



WSBA

COMMITTEE ON PROFESSIONAL ETHICS

TO: WSBA President, President-Elect, and Board of Governors

FROM: Mark Fucile, Chair, Committee on Professional Ethics
Jeanne Marie Clavere, Staff Liaison

RE: Report and Recommendations on Ethical Issues and Initiative 502

DATE: January 8, 2014

<p>ACTION REQUESTED: Approve CPE recommended integrated approach of proposed Washington-specific comments adopted by the Supreme Court and a cross-referenced advisory opinion issued by the Bar Association. (ACTION)</p>
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Executive Summary

At the direction of the Board of Governors, the Committee on Professional Ethics undertook a comprehensive review of options to address professional responsibility issues arising from the voters' adoption of Initiative 502 in the Fall of 2012. As is discussed more fully in the following report, the CPE recommends an integrated package of proposed Washington-specific comments to the Rules of Professional Conduct together with a cross-referenced proposed advisory opinion. The proposals are attached. If the proposed comments are adopted by the Washington Supreme Court, then the CPE would follow by issuing the proposed advisory opinion. The proposed package concludes that advising and assisting clients with activities permitted by I-502 is permissible under the Washington RPCs as long as the Federal Government continues its announced policy of not generally enforcing federal statutory law otherwise prohibiting the manufacture, distribution, sale and use of marijuana as long as such conduct conforms to I-502. For the same reasons, the proposed package reaches the same conclusion concerning a lawyer's personal use of marijuana within the scope permitted by I-502 and the current federal enforcement policy. The proposed package would blend the imprimatur of the Supreme Court through the adoption of comments to the RPCs with the more detailed treatment of the matters concerned afforded by a cross-referenced advisory opinion issued by the Bar Association. The CPE concluded that amending the text of the RPCs was not advisable for multiple reasons that are fully discussed below. As the Supreme Court Rules Committee requested, the CPE also reviewed the proposals currently before the Court from the King County Bar Association. The CPE concluded that the blended approach proposed by the CPE that is tied specifically to the current federal enforcement policy is a more prudent approach than a blanket exemption from the regulatory consequences of the violation of a federal criminal law that

supersedes state law under the Supremacy Clause of the United States Constitution and has recently been upheld in the context of medical marijuana by the United States Supreme Court.

I. INTRODUCTION

The Board of Governors asked the Committee on Professional Ethics to review professional responsibility issues arising from the voters' adoption of Initiative 502 in the Fall of 2012. Subsequently, the Supreme Court Rules Committee requested comment on related proposals for amendments to the Rules of Professional Conduct (RPCs) submitted by the King County Bar Association.

The CPE began operations this past October and has devoted the bulk of our activities to date on this topic. We had wide-ranging discussions of various options to address the ethics issues surrounding the adoption of I-502 at multiple meetings/calls and had the benefit of a subcommittee's detailed analysis and development of the approach reflected in this report.

Based on those discussions, the CPE concluded unanimously that an integrated approach of proposed Washington-specific comments to the RPCs and a cross-referenced advisory opinion would be the most appropriate way to proceed. Copies of the CPE's proposals are attached. The CPE opted for this blended approach so that Washington lawyers would—if the proposed comments are adopted by the Supreme Court—have the additional comfort of the Supreme Court's approval via comments cross-referenced with a more detailed discussion afforded by an advisory opinion issued by the CPE. Because these matters are being handled outside the regular GR 9 process, the CPE's opinion would only be issued (in its current form) if the Supreme Court adopts the accompanying cross-referenced comments. As are reflected in the CPE proposals, we concluded that *as long as* the Federal Government continues its announced policy of not generally targeting for prosecution individuals acting within I-502, Washington lawyers should be free to advise and assist such clients in carrying out activities within the scope permitted by I-502. The CPE proposals reach the same general conclusion regarding a lawyer's personal use of marijuana consistent with I-502.

As is discussed in more detail below, the CPE concluded unanimously that the text of the RPCs should not be amended to include a blanket exemption for the regulatory consequences of a violation of federal criminal law.

II. ANALYSIS

A. Background

Although Washington and Colorado are the first states to generally legalize marijuana manufacture, distribution and possession at the state level (subject to their respective voter-approved initiatives), a number of states (including Washington) had earlier adopted a variety of medical marijuana statutes. Therefore, the present set of issues is not painted against a completely blank slate.

For lawyers, the issues concerned turn primarily on two provisions of the RPCs: 1.2(d) and 8.4(b). The former permits a lawyer to “discuss the legal consequences of any proposed

course of conduct with a client” but prohibits a lawyer from “assist[ing] a client, in conduct that the lawyer knows is criminal[.]” The later prohibits a lawyer from “commit[ing] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” To the extent that a lawyer wishes to enter into a marijuana-related business with a client, then the business transaction rule—RPC 1.8(a)—would also be triggered. Washington also has three provisions in its version of RPC 8.4 that differ from the corresponding ABA Model Rule on points relevant to the present discussion: RPC 8.4(i), which proscribes “any act . . . which reflects disregard for the rule of law”; RPC 8.4(k), which classifies as professional misconduct the violation of the “oath as an attorney”; and RPC 8.4(n), which includes within professional misconduct “conduct demonstrating unfitness to practice law.”

These professional rules come into play in the marijuana context because although states have passed a variety of statutes allowing medical and now general sale and use of marijuana, the manufacture, distribution and/or possession of marijuana remains a federal crime under the Controlled Substances Act (CSA), 21 U.S.C. § 801, *et seq.* Further, under Article VI, Clause 2 of the United States Constitution—the “Supremacy Clause”—federal law controls not withstanding any inconsistent state law.

Four other states have issued ethics opinions on aspects of these issues. Four (Arizona (2011), Colorado (2012), Connecticut (2013) and Maine (2010)) are in the context of medical marijuana. One—Colorado (2013)—also addresses the issues in the context of its adoption of a voter-approved initiative permitting general personal use roughly similar to Washington. They did not produce uniform results. Generally, those that reached the issue found that a lawyer could, consistent with state variants of ABA Model Rule 1.2(d), *advise* clients concerning the interpretation and application of federal and state law in this area. But, two—Connecticut and Maine—concluded that a lawyer could not generally *assist* a client in violating federal law. Colorado concluded in one opinion that personal use by a lawyer of medical marijuana would not ordinarily constitute a violation of its version of RPC 8.4(b). At the same time, the more recent Colorado opinion concluded that a lawyer could not assist a client in violating federal law. Arizona took a more nuanced approach. Relying on guidance published by the United States Department of Justice to the effect that it would not ordinarily prosecute individuals using medical marijuana consistent with Arizona law (provided that other factors, such as money-laundering or ties to organized crime, were not present), Arizona concluded that assisting clients in implementing state law in this area (again, consistent with both state law and the federal guidance from the U.S. Department of Justice), would not ordinarily violate its version of RPC 1.2(d).

The CPE also reviewed and took into consideration the ethics opinion issued this past Fall by the King County Bar Association.

As is discussed in more detail in the accompanying proposed opinion, the questions presented by I-502 are unfolding in a very unusual context. The Washington and United States Attorneys General met to discuss I-502 and issued press releases reflecting a willingness on the part of the Federal Government not to oppose the implementation of I-502 within its terms. At the same time and as discussed in the cases noted below, the Federal Government has not ceded its ability to enforce the CSA should circumstances (or Administrations) change.

B. Potential RPC Amendments

There was no support on the CPE for amending the text of the RPCs, including the proposals put forward by the KCBA, to create an exemption from the regulatory consequences of violating federal criminal law.

The principal reasons were as follows.

First, notwithstanding the adoption in Washington of I-502, marijuana manufacture, distribution and/or possession remains a federal crime under the CSA. The United States Supreme Court upheld the constitutionality of the CSA in the context of medical marijuana manufacture, distribution and use in *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L.Ed.2d 1 (2005). The Ninth Circuit reiterated the constitutionality of the CSA in the medical marijuana context in *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007). Subsequent decisions by a variety of federal courts within the Ninth Circuit have emphasized that although the United States Department of Justice has issued “guidance” to federal prosecutors for application of the CSA in the medical marijuana context, Congress has not repealed the CSA as it relates to marijuana. Examples include: *Montana Caregivers Ass’n v. U.S.*, 841 F. Supp. 2d 1147, 1148-49 (D. Mont. 2012) (“A reasonable person, having read the entirety of the Ogden Memo, could not conclude that the federal government was somehow authorizing the production and consumption of marijuana for medical purposes. Any suggestion to the contrary defies the plain language of the Memo.”); *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1111-12 (E.D. Cal. 2012) (rejecting estoppel argument by medical marijuana dispensary seeking to bar enforcement of the CSA); *Marin Alliance for Medical Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1153-59 (N.D. Cal. 2011) (denying TRO to medical marijuana dispensaries challenging federal enforcement of the CSA). Notably, the U.S. Department of Justice in the cases cited vigorously defended the right of the Federal Government to enforce the CSA notwithstanding state laws permitting medical use of marijuana.

Second, the Supremacy Clause of the United States Constitution (Article VI, Clause 2), reads, in relevant part: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The United States Supreme Court in *Raich* noted that “[d]espite considerable efforts to reschedule marijuana, it remains a Schedule I drug [under the CSA].” 545 U.S. at 15.

Third, the Washington RPCs are rules of general application both in their classification and application. There are no exemptions granted from the application of particular federal statutes. To the contrary, Paragraph 5 of the Preamble notes: “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.” Similarly, the oath required of attorneys under APR 5(e) requires (in Paragraph 1) that Washington lawyers acknowledge that they are subject to federal as well as state law and that they “will abide by the same.”

Fourth, especially in light of the unusual circumstances here, we did not favor amending the RPCs—which, again, are intended to be rules of general application—to address every new development in law practice. We felt that a blend of Washington-specific comments (such as the recent addition to the comments (Washington Comment 4) to RPC 4.4 addressing *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010)) and a cross-referenced advisory opinion

(such as the recent advisory opinion on cloud computing) was a more appropriate vehicle to address these emerging issues. Further, we were concerned that, under the proverbial “law of unintended consequences,” a blanket exemption in the text of the RPCs may be enlarged (either intentionally or inadvertently) to encompass other activities in undesirable and unpredictable ways—again because the RPCs themselves are rules of general application.

In sum, we did not find that a categorical exemption from the regulatory consequences of a violation of federal criminal law to be supported by either the text or the context of the RPCs.

C. Potential RPC Comments

The CPE concluded that a cross-referenced package of Washington-specific comments and an ethics opinion is the most appropriate way to address the issues concerned.

Our reasoning was twofold.

First, the lynchpin of our analysis was that although marijuana manufacture, distribution and possession remain a federal crime, the U.S. Department of Justice has taken the position that it will not oppose implementation of I-502 within its terms (and subject to other individual factors such as the absence of organized crime involvement in any given business or person acting within I-502). We acknowledge that federal policy may change and, as several of the court decisions noted above illustrate, the Federal Government has reserved its ability to fully enforce federal statutory law. Therefore, we intentionally couched our analysis in light of present circumstances as neither the Bar Association nor the Washington Supreme Court has the power to repeal or invalidate federal statutory law that has recently been upheld by the United States Supreme Court.

Second, at the same time, we favored an approach that blended the more detailed discussion available through an advisory opinion with the imprimatur of the Supreme Court through an accompanying set of comments that cross-referenced the opinion. Comments are classified as “guidance for practicing in compliance with the Rules.” (Scope, ¶ 14.) But, unlike an advisory opinion issued by the Bar Association (which, as the term implies, would be advisory only and not binding on either the Office of Disciplinary Counsel or the adjudicators in the disciplinary system), comments are adopted directly by the Supreme Court.

In sum, the reasoning underlying the respective opinion and comments do not vary and, in fact, the analytical basis for our conclusions is set out in greater detail in the proposed opinion because that format lends itself more readily to an extended discussion. The addition of a cross-referenced comments, however, reinforces the result of the opinion if the proposed comments are adopted by the Supreme Court.

Because the Supreme Court Rules Committee asked us for comments on the KCBA proposals, we also offer the following observations. Although we understand from the Chief Disciplinary Counsel’s letter of October 24, 2013, to Justice Johnson, Chair of the Supreme Court Rules Committee, that no Washington lawyer has ever been disciplined for a violation of Washington’s medical marijuana statute and the Office of Disciplinary Counsel has no plan to undertake such prosecutions under I-502, we nonetheless appreciated the considerable work that the KCBA put into these issues. However, we favored the integrated comment-opinion approach

described above over the comments proposed by the KCBA because we respectfully believe that the KCBA's proposed comments suffer from the same defect as its proposed amendments to the text of the RPCs: on their face they create an exemption from the regulatory consequences of a violation of federal criminal law. For the reasons outlined above, we do not believe that this unprecedented suggestion is consistent with the RPCs as rules of general application or with the other aspects of the RPCs and APRs noted. As also noted earlier, we were concerned that the exemption that the KCBA proposes may be enlarged (either intentionally or inadvertently) to encompass other activities in undesirable and unpredictable ways.

III. RECOMMENDATION

For the reasons noted, the CPE recommends an integrated approach of proposed Washington-specific comments adopted by the Supreme Court and a cross-referenced advisory opinion issued by the Bar Association.

Attachments:

- Proposed Washington Comment [18] to RPC 1.2
- Proposed Washington Comment [7] to RPC 8.4
- Proposed Advisory Opinion 2232

RULES OF PROFESSIONAL CONDUCT (RPC)

SUGGESTED RULE 1.2

Scope of Representation and Allocation of Authority Between Client and Lawyer

1 Additional Washington Comment [14-18]

2
3 *Special Circumstances Presented by Washington Initiative 502*

4 [18] Since the passage of I-502 by Washington voters in November 2012, both the federal and
5 the state government have devoted considerable resources to allowing I-502 to come into effect
6 without regard to federal controlled substances laws, as long as certain stated federal concerns
7 regarding matters such as sales to minors and other unlawful conduct are addressed. See, e.g.,
8 Washington State Bar Association Advisory Opinion 2232 and sources cited. At least until there
9 is a subsequent change of federal enforcement policy, a lawyer who counsels or assists a client
10 regarding conduct permitted under I-502 does not, without more, violate RPC 1.2(d). See also
11 Washington Comment [7] to RPC 8.4.

RULES OF PROFESSIONAL CONDUCT (RPC)

SUGGESTED RULE 8.4 Misconduct

1 Additional Washington Comment [6-7]

2
3 *Special Circumstances Presented by Washington Initiative 502*

4 [7] A unique circumstance was presented by the November 2012 passage by Washington
5 voters of I-502, which allows for the creation of a state-regulated system for the production and
6 sale of marijuana for recreational purposes. At least until there is a subsequent change of federal
7 enforcement policy, a lawyer who engages in conduct permitted under I-502, does not, without
8 more, violate RPC 8.4(b), (i), (k), or (n). See also Washington Comment [18] to RPC 1.2.



WASHINGTON STATE BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS

Proposed Advisory Opinion: 2232
January 8, 2014

Providing Legal Advice and Assistance to Clients Under Washington State Marijuana Law I-502; Lawyer's Participation in Marijuana Business and Purchase of Marijuana in Compliance with State Law

FACTS:

In November 2012, Washington voters passed Washington Initiative 502 ("I-502"), which sets forth terms and conditions under which marijuana may be produced and sold to general retail customers. Since then, government officials at both the federal and state levels have repeatedly discussed means by which I-502 can be implemented notwithstanding federal anti-drug laws, 21 USC §§ 801–904, and the "Supremacy Clause" contained in Article VI, Clause 2 of the United States Constitution. For example:

- The Washington Attorney General and the United States Attorney General have met and discussed these matters and have issued press releases that indicate a federal willingness not to oppose the implementation of I-502 within its terms. *See, e.g.*, Joint statement from Gov. Jay Inslee and AG Robert 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/pressrelease.aspx?&id=31361>; USDOJ: Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013), available at <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>.
- The Washington Governor has testified about the care that will be taken to implement I-502 in a way that will not be federally challenged. *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/news/releases/article.aspx?id=145>; a copy of the testimony available at http://www.governor.wa.gov/documents/testimony_20130910.pdf
- 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, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009),

available at <http://blogs.justice.gov/main/archives/192>; Memorandum from James M. Cole, Deputy Attorney General, to 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>; 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”)

- The executive branch of Washington State Government—including not only Washington’s Governor and Washington’s Attorney General—is actively and openly involved in setting the standards for implementation of I-502.

Lawyer A wishes to give Client A legal advice about how I-502 and any regulations issued thereunder may be interpreted and complied with.

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 any regulations issued thereunder.

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

Lawyer D wishes to purchase marijuana in compliance with I-502 and any regulations issued thereunder.

QUESTIONS:

1. May Lawyer A advise Client A about the interpretation of and compliance with I-502 and any regulations issued thereunder 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 any regulations issued thereunder without violating the RPCs?
3. May Lawyer C own and operate a business in compliance with I-502 and any regulations issued thereunder without violating the RPCs?
4. May Lawyer D purchase marijuana in compliance with I-502 and any regulations issued thereunder without violating the RPCs?

CONCLUSIONS:

1. Yes, qualified.
2. Yes, qualified.

3. Yes, qualified.
4. Yes, qualified.

DISCUSSION:

1. Lawyer A: Giving Legal Advice to Client A About I-502

Whether or not Lawyer A knows that Client A's proposed conduct violates any state or federal law, Lawyer A may advise Client A about the legality of Client A's proposed conduct. 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 [1] 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.

As noted in Official Comment [9] to RPC 1.2:

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.

We emphasize, however, that Lawyer A may not knowingly advise Client A about how to violate or conceal any violations of I-502 or any regulations that may be issued thereunder. *See* Official Comments [10]² and [13]³ to RPC 1.2. In addition, and pursuant to the duty of

¹ 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.

² Official Comment [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

competent representation that Lawyer A owes to Client A under RPC 1.1,⁴ Lawyer A must advise Client A about the risks to Client A under federal law.⁵

2. Lawyer B: Advising Client B to Engage in Business Under I-502 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 any regulations issued thereunder notwithstanding ostensibly controlling federal law to the contrary and to assist Client B in doing so.⁶ In addition to the analysis and conclusion in the preceding section of this advisory opinion, because Lawyer B's conduct goes beyond the mere expression of a legal opinion as to what is or is not lawful, it also becomes necessary to consider RPC 8.4, which provides in pertinent part that:

It is professional misconduct for a lawyer to:

* * * *

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.

³ Official Comment [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).

⁴ 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.

⁵ *Cf. Montana Caregivers Ass'n, LLC v. U.S.*, 841 F.Supp. 2d 1147 (D. Mont. 2012) (although plaintiff's conduct may have been legal under state marijuana laws, it was illegal under the federal Controlled Substances Act).

⁶ Since we are not authorized to opine on general questions of constitutional or statutory law, we assume for purposes of this opinion that there are no potentially meritorious (*i.e.*, non-frivolous) grounds on which Lawyer A could assert either that the Supremacy Clause would not prevail in the context of I-502 or that any applicable federal law would have to be construed consistently with I-502. *Cf.* Official Comment [4] to RPC 8.4 ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.").

(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;

In our opinion, and at least for as long as the federal government continues to take the same approach to I-502, Lawyer B's conduct and legal advice does not violate these rules.

As a general matter, and as noted in Official Comment [14] to the Scope section of the RPCs:

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. *See* 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"). The State of Washington has approved the activities in question, and the United States Department of Justice has 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 enacted regulatory measures expressly directed at addressing federal concerns. In light of Washington's and the federal government's efforts to address the

tension posed by I-502 and the federal drug laws, a lawyer's assistance of a client to engage in activities authorized by I-502 and its regulations does not undermine the rule of law or subvert the legal system in the sense intended by either of these Rules of Professional Conduct.

Under these truly extraordinary circumstances, it would be highly unreasonable, harmful to the public, and counterproductive to prohibit lawyers from advising private clients about this process. Clients who wish to comply with I-502 will 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. In addition, the predominant purpose of lawyer discipline is to protect the public. *See, e.g., In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 257, 66 P.3d 1057 (2003) (citing *In re Disciplinary Proceeding Against Noble*, 100 Wn.2d 88, 95, 667 P.2d 608 (1983)).

Washington voters approved I-502. Given the clear efforts presently being made by federal authorities to allow the implementation of I-502 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, consistently with those federal concerns. Stated another way, such conduct by a lawyer, without more, does not 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)). To the contrary, if lawyers could not give legal advice to clients about how to conform their conduct to the requirements of I-502 and stated federal concerns, then no one could do so. *See, e.g., RCW 2.48.180* (broadly prohibiting the unauthorized practice of law); RPC 5.5(a) ("A lawyer shall not *** assist another" in the unauthorized practice of law). The result—no lawyer involvement—would plainly lead to far greater problems of interpretation and enforcement of applicable state and federal law. It also would be extraordinarily unreasonable to discipline private practice lawyers for engaging in conduct to assist in the implementation of I-502 when government lawyers in the Federal and State Attorney General's Offices are expected and being asked to work on the same matter.

This analysis is consistent with, and provides a logical basis for, Washington Official Comment [18] to RPC 1.2, which provides that:

Since the passage of I-502 by Washington voters in November 2012, both the federal and the state government have devoted considerable resources to allowing I-502 to come into effect without regard to federal controlled substances laws, as long as certain stated federal concerns regarding matters such as sales to minors and other unlawful conduct are addressed. *See, e.g., Washington State Bar Association Advisory Opinion 2232* and sources cited. At least until there is a subsequent change of federal enforcement policy, a lawyer who counsels or

assists a client in conduct permitted under I-502 does not, without more, violate RPC 1.2(d). *See also* Washington Comment [7] to RPC 8.4.^{7]}

We recognize that none of the recent developments necessarily prohibit the federal government from seeking to enforce 21 USC §§ 801–904 as written, in the future. Nonetheless, a lawyer who provides legal advice or assistance to a client in compliance with I-502 and the expressed federal statements of position does not violate the RPCs. Like Lawyer A, however, Lawyer B must advise Client B about the federal risk in order to comply with the duty of competent representation under RPC 1.1.

3. Lawyer C: Engaging in Businesses Under I-502

Subject to exceptions not pertinent hereto, lawyers are generally free to engage in businesses to the same extent as other members of the public. Assuming, as we do, that Lawyer C’s business under I-502 will be 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 to the same extent that non-lawyers may do so. It would be unreasonable 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 unless and until there is a change in federal enforcement policy that puts compliance with I-502 in jeopardy. *See* Washington Comment [7] to RPC 8.4. We note, however, that if Lawyer C plans 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,

⁷ Washington Comment [7] to RPC 8.4 provides that:

A unique circumstance was presented by the November 2012 passage by Washington voters of I-502, which allows for the creation of a state-regulated system for the production and sale of marijuana for recreational purposes. At least until there is a subsequent change of federal enforcement policy, a lawyer who engages in conduct permitted under I-502, does not, without more, violate RPC 8.4(b), (i), (k), or (n). *See also* Washington Comment [18] to RPC 1.2.

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.

4. Lawyer D: Purchasing Marijuana Under I-502.

Our analysis of the first three questions leads us to conclude as well that subject to the same limitations, Lawyer D may purchase marijuana consistently with I-502 to the same extent that non-lawyers may generally do so. We again see no legitimate public purpose in subjecting lawyers to discipline for conduct unrelated to the practice of law in which members of the public are free to engage.⁸ Again, it would be unreasonable 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 unless and until there is a change in federal enforcement policy that puts compliance with I-502 in jeopardy. See Washington Comment [7] to RPC 8.4.

5. Final Observations.

This opinion does not and is not intended to suggest that lawyers are generally free to disregard the law or to disregard conflicts between federal and state law. It does, however, conclude that the extraordinary combination of factors that is present as a result of the passage of I-502 and the combined federal and state governmental approach being taken with regard to the implementation of I-502 requires an analysis under the RPCs that is appropriately mindful of this combination.⁹

⁸ If, on the other hand, Lawyer D's consumption of marijuana causes Lawyer D to engage in conduct otherwise prohibited by the RPC, 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 Curran*, 115 Wn.2d 747, 801 P.2d 962 (1990).

⁹ Our conclusions are generally consistent with the results reached in the King County Bar Association Ethics Advisory Opinion on I-502 & Rules of Professional Conduct (October 2013), available at http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf and the Arizona State Bar Ethics Committee Opinion 11-01: Scope of Representation (Feb. 2011), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>. We reach a different conclusion than Colorado Bar Association Formal Ethics Opinion 125: The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities (Apr. 23, 2012), available at http://www.cobar.org/repository/Ethics/FormalEthicsOpinion/FormalEthicsOpinion_125_2013.pdf and than Connecticut Bar Association Professional Ethics Committee Informal Opinion 2013-2 (Jan. 16, 2013), available at http://www.ctbar.org/userfiles/Committees/ProfessionalEthics/Opinions/Informal_Opinion_2013-02.pdf.