



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

October 4, 2013

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

Dear Justices Madsen and Johnson:

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

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

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

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

At its August meeting, the KCBA Board of Trustees voted to support the creation of a new RPC to address the conflict between state and federal law. The new rule would create a safe harbor for attorneys and would provide that a lawyer would not be in violation of the RPCs or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of Washington law and implementing regulations is either (a) permitted or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal law.

October 4, 2013

Page 2

In addition, the Board subsequently voted to support a proposed comment to RPC 8.4 (Misconduct) that would also address the issue of a lawyer who engages in legal state action, such as personal use of marijuana. The comment recognizes that a lawyer's use of marijuana may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence. Such violations may subject the lawyer to discipline. However, consuming marijuana in and of itself — like the consumption of alcohol — would not be misconduct.

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

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

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

Sincerely,

A handwritten signature in cursive script that reads "Anne M. Daly". The signature is written in black ink and is positioned above the typed name and title.

Anne M. Daly
President, King County Bar Association

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

GR 9 COVER SHEET

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

Submitted by the King County Bar Association

- A. **Name of Proponent:**
King County Bar Association
- B. **Spokesperson:**
Anne M. Daly, President, King County Bar Association, 1200 Fifth Avenue, Suite 600,
Seattle, WA 98101 (telephone 206-267-7061)
- C. **Purpose:**
Removes from misconduct violation any work by an attorney when advising a client about a state law that might be in violation of a federal law, and expresses that an attorney who personally uses marijuana as permitted under state law would not be subject to discipline only for that reason.
- D. **Hearing:**
A hearing is not requested.
- E. **Expedited Consideration:**
KCBA believes that exceptional circumstances justify expedited consideration of the suggested rule, notwithstanding the schedule set forth in GR9(i). The new marijuana law becomes effective in just two months, on December 1, 2013, which could result in attorneys operating without clear RPC guidance in this important area.

1 **SUGGESTED RULE CHANGES**

2 **RULES OF PROFESSIONAL CONDUCT**

3 **Recommended by the King County Bar Association**

4
5 **Proposed Additional Comment to Rule 8.4:**

6 [7] As provided by Rule 8.6, conduct of a lawyer that by virtue of a specific provision of
7 Washington state law and implementing regulations is either (a) permitted, or (b) within an
8 affirmative defense to prosecution under state criminal law, does not reflect adversely on the
9 lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct,
10 standing alone, may violate federal law. This comment specifically addresses Washington State
11 Initiative Measure No. 502, approved by the voters on November 6, 2012. The phrase "standing
12 alone" clarifies that a lawyer's use of marijuana, while itself permitted under state law, may cause
13 a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other
14 rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to
15 discipline. The phrase "standing alone" is further addressed in Comment [2] to Rule 8.6.

16
17 **New Rule 8.6**

18 Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these
19 rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to
20 engage in conduct, that by virtue of a specific provision of Washington state law and
21 implementing regulations is either (a) permitted, or (b) within an affirmative defense to
22 prosecution under state criminal law, solely because that same conduct, standing alone, may
23 violate federal law.

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Comments to New Rule 8.6

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

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



President's Page

By Anne M. Daly

Legalized Marijuana:

Taking the Lead on Drug Policy Reform

Remember the ethics portion of the bar exam? While you may have hoped to never see another bar question, here are two ethics questions relevant in our community for you to ponder:

1. Sam is a lawyer in King County. He has been in practice for several years and has a stellar reputation. He is a solo practitioner and relies heavily on word of mouth for clients.

Mary is a potential client who is referred to Sam. In their initial meeting, Mary informs Sam that she would like his help in setting up a legal marijuana distribution business in King County. She needs advice on banking and tax issues, insurance, employment, zoning, regulatory compliance, and corporate structure.

While the marijuana business contemplated by Mary is legal in Washington, it is illegal under federal law to possess or distribute marijuana in any state. If Sam advises and assists Mary, is he subject to disciplinary action under the Rules of Professional Conduct?

2. Cathy is an attorney in a large law firm in King County. Cathy works long hours; she is often in the office by 6:30 a.m. and there until late in the evening. Lately, Cathy has been working on a highly stressful and time-sensitive matter. Cathy finds that she is having a hard time relaxing enough to sleep at night.

She sees her doctor, who offers sleeping pills. After reading about the side effects of the pills, Cathy is leery of taking them. One of Cathy's friends suggests she try marijuana. Cathy decides to do so as an alternative to the sleeping pills.

Cathy smokes her marijuana in the privacy of her home to help her relax. Recreational use of marijuana by an adult is legal in Washington. Recreational use of marijuana by an adult in any state is illegal under federal law. Is Cathy subject to disciplinary action under the RPCs for her personal use of marijuana?

To answer either question, one should first turn to the RPCs. They offer no guidance. One might next look for an advisory ethics opinion for direction. There is none.

Both Sam and Cathy run the risk of disciplinary sanctions even though their conduct would be legal under state law. So, where does this leave Sam and Cathy or any of the more than 14,000 lawyers in King County who could easily find themselves in a similar predicament?

KCBA is taking the lead in seeking answers to these questions. Since 2001, KCBA has been a leader on drug policy reform. KCBA has been recognized numerous times in connection with its Drug Policy Project (for our history on drug policy reform, go to www.kcba.org/druglaw). It is only natural that KCBA be the leader in navigating the challenges that the adoption of I-502 presents to Washington attorneys.

Through our ABA Delegate Tom Fitzpatrick, KCBA began looking for a solution to the conflict between state and federal law more than six months ago. KCBA adopted a resolution for presentation at the ABA's House of Delegates meeting in August. KCBA had hoped to have WSBA's support for this resolution. However, WSBA declined in May to support the resolution or to establish a joint work group to look for solutions to this problem.

Instead, WSBA offered to refer the matter to its Committee on Professional Ethics, which was not scheduled to meet until this month. Such a delay likely would result in no changes being made to the RPCs until September 2015 under the timeline provisions of

GR 9, Supreme Court Rulemaking. As a result, KCBA withdrew its resolution to the ABA and began to look at other possible ways to solve this problem prior to I-502's December 1 implementation date.

At our August and September meetings, the KCBA Board of Trustees adopted a proposed comment to RPC 8.4 (Misconduct) that would address the issue of a lawyer who engages in legal state action, such as Cathy's personal use of marijuana. The comment recognizes that a lawyer's use of marijuana may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence. Such violations may subject the lawyer to discipline. However, consuming marijuana in and of itself — like the consumption of alcohol — would not be misconduct.

Additionally, the Board voted to support the creation of a new RPC to address the conflict between state and federal law. The new rule would create a safe harbor for attorneys like Sam and provides that a lawyer shall not be in violation of the RPCs or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of Washington law and implementing regulations is either (a) permitted or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal law.

The brain behind these two proposals is an ad hoc committee convened to make recommendations addressing the conflict between state and federal law. Former KCBA President Mark Fordham chairs this committee. Joining him are Fitzpatrick, our ABA delegate; Alison Holcomb of the ACLU; and James Yand, an attorney with Miller Nash. This ad hoc committee drafted the proposed comments to the RPCs as well as the proposed, new RPC adopted by the Board. Copies of KCBA's recommendations and related materials are online at www.kcba.org/502ethics.

The ad hoc committee is now drafting an advisory ethics opinion that will be taken up by the board at a future meeting. I am very proud of the work done by this ad hoc committee and the strong leadership that Mark and Tom have provided. They have my utmost respect and sincere thanks for their efforts on this issue.

In addition to the strong work of our ad hoc committee, Andy Prazuch and I met with Chief Justice Barbara Madsen, Attorney General Bob Ferguson and Gov. Jay Inslee's Chief Counsel Nick Brown on this issue. All three expressed interest in our work and have asked that we share our proposed RPC changes with them.

KCBA will be forwarding our proposed RPC comments and new rule to the Washington Supreme Court and will call on the justices to amend the RPCs to offer ethical guidance to attorneys as they advise clients and conduct their own affairs now that I-502 is the law in Washington.

The KCBA Young Lawyers Division also has voted to support the drafting of an advisory ethics opinion and to support changes to the RPCs to create a safe harbor for attorneys and clarity in the RPCs.

We now face another challenge in moving these proposed rule changes forward — the timeline set forth in GR 9. Without going into great detail, our proposed changes could not go into effect until September 1, 2014, under the normal rulemaking process.

GR 9 does have a provision for expedited consideration that allows the process to be accelerated. As I-502 takes full effect on December 1, I believe acceleration is warranted. Attorneys need guidance and clarity now, not in a year or more.

It is your turn to lead on this issue. I ask that you contact our Supreme Court justices and encourage them to expedite the rulemaking process on KCBA's proposed RPC 8.6 and the proposed comment to RPC 8.4. It is critical that attorneys have direction sooner rather than later. Please help make this happen. It's the right thing to do. ■

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The King County Bar Association provides support to its diverse membership; promotes a just, collegial and accessible legal system and profession; works with the judiciary to achieve excellence in the administration of justice; strives to benefit the community through its own efforts and those of its Foundation; and offers opportunities for public service and input into matters of public policy.

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