



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

November 4, 2013

The Honorable Charles Johnson
Rules Committee Chairman
Washington State Supreme Court
Temple of Justice
Olympia, Washington 98504

Dear Justice Johnson:

As you are aware, the Supreme Court Rules Committee has recommended that the Court adopt most of the amendments and comments to the Rules of Professional Conduct proposed by the King County Bar Association (KCBA). On October 24, 2013, Washington State Bar Association (WSBA) Chief Disciplinary Counsel Douglas Ende submitted a letter (the "Ende letter") to the Court requesting additional time for consideration of the proposed new rule and comments. KCBA opposes any delay that would prevent the ethical issues presented by I-502 from being immediately addressed. This letter responds some of the concerns raised by the Ende letter.

Immediate guidance is necessary. I-502's implementing regulations will become effective on December 1, 2013, and KCBA takes the position that attorneys and their clients require prompt ethical guidance on conduct that is now expressly permitted under state law, but criminal under federal law. Through I-502, the Washington voters endorsed a system where marijuana will be sold in a manner that is legal under state law, and heavily regulated. The federal government has recognized that the regulatory regime of I-502 may work as well as criminalization, so long as the new, regulatory approach is actually effective. A heavily regulated system such as I-502 has little chance of succeeding without the help of attorneys, but attorneys might not know whether the RPCs allow them to help at all.

Without new RPCs, the Washington legal community would be telling its citizens that they may need to navigate this regime without the assistance of attorneys. The voters of Washington did not endorse this approach, and the legal community has an obligation to remedy any shortfalls in the RPCs to ensure that an attorney may ethically offer such assistance.

The Ende letter fosters the very type of ethical uncertainty that the proposed amendments are intended to remove. Far from providing clarity, the Ende letter suggests that conduct covered by the proposed amendments violates the oath of attorney and could "reflect disregard for the rule of law," and may simply be "unethical." Mr. Ende also states, however, that his office "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."

In short, Mr. Ende's letter offers a mixed message: his office views the type of conduct addressed by the proposed amendments as unethical under the current rules, but his office may

look the other way for the time being. KCBA's preference is that the ethical issues prompting these proposed amendments be directly addressed with express guidance from this Court.

Only amendments to the text of the rules can address the ethical issues associated with I-502. Mr. Ende's proposal—to leave the current rules in place as I-502 is implemented—simply does not tell lawyers whether it is ethically permissible to counsel or assist clients in conduct permitted by I-502 or to engage in such conduct themselves. It is not enough to ask lawyers to engage in an “informed exercise of professional judgment” before undertaking conduct permitted by I-502. Many attorneys, in considering the text of RPC 1.2(d), will exercise this professional judgment in a manner that concludes that the current ethics rules do not permit the attorney to offer advice to a client engaging in conduct expressly permitted by I-502. KCBA believes that this is undesirable and contrary to the public policy expressed by I-502, which depends on the advice of attorneys for its implementation. A solution that does not answer the question of whether the conduct is ethical or not under the existing rules is no solution at all.

Nor can an ethics advisory opinion by WSBA remedy the uncertainty created by the existing rules. As a threshold matter, WSBA has issued no such opinion, and Mr. Ende offers no guarantee that an opinion would conclude that conduct permitted by I-502 could be reconciled with the existing rules. While the Arizona bar opinion cited in the Ende letter permitted attorneys to advise clients on compliance with its state's medical marijuana act, *see* State Bar of Az. Ethics Op. 11-01 (Feb. 2011), Mr. Ende fails to mention two contrary opinions that would prohibit attorneys from advising clients under similar circumstances. *See* 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) (concluding 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.”); Maine Prof. Ethics Comm'n, Op. 199 (July 7, 2010) (reaching similar conclusion). KCBA itself has prepared an ethics advisory opinion regarding the ethical implications of counseling or assisting clients in complying with I-502 and engaging in personal conduct permitted by I-502. But the KCBA opinion, just like any WSBA opinion, cannot promise attorneys that they will not be subject to professional discipline for such conduct. *See* WSBA, *Advisory Opinions: About Advisory Opinions* (“[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.”).¹ Only this Court can do so.

Neither an unofficial policy of non-enforcement nor an advisory opinion will fully mitigate the chilling effect on advice or personal conduct in compliance with I-502 and its implementing regulations. Lawyers may still be subject to bar complaints regarding their good faith advice to clients regarding I-502 compliance or their own conduct; indeed, KCBA is aware of at least two attorneys who have been the subject of such complaints. While Mr. Ende's office appears uninterested in pursuing complaints such as these, the effect on an attorney's personal life and professional reputation from being accused of misconduct can be substantial, disruptive and expensive. The rule amendments are intended to avoid precisely this effect by making clear to

¹ Available at <http://www.wsba.org/Resources-and-Services/Ethics/Advisory-Opinions> (last accessed Oct. 6, 2013)

attorneys in this state that advice regarding compliance with I-502, or personal conduct in compliance with I-502, is expressly permitted by the RPCs.

KCBA’s solution of a new rule is only as novel as the circumstances warrant. The Ende letter argues that the addition of a new rule to address a specific ethical issue is unprecedented, and counsels delay. Mr. Ende overstates the novelty of new rules adapting to specific situations arising from new legal issues. For example, just this year, the Court added a comment to RPC 4.4(a) that addressed (for the first time) whether an attorney could permissibly inquire into a third person’s immigration status. *See* Cmt. [4] to RPC 4.4 (effective Sept. 1, 2013) (citing *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010)). And RPC 4.4(b), which deals with inadvertent disclosure of documents, is surely a product of increased use of electronic transmissions of documents. *See* Tom Andrews et al., *The Law of Lawyering in Washington*, § II-D-3 at 6-62 (noting that the ABA added section (b) to MRPC 4.4 in 2002, and this amendment was later adopted by Washington). The RPCs are not set in stone and have been substantially and appropriately revised in lesser circumstances than a vote of the citizens of the State of Washington to implement an innovative policy and system of regulation.

Even if the proposed amendments depart in some manner from previous practice, they do so only because I-502 presents previously unknown ethical issues. RPC 1.2(d), which serves the laudable purpose of ensuring that attorneys do not help their clients break the law, simply does not contemplate a situation where the voters of Washington have decided to make legal a form of conduct that is criminalized by federal law, in the hope that a vigorous state regulatory regime will accomplish the same goals in a different manner. The success of this “tightly regulated, state-licensed system,” which includes pages of new regulations, depends on the advice of counsel. Indeed, the federal policy of reducing enforcement efforts in states that have chosen to heavily regulate marijuana, articulated in the August 29, 2013 Memorandum by Deputy Attorney General James M. Cole, hinges in large part on compliance with, and the effectiveness of, the new state regulatory system. Cole Memorandum at 3 (noting 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”).² Any novelty present in KCBA’s approach is not “an enemy of justice,”³ but rather the only way to ensure that legal representation is available to Washington residents seeking to comply with I-502 and its implementing regulations.

The proposed rules are not structurally infirm, and have been the subject of rigorous analysis. The Ende letter suggests that the text of RPC 8.6 and the comments to that rule and Rule 8.4 are infirm, but these criticisms present no reason to delay the rule amendments. First, the comment to RPC 8.4 “advertises to the elements of RPC 8.4(b)” in order to illuminate the rule expressly dealing with criminal acts (which is the issue most directly raised by the interaction of I-502 and the CSA). *See also* Colo. Bar Ass’n Ethics Comm’n Formal Op. No. 124 (2010) (analyzing personal use of medical marijuana under this provision of that state’s ethics rules). To the extent that the comment *should* address other provisions of RPC 8.4, its language could

² The Cole Memorandum is available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³ *Wong v. Beebe*, -- F.3d --, 2013 WL 5539621, at *20 (9th Cir. Oct. 13, 2013) (Kozinski, C.J., concurring) (“Novelty is not an enemy of justice . . .”).

be slightly modified. Second, while Mr. Ende suggests that the comment to RPC 8.4 may be duplicative of proposed rule 8.6, the comment serves the additional purpose of illustrating of the interaction between the new RPC 8.6 and the misconduct provisions of RPC 8.4. As a comment, it creates no rights or duties under the RPCs and can be used for the purpose of explaining the interaction with and application of other rules, as it is here.

Third, the Ende letter suggests that RPC 8.6 may encompass situations other than those arising under I-502. The scope of RPC 8.6 is extremely limited: to come within its scope, the conduct at issue must (i) by a *specific provision* (ii) of *Washington state law and implementing regulations*, be (iii) *specifically permitted* or an affirmative defense to prosecution, (iv) under state *criminal* law. Implicitly, given the nature of the rule, there must also be an underlying federal criminal violation. While RPC 8.6 could hypothetically be applied to another situation in which these elements were established, KCBA is aware of no similar law, and the Ende letter points to none. If there were such a law, now or in the future, it would likely also reflect an independent state policy of decriminalization, like I-502, and be appropriately applied. And if not, the legal community could address its effect at the appropriate time and in its specific context.

The Ende letter also implies, but does not substantiate, that issues raised in the letter have not been studied. To the contrary, in addition to over a decade of leadership on these issues in our state's legal community, KCBA has been engaged in the study of I-502 ethical issues during two board cycles, and the full board has considered ethical issues created by I-502 on at least six separate occasions (first when considering a proposed ABA resolution earlier this year, and later with respect to these amendments) . KCBA has consulted with committees of the ABA Center for Professional Responsibility about how to address these issues, received feedback from the Association of Professional Responsibility Lawyers, reviewed applicable ethical opinions from other jurisdictions, considered the guidance issued by the U.S. Department of Justice, and reviewed the extensive work done by the Colorado Standing Committee on the Rules of Professional Conduct and its subcommittee on its state's recreational marijuana law. As to the latter, the Colorado subcommittee issued a full report while recommending changes to the Colorado RPCs that are similar to those proposed by KCBA. The Association's engagement on this issue has been longstanding and substantial.

No further delay should be undertaken at the expense of Washington attorneys and their clients, who need immediate guidance on I-502 issues.

The King County Bar Association thanks the Court for its consideration of this issue and urges it to adopt the proposed amendments.

Sincerely,



Anne M. Daly
President, King County Bar Association

November 4, 2013

Page 5

cc: Members of the Court
Mr. Patrick Palace, President, Washington State Bar Association
Paula Littlewood, Executive Director, Washington State Bar Association
Douglas Ende, Disciplinary Counsel, Washington State Bar Association
Andrew J. Prazuch, Executive Director, King County Bar Association