1.1(C), and the annotation to Rule 1.1 shed light on the court's intent in adopting Rule 1.1(B).

The minutes include the following explanation for the Committee's recommendation that the court adopt what is now Rule 1.1(B):

> The . . . proposed [rule] was crafted in response to the committee's concerns, raised at previous meetings, that the requirement that "[a] judge shall comply with the law" is vague and confusing, and could potentially subject judge's to discipline for misconduct that is minor. . . . As the committee noted, the rule, if read literally and expansively, could subject a judge to discipline for failure to follow precedent in on-the-bench rulings (which would be one form of non-compliance with the law). It also could subject judges to discipline for what typically are regarded as minor infractions, such as receiving a parking ticket or permitting the judge's dog to run at large. Thus, the proposed [rule], which was drawn from a West Virginia Supreme Court opinion, was designed to clarify that judges should be subject to discipline under this rule for more serious failures to adhere to the law in their personal conduct, such as when engage[d] in conduct that would be criminal under state or federal law.

This explanation, particularly the parking ticket[2] and dog at large examples, suggests that the Committee's intent in drafting and the supreme court's intent in adopting Rule 1.1(B) was to exempt as "minor" only violations of relatively insignificant traffic offenses and local ordinances, not state or federal drug laws.

The self-reporting requirement in Rule 1.1(C) reinforces that conclusion, because it requires judges to report having sustained any criminal convictions other than "misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs." The rule thus reflects the court's determination that drug-related traffic offenses are sufficiently serious to trigger the self-reporting requirement while other traffic offenses are too insignificant to be of concern. Concluding that a judge's use of marijuana in violation of federal law is a

[1] The Committee proposed the language in Rule 1.1(B) as a comment to Rule 1.1, but the court adopted it as part of the rule.

[2] We note that even parking tickets can give rise to judicial discipline. See In re Harrington, 877 A.2d 570 (Pa. Ct. Jud. Disc. 2005) (magistrate who repeatedly parked at expired parking meters and displayed parking tickets issued to others violated rule requiring judges to respect and comply with the law).

"minor" violation within the meaning of Rule 1.1(B) would lead to the illogical result that a judge's use of marijuana does not violate the requirement in Rule 1.1(A) that judges comply with the law, but that a judge is nevertheless required to report a federal conviction for marijuana use under Rule 1.1(C). We decline to construe Rule 1.1 as containing such an inherent inconsistency.[3] See People in Interest of S.M.A.M.A., 172 P.3d 958, 959-60 (Colo. App. 2007) (in determining the meaning of court promulgated rules, courts "give the words of the rules their plain meaning and read all the rules in pari materia to effectuate their intent and avoid inconsistencies").

The cases in the annotation to Rule 1.1 support our conclusion that the scope of the minor violations exception to the compliance with the law requirement is extremely narrow. In each case, the court found that the judge's unlawful conduct violated the equivalent of Rule 1.1(A) and warranted discipline; none concluded that the judge's violation of the law was so "minor" or "trivial" that it did not violate the state's Code of Judicial Conduct. See In re Conduct of Roth, 645 P.2d 1064, 1070 (Or. 1982) (noting that not every "violation of law, however trivial, harmless or isolated, would also be a violation" of the requirement that judges comply with the law, but concluding that the judge's misdemeanor criminal offenses warranted discipline, despite the dismissal of the charges); In re Sawyer, 594 P.2d 805, 811-12 (Or. 1979) (recognizing that some violations of law "such as minor traffic infractions[] may be of such a nature as to not come within the intended meaning of" the requirement that judges comply with the law, but concluding that the judge's part-time employment as a teacher at a state-funded college in violation of a state constitutional prohibition on officials of one state department exercising functions of another was not such a "minor" violation and warranted his temporary suspension); Matter of Vandelinde, 366 S.E.2d 631, 633-34 & nn.4, 6, 638 (W.Va. 1988) (noting that a judge's criminal conduct "may, unless the violation is trivial, constitute a violation of the requirement that a judge must comply with the law," but concluding that the judge's excessive contributions to a political organization that supported his candidacy – a misdemeanor offense under the applicable statute – violated the requirement that judges comply with the law and warranted a public reprimand, despite the fact that the judge was not criminally charged) (citing West Virginia Jud. Inquiry Comm'n v. Dostert, 271 S.E.2d 427 (W. Va. 1980) (judge who violated gun licensing statute found to be in violation of Canon requiring compliance with the law)).

Analogizing Rule 1.1(B) to Rule 8.4(b) of the Colorado Rules of Professional Conduct, which 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," the requesting judge notes that in Formal Opinion 124, the Colorado Bar Association Ethics Committee concluded that, by itself, a lawyer's personal use of marijuana constitutes a

[3] We recognize that the self-reporting requirement in Rule 1.1(C) applies only to convictions while Rule 1.1(B) provides that unlawful conduct – not just criminal convictions – may constitute a violation of the Code. See In re Conduct of Roth, 645 P.2d 1064, 1070 (Or. 1982) (conviction not required to support a finding that judge failed to comply with the law). We do not by this comparison suggest that a judge is required to report criminal conduct that does not result in a conviction, or that the requirement that a conviction be reported under Rule 1.1(C) is conclusive as to whether a violation is minor within the meaning of Rule 1.1(B). A violation may be other than a "misdemeanor traffic offense[] or traffic ordinance violation[] not including the use of alcohol or drugs" and still be a minor violation. Conversely, there may be some traffic offenses not involving alcohol or drugs that do not trigger the self-reporting requirement of Rule 1.1(C) but nevertheless violate the law within the meaning of Rule 1.1(A).

federal criminal act that does not violate R.P.C. 8.4(b). Relying on that analogy, the judge suggests that whether an offense is "minor" within the meaning of Rule 1.1(B) should be determined based on a "moral turpitude" test.

But the analogy fails, because Rule 1.1(A) is broader than R.P.C. 8.4(b): it provides that it is judicial misconduct for judges to violate laws in general, not just laws relating to honesty, trustworthiness and professional fitness. The premise of the judge's argument for application of a "moral turpitude" test akin to the test used under R.P.C. 8.4(b) is also flawed, because, while the "moral turpitude" test applied under the now obsolete Code of Professional Responsibility, it is not the standard for determining which offenses constitute professional misconduct under current R.P.C. 8.4(b). As comment 2 to that Rule makes clear, the relevant test is not whether the offense is one of "moral turpitude" but whether it "indicate[s] lack of those characteristics relevant to law practice."[4]

If the supreme court had intended the minor violation exception in Rule 1.1(B) to mirror R.P.C. 8.4(b), it could have done so expressly, by including language in the rule itself or explaining in a comment that "minor" violations are those that do not reflect adversely on the judge's honesty, trustworthiness and professional fitness. But the court did not do so. Indeed, we note that the self-reporting requirement in Rule 1.1(C) expressly refers to the corollary self-reporting requirement for attorneys under C.R.C.P. 251.20. The court was thus aware of the interplay between the rules governing the professional conduct of attorneys and rules governing the conduct of judges when it promulgated Rule 1.1, and we presume that its decision not to analogize the minor violations exception in Rule 1.1(B) to R.P.C. 8.4(b) was intentional. See S.M.A.M.A., 172 P.2d at 960.[5] Moreover, we note that the Standing Committee on the Colorado Rules of Professional Conduct recently proposed an amendment that would have added a comment to R.P.C. 8.4 expressly protecting a lawyer from being disciplined for the personal or medical use of marijuana consistent with Colorado law, but the supreme court did not adopt the

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[4] Comment 2 to R.P.C. 8.4(b) explains that "[m]any kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."

[5] Nor do the cases in the annotation to Rule 1.1 suggest that the minor violations language in Rule 1.1(B) is intended to exempt crimes that do not involve moral turpitude. See, e.g., Sawyer, 594 P.2d 811-12 (part-time teaching job at state funded college); Vandelinde, 366 S.E.2d at 638 (excess campaign contributions). In fact, one specifically held that a judge may be disciplined for behavior that does not affect judicial fitness or the ability to perform judicial duties, and discussed the gravity and seriousness of the judge's conduct in the context of deciding whether it warranted discipline, not in the context of discussing whether it violated the Code. In re Conduct of Roth, 645 P.2d at 1067-70.

proposed comment. We presume that the court likewise would not approve exempting a judge's use of marijuana from discipline under Rule 1.1(A).

We recognize that simple possession of marijuana is a misdemeanor under federal law and that, in some circumstances, marijuana use is an infraction punishable only by a civil penalty. See 18 U.S.C. § 3559(a)(6)-(9); 21 U.S.C. §§ 802(13), (44), 844(a), (c), 844a(a). It is nevertheless a violation of federal criminal law and, in our view, while not necessarily a "serious" offense, it is not a "minor" offense within the meaning of Rule 1.1(B). It is significantly more serious than the parking ticket and dog at large violation referred to in the Committee minutes, and is no less serious than the unlawful conduct of the judges involved in Sawyer and Vandelinde.

Other states have disciplined judges for using and possessing marijuana, concluding that such conduct violates the requirement that judges comply with the law. See, e.g., Matter of Marquardt, 778 P.2d 241, 247-48 (Ariz. 1989); In re Peters, 715 S.E.2d 56, 58 (Ga. 2011); In re Whitaker, 463 So.2d 1291, 1303 (La. 1985); In re Gilbert, 668 N.W.2d 892, 894-95 (Mich. 2003); In re Sherrill, 403 S.E.2d 255, 257 (N.C. 1991); In re Toczydlowski, 853 A.2d 20, 22 (Pa. Ct. Jud. Disc. 2004), overruled on other grounds by In re Murphy, 10 A.3d 932 (Pa. Ct. Jud. Disc. 2010); In re Binkoski, 515 S.E.2d 828 (W. Va. 1999). While marijuana use was illegal under state law when those opinions were issued and the judges' marijuana use was, in many cases, not the only basis for discipline, the requesting judge did not cite and we are not aware of any judicial ethics opinions on this issue from states that have decriminalized the personal use of medicinal or recreational marijuana. Moreover, the difficult issue in those decisions was not whether a judge's illegal marijuana use violates the requirement that judges comply with the law, but whether such a violation warrants discipline. Because we are authorized only to provide state judicial officers with opinions "concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct," not regarding whether such conduct is censurable, see CJD 94-01(I)(A), (XI)(A), (XIII)(A), we do not address whether a judge who uses marijuana consistent with Colorado law should be disciplined for violating Rule 1.1(A) of the Code.

Having concluded that a judge's use of marijuana violates Rule 1.1, we need not address whether it also violates the requirement in Rule 1.2 that judges "act at all times in a manner that promotes public confidence in the . . . integrity . . . of the judiciary" and "avoid impropriety and the appearance of impropriety."

FINALIZED AND EFFECTIVE AS MODIFIED this 31st day of July, 2014.

EXHIBIT 7

EXHIBIT 7

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.