WSBA
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Associate Chief Justice Charles W. Johnson
Chair, Supreme Court Rules Committee
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Re: King County Bar Association Suggested RPC Amendments

Dear Justice Johnson:

The first solemn declaration of Washington's Oath of Attorney is this: "I am fully subject to the laws of the State of Washington and the laws of the United States and will abide by the same." Admission to Practice Rule 5(e). The King County Bar Association's (KCBA) suggested amendments to the Rules of Professional Conduct would change our rules of ethics to provide that in certain circumstances, a lawyer may knowingly violate federal law or assist a client in doing so. This represents a significant change to Washington's Rules of Professional Conduct.

The intent of the suggested amendments, of course, is to address the federal-state conflict of laws in the wake of I-502, our state's ballot initiative that legalizes under state law the possession of small amounts of marijuana and provides for state regulation of marijuana production, processing, and sale. KCBA urges the Court to proceed on an expedited basis. On October 21, 2013, the Court requested suggestions regarding the proposal on or before Octob er 25. I respectfully suggest that the amendments be published for comment under General Rule (GR) 9(g) and/or that, in making an initial determination under GR 9(f) or (j), the Court provide additional time for comment on both the advisability and form of the proposal.

As Chief Disciplinary Counsel, it is my delegated duty to oversee the investigation and prosecution of matters in which lawyers may be subjected to disciplinary action for violations of the Rules of Professional Conduct (RPC) enacted by this Court. KCBA's suggested amendments implicate both the substance of the RPC and the procedures by which they are enforced. I view it as a duty of my office to seek to ensure that regulatory changes to our rules of ethics and discipline are consistent with the profession's fundamental values: protecting the public, preserving the profession's core values, and maintaining a strong, independent, and self-regulating legal profession. It is with my role and these values in mind that I convey these comments. I speak as Chief Disciplinary Counsel only; I am not authorized to take a position on

behalf of the Washington State Bar Association or its Board of Governors.

I appreciate the concerns of KCBA and applaud its swift work in providing the Court with a suggested solution to an ethical dilemma seemingly raised by I-502 and the apparent conflict with the federal Controlled Substances Act. I emphasize that as a matter of policy, I strongly agree with the notion, persuasively stated by the State Bar of Arizona's Committee on the Rules of Professional Conduct in an analogous context, that to prohibit lawyers from assisting clients in conduct clearly in compliance with state law would be "depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits," and that "[l]egal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law." State Bar of Arizona Ethics Op. 11-01 (2011). Nevertheless, in my opinion, there are a number of flaws in the KCBA proposal and, therefore, a number of reasons that the Court, before acting, should consider carefully and deliberately this suggestion to amend the RPC. In short, my comments are these:

A Solution in Search of a Problem. The U.S. Department of Justice has very publicly left it to the states to address marijuana-related activity insofar as state enforcement efforts adequately protect against conduct that implicates federal enforcement priorities. See Memorandum from Deputy Attorney General James M. Cole (Aug. 29, 2013). As a consequence, and for the time being, Washington lawyers and their clients will be at no risk of federal prosecution when compliant with I-502 and its implementing regulations. The KCBA proposal, therefore, seeks to protect lawyers from a disciplinary prosecutor's hypothetical decision to charge an ethics violation for an act technically contrary to federal law, irrespective of the federal government's stated policy and enforcement priorities. But there is no urgent need for such "safe harbor" protection.

Initiative Measure No. 692, the Washington State Medical Use of Marijuana Act, was approved by the voters on November 3, 1998. It is no secret that, for more than a decade, lawyers have advised clients about the Act and provided legal assistance to patients, providers, health care professionals, collective gardens, licensed growers, licensed processors, and licensed dispensaries re garding activities in compliance with the Act. Doubtless some lawyers have qualified as patients and used marijuana under the Act. KCBA has cited no instance of any lawyer being disciplined or subject to discipline for conduct compliant with Medical Use of Marijuana Act. That is because there are none. Similarly, since the effective date of I-502, there is not a doubt that lawyers have been advising and assisting clients preparing to conduct business as state-licensed marijuana producers, processors, and sellers. It is quite possible that some lawyers have personally possessed or ingested small amounts of marijuana within the permissible parameters of our new state law. KCBA has cited no instance of any lawyer being disciplined or subject to discipline for personal or professional conduct compliant with I-502 and its anticipated implementing regulations. That is because there are none.

The Office of Disciplinary Counsel has not disciplined and does not intend to discipline lawyers who in good faith advise or assist clients or personally engage in conduct that is in strict

compliance with I-502 and its implementing regulations.[1] There is no exceptional circumstance or emergency that would support adopting the amendments without publication for comment under GR 9.

Ethics Advisory Opinions Are Adequate to Address New Ethical Dilemmas. The Rules of Professional Conduct are, collectively, a general expression of the legal profession's core values. They should not be amended lightly, and the burden of persuasion with respect to an asserted need to amend the RPC should be high. From time to time, complex practice issues arise because an external change affects the way legal services are delivered. A change in the law, a new technology, an economic crisis, or a host of other factors can create new and unanticipated ethical dilemmas for lawyers. Yet the Rules of Professional Conduct are not amended in every instance in order to solve each of those emerging dilemmas. For example, ten years ago, the uses of cloud-based data storage and the meaning of metadata were essentially unknown to most legal services providers. Now these technologies are ubiquitous and important to the profession, and their potential misuse creates a risk of ethics violations. In the interim, many jurisdictions, including Washington, have guided lawyers in the ethics of handling these technologies by means of ethics advisory opinions. See WSBA Ethics Advisory Ops. 2215 & 2216 (2012). This approach has benefited the profession by encouraging lawyers to thoughtfully apply ethics rules of general application to particular practice situations, thereby assisting in the resolution of specific ethical dilemmas. Meanwhile, the character of the underlying "change agent" may continue to evolve, and the profession's response to it can evolve simultaneously.

Moreover, this approach is consistent with the drafting philosophy of the RPC: "Within the framework of these Rules . . . many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." RPC Preamble ¶ 9. If, by contrast, we hastily amended the RPC to address each new ethical dilemma, we would have more than 600 rules rather than (only) nearly 60. KCBA has not convincingly shown that the usual means of guiding the profession—issuance of ethics advisory opinions—will not work here. Promulgation of ethics opinions seemingly has worked in a number of jurisdictions that have authorized use of medical marijuana against the backdrop of the federal Controlled Substances Act. See, e.g., State Bar of Arizona Ethics Op. 11-01, supra.

The Suggested New Rule Represents a Fundamental Conceptual Change to the RPC. The RPC provide a framework for regulating the behavior of lawyers. They do so largely by specifying what conduct is ethically required and what conduct is ethically prohibited. See RPC Scope ¶ 14 (imperatives in the rules "define proper conduct for purposes of professional discipline"); RPC 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct). Our disciplinary procedural rules, the Rules for Enforcement of Lawyer Conduct, define the regulatory structure used to implement the RPC, including how regulatory discretion is exercised when interpreting and applying the RPC. The KCBA proposal blurs this distinction. Rather than identifying the conduct at issue as ethically required, prohibited, or

[1] In attempting to provide a safe harbor against hypothetical disciplinary enforcement actions that have not occurred, are not occurring, and will not occur, the most likely practical effect of the suggested amendments will be to add an element to the Office of Disciplinary Counsel's burden of proof in situations of legitimate controlled-substance-related disciplinary action, where the safe harbor will likely be asserted as a defense by those who have engaged in conduct that is not compliant with state law.

permissible, it simply declares that certain conduct is not a violation of any other rule and that a lawyer shall not be "subject to discipline" for engaging in such conduct. Characterized as a "safe harbor," this provision would be unique among our Rules of Professional Conduct in providing disciplinary immunity for conduct that may otherwise be unethical. This blunt drafting approach to addressing a subtle ethics issue would benefit from close review and consideration for many reasons. If enacted, it could well become a popular idea for those seeking self-interested exemptions from particular ethics obligations. It leads to the dissonance of the Oath of Attorney saying one thing and the RPC saying another. And a simple safe harbor is not a good substitute for the profession's traditional means of resolving difficult ethical problems, i.e., a lawyer's thoughtful analysis of the competing interests at stake followed by an informed exercise of professional judgment.

The Suggested Amendments Are Otherwise Structurally Infirm. There are a number of particular drafting issues that could be corrected with opportunity and time enough to consider the many implications that arise when amending a tightly constructed set of interrelated rules. Several such issues were spotted when the WSBA Committee on Professional Ethics met and preliminarily reviewed the KCBA proposal. For example, though the comment to Rule 8.4 adverts to the elements of RPC 8.4(b), it neglects to address the variant language of RPC 8.4(i) (prohibiting an 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 RPC 8.4(k) (violation of oath of attorney). Moreover, it appears that suggested Comment [7] to Rule 8.4 may be surplusage, since, by its terms, suggested Rule 8.6 applies "notwithstanding any other provision of these rules," seemingly making it unnecessary to further explain in Rule 8.4 that conduct compliant with I-502 is specifically not a violation of that rule. Finally, I note that suggested Rule 8.6 is not by the language of the rule itself limited to marijuana offenses, and it may have implications beyond I-502 and the federal Controlled Substances Act. Those potential implications appear not to have been analyzed.

For these reasons and those set forth above, I respectfully request more time and opportunity for consideration of this proposal so that a comprehensive, analytic comment can be provided to the Court prior to a decision being made and a significant new RPC being enacted.

Thank you for the opportunity to submit these preliminary written comments. I would be happy to provide the Court with additional thoughts and information.

Sincerely,

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Chief Disciplinary Counsel

cc: Nanette B. Sullins, Administrative Office of the Courts
Patrick A. Palace, President, Washington State Bar Association
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