GR 9 COVER SHEET

Suggested Amendments RULES OF PROFESSIONAL CONDUCT (RPC) Rules 1.2 and 8.4

Submitted by the Board of Governors of the Washington State Bar Association

A. Name of Proponent: Washington State Bar Association (WSBA)

B. **Spokepersons**:

Mark Fucile, Chair, WSBA Committee on Professional Ethics, Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101-2539 Phone: 503,3224,4895

Jeanne Marie Clavere, Professional Responsibility Counsel, Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101-2539 Phone: 206.727.

C. Purpose:

Washington-specific comment to RPC 1.2 permitting lawyers to advise and assist clients in activities in compliance with Initiative 502.

Washington-specific comment to RPC 8.4 permitting lawyers to engage in conduct in compliance with Inititiative-502.

- **D.** <u>Hearing</u>: A hearing is not requested.
- E. Expedited Consideration: Expedited consideration is requested.

F. Supporting Material:

Suggested Comment to RPC 1.2, Suggested Comment 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]
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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.
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26	RPC 1.2 WASHINGTON STATE BAR ASSOCIATION

RULES OF PROFESSIONAL CONDUCT (RPC)

SUGGESTED RULE 8.4 Misconduct

1	Additional Washington Comment [6-7]
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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.
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26	RPC 8.4 WASHINGTON STATE BAR ASSOCIATION Page 1 of 1 1325 Fourth Avenue – Sixth Floor
27	Seattle, WA 98101-2539



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

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

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

¹ RPC 1.0(f) provides that:

² Official Comment [10] provides that:

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. 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 nonlawyers 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. 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

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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/FormalEthicsOpion/FormalEthicsOpinion_125_2013.pdf and than Connecticut Bar Association Professional Ethics Committee Informal Opinion 2013-2 (Jan. 16, 2013), available at

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