

WSR 24-05-008
RULES OF COURT
STATE SUPREME COURT
[February 7, 2024]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENTS TO) NO. 25700-A-1563
RPC 1.2—SCOPE OF)
REPRESENTATION AND)
ALLOCATION OF AUTHORITY)
BETWEEN CLIENT AND LAWYER,)
COMMENT 18 AND RPC 8.4—)
MISCONDUCT, COMMENT 8)

The Washington State Bar Association, having recommended the suggested amendments to RPC 1.2—Scope of Representation and Allocation of Authority Between Client and Lawyer, Comment 18 and RPC 8.4—Misconduct, Comment 8, and the Court having approved the suggested amendments for publication on an expedited basis;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as shown below are to be published expeditiously for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites.

(b) The purpose statement as required by GR 9(e) is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than August 30, 2024. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 7th day of February, 2024.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

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

A. Proponent: Washington State Bar Association

B. Spokespersons:

Hunter M. Abell, President, Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101-2539

Terra Nevitt, Executive Director, Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101-2539

Monte Jewell, Chair, Committee on Professional Ethics, Project DVORA/Jewish Family Service of Seattle, 1601 16th Avenue, Seattle, WA 98122

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

C. Purpose: These suggested revisions to the "Special Circumstances" Comments to RPC 1.2 and RPC 8.4 would replace existing language that focuses on lawyer counsel about cannabis. The new broader language protects lawyer counsel and assistance to clients about conduct the lawyer reasonably believes is permitted under Washington laws (for example laws related to reproductive health care and gender-affirming care as well as cannabis), even if that guidance might be viewed as violating the laws of another jurisdiction.

Background

In 2022, the Office of the Attorney General communicated concerns to the WSBA Board of Governors and suggested revisions to the "Special Circumstances" Comments to RPC 1.2 and RPC 8.4. That office recommended adjustments to RPC 1.2 and 8.4 aimed at addressing situations in which a Washington lawyer gives assistance on reproductive rights that is treated by a prosecutor in another jurisdiction as possible criminal activity. An example would be advising a health care provider, a parent, or minor child, practicing, or residing in another state, about providing, or obtaining an abortion or gender-affirming care in Washington where such care violate the laws in the other jurisdiction. In such a scenario, a family member, political group, member of the public, opposing party, or prosecutor might file one or more disciplinary grievances against the Washington lawyer.

Attorneys general and prosecutors in some jurisdictions already are acting to zealously enforce statutes criminalizing access to reproductive health services and gender affirming care. In jurisdictions that criminalize reproductive health care and assistance to patients/clients, law enforcement routinely investigates these "crimes" using digital evidence. Washington lawyers thus have credible concerns that law enforcement outside of Washington will investigate conduct associated with guidance given by Washington attorneys on Washington reproductive rights law. In addition, Washington lawyers should not expect that abortion-ban statutes enacted outside Washington state would include express exceptions for communications between lawyers and clients.

Two primary RPCs are involved here.

RPC 1.2(d) states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows 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.

Comment [18] to Washington's RPC 1.2 currently addresses "Special Circumstances Presented by Washington's Marijuana Laws," as follows:

[18] Under Paragraph (d), a lawyer may counsel a client regarding Washington's marijuana laws and may assist a client in conduct that the lawyer reasonably believes is permitted by those laws. If Washington law conflicts with federal or tribal law, the lawyer shall also advise the client regarding the related federal or tribal law and policy.

RPC 8.4(b) states that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects ..."

Comment [8] to Washington's RPC 8.4 currently states:

[8] A lawyer who counsels a client regarding Washington's marijuana laws or assists a client in conduct that the lawyer reasonably

believes is permitted by those laws does not thereby violate RPC 8.4. See also RPC 1.2 Washington Comment [18].

Recommendation

At their August 12, 2023, meeting, the WSBA Board of Governors approved a suggestion from the Committee on Professional Ethics that the Washington Supreme Court revise the "special circumstances" Comments to RPC 1.2 and RPC 8.4. The replacement Comments would include broader language encompassing more than just guidance on Washington's cannabis laws. The Comments to be replaced were adopted in 2014 (updated in 2018 and 2023) to provide clarification to Washington lawyers who advise clients on Washington cannabis laws that their counsel is not in violation of the RPCs, notwithstanding the fact that cannabis is a controlled substance under federal law and many tribal laws. This proposal recognizes that the issues of criminalized reproductive care and gender-affirming care in other states presents similarly fundamental, practical, and urgent questions under the RPCs for members of the Washington Bar.

Redline and clean versions of the suggested rules are attached for consideration.

D. Hearing: A hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material:

- Exhibit A: Suggested Amendment to Comment [18] to RPC 1.2, redline and clean versions.
- Exhibit B: Suggested Amendment to Comment [8] to RPC 8.4, redline and clean versions.

Exhibit A

Suggested Amendment to Comment [18] to RPC 1.2, redline version:

Additional Washington Comments [14-1718]

Special Circumstances Presented by Washington's Marijuana Laws Involving Advice and Assistance About Washington Laws

[18] Under Paragraph (d), a lawyer may counsel a client regarding ~~Washington's marijuana~~ Washington laws and may assist a client in conduct that the lawyer reasonably believes is permitted under those laws (for example and without limitation, Washington laws related to reproductive health care services, gender-affirming care, or cannabis). If Washington law conflicts with federal law, ~~or tribal law, or the law of another jurisdiction,~~ the lawyer shall also advise the client regarding the ~~related federal or tribal law and policy~~ conflicting laws or recommend that the client seek the advice of a lawyer with established competence in the field in question. See Comment 1 to Rule 1.1. If a lawyer counsels or assists a client regarding Washington's laws in these circumstances, that conduct, and the predominant effect of the conduct, shall be deemed to occur in Washington for purposes of these Rules.

Exhibit B

Suggested Amendment to Comment [8] to RPC 8.4, redline version:

Washington Comment [8] to Rule 8.4

A lawyer who counsels a client regarding Washington laws ~~Washington's marijuana laws~~ or assists a client in conduct that the lawyer reasonably believes is permitted by those laws (for example and without limitation, Washington laws related to reproductive health care

services, gender-affirming care, or cannabis), does not thereby violate RPC 8.4. See also Washington Comment [18] to RPC 1.2.

Reviser's note: The typographical errors in the above material occurred in the copy filed by the state supreme court and appear in the Register pursuant to the requirements of RCW 34.08.040.