MEMORANDUM

DATE: August 7, 2013

TO: KCBA Board of Trustees

FROM: Mark Fordham, Chair Ad Hoc Committee on I-502 Ethics Issues

RE: Proposed Changes to Washington Rules of Professional Conduct

KCBA's ad hoc committee on I-502 ethics issues recommends that the KCBA board approve a proposal for changes to the Washington Rules of Professional Conduct and transmit this recommendation directly to the Washington Supreme Court for its consideration.

Background
The Washington State Bar Association did not accept KCBA's proposal to appoint a joint working group to address the ethics issues related to I-502 implementation, deferring the issue to a state bar committee that is not scheduled to meet until October. Recognizing this would not be a timely solution, KCBA President Anne Daly appointed an ad hoc committee to develop an alternate approach for KCBA's board to consider. The KCBA committee met July 31 and included KCBA past president Mark Fordham (chair), Tom Fitzpatrick, Alison Holcomb, James Yand, and Andrew Prazuch.

Colorado Approach
The committee focused on the extensive work done on this issue by the Colorado Bar Association in response to their state's simultaneous adoption of a similar ballot measure to Washington's. Their state bar, upon recommendation from its Standing Committee on Colorado's Rules of Professional Conduct, has proposed to their state Supreme Court that the Colorado RPCs be amended to include a new rule (and attached comments to the rule) that 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. The Colorado Bar Association also has recommended to their Supreme Court that a comment be added to the existing misconduct rule (8.2) to express that an attorney who personally uses marijuana as permitted under state law would not be subject to discipline only for that reason.

KCBA's ad hoc committee endorsed the Colorado approach as appropriate for Washington. Attached to this memo is draft language (based on the Colorado materials) that we propose KCBA immediately transmit to the Washington Supreme Court.

Ethics Advisory Opinion
The KCBA committee also discussed the usefulness of KCBA issuing an ethics advisory opinion on this issue. The committee felt that while such opinions traditionally would come from the state bar or American Bar Association, there is no prohibition on KCBA developing a statement of its own. Such an opinion would not offer attorneys an official safe harbor, and KCBA would
need to include a disclaimer on the extent to which an attorney might rely on a KCBA statement. However, the committee still felt such a statement would not be unusual for KCBA given our long history of work on public policy issues including drug policy. The final statement would be published in the Bar Bulletin.

The Committee has begun drafting this statement and will bring it to the Board of Trustees for approval, likely at the September board meeting.

**Conclusion**

We recommend the board approve that KCBA call on the State Supreme Court to amend the RPCs to offer attorneys ethical guidance as they advise clients and conduct their own affairs now that I-502 is the law of Washington. The KCBA President would transmit the recommendation to the Court, with a copy send to WSBA.
The following language is based on what the Colorado Bar Association has proposed to its Supreme Court. Note that there is some redundancy by both comment to 8.4 and a new rule 8.6, but the Colorado Bar felt this approach was preferred because potential discipline would not be imposed solely on advising clients (which isn't addressed in the existing rule), but also imposed under the personal misconduct section of the existing RPC.

**Proposed Comment to Rule 8.4:**
Conduct of a lawyer that by virtue of a specific provision of Washington state law and implementing regulations is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal law. This comment specifically addresses Washington State Initiative Measure No. 502, approved by the voters on November 6, 2012. The phrase "standing alone" clarifies that a lawyer's use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

**New Rule 8.6**
Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of Washington state law and implementing regulations is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal law.

**Comments to New Rule 8.6**
1. This rule specifically addresses Washington State Initiative Measure No. 502, approved by the voters on November 6, 2012.

2. The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer's personal conduct, or advice to clients, includes, but is not limited to activity, permitted by Washington state law, and that conduct in total contravenes federal laws other than those prohibiting 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.