

October 18, 2013

The Honorable Nathan B. Coats
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

The Honorable Monica Márquez
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

Re: Proposed New CRPC 8.4, Comment [2A]; and New CRPC 8.6

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). Enclosed is a proposed new Comment [2A] to existing Colorado Rule of Professional Conduct (CRPC) 8.4; and a proposed new CRPC 8.6. Both the proposed comment and rule address different aspects of the limited legalization of marijuana in Colorado.

The Standing Committee began considering the possibility of marijuana-related amendments to the CRPC in February 2012. At the Standing Committee's direction, a subcommittee studied the issue and presented its recommendations to the full Standing Committee at its May 3, 2013, July 26, 2013, and October 11, 2013 meetings.¹ At the October 11, 2013 meeting, a majority of the Standing Committee voted to recommend for the Court's adoption the new proposed comment and rule.

A majority of the Standing Committee believes that both proposals should be adopted to address the peculiar circumstances that exist due to the legality of certain marijuana-related conduct under Colorado law, but the illegality of the same conduct under federal law. The proposed comment and rule would address the inconsistent state and federal law as follows:

¹ Colorado Court of Appeals Judge John Webb chaired the Subcommittee, and the following Standing Committee members served on the Subcommittee: Federico Alvarez; Michael Berger; Gary Blum; Ronald Nemirow; Alexander Rothrock; Marcus Squarrell; James Sudler; and Eli Wald. Though not official Subcommittee members, Anthony van Westrum and Marcy Glenn also participated actively in the Subcommittee's work.



Proposed Comment [2A] to CRPC 8.4:

A lawyer's "medical use" or "personal use" of marijuana that, by virtue of any of the following provisions of the Colorado Constitution, is either permitted or within an affirmative defense to prosecution under state criminal law, and which is in compliance with legislation or regulations implementing such provisions, 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 criminal law: (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(1)(b); (2) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(4); or (3) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, Subsection 16(3).

The purpose of this proposed new comment is to protect a lawyer from discipline under CRPC 8.4(b), if the lawyer engages in personal or medical use of marijuana that is permitted under the identified provisions of the Colorado Constitution, and otherwise complies with Colorado law. CRPC 8.4(b) provides 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." Because the personal and medical use of marijuana that is lawful under Colorado law nevertheless violates federal law, Colorado lawyers currently risk discipline under CRPC 8.4(b) even if they comply fully with Colorado law. The proposed new comment is intended to eliminate that risk, but only with respect to the personal or medical use of marijuana. The Standing Committee considered, and a majority rejected, extending this protection to any form of commercial conduct that is permitted under Colorado law, such as a lawyer's operation of marijuana-related facilities.

Proposed 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 counseling or assisting a client to engage in conduct that, by virtue of (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, or (2) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, the lawyer reasonably believes to be either permitted or within an affirmative defense to prosecution under state criminal law, and which the lawyer

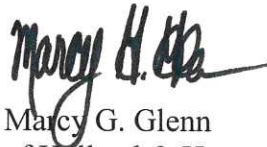
reasonably believes is in compliance with legislation or regulations implementing such provisions, solely because that same conduct, standing alone, may violate federal criminal law.

This proposed rule is intended to allow Colorado lawyers to provide legal services to clients on issues concerning marijuana-related activities that are lawful under Colorado law, even though those activities violate federal law. Under CRPC 1.2(d), a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, . . .” Absent the safe harbor recommended in the proposed rule, a lawyer who advises a client on legal issues related to, for example, the operation of a marijuana dispensary, risks violating CRPC 1.2(d). As a result of this risk, it appears that numerous Colorado lawyers are unwilling to provide legal services to persons and entities engaged in conduct that is lawful under Colorado law because that conduct remains unlawful under federal law. The result appears to be that many Colorado citizens and businesses are being denied the benefit of legal counsel on important personal and business conduct. A majority of the Standing Committee believes that the public interest is best served by removing the current barrier to representation of clients whose conduct is reasonably believed to comply with Colorado law related to marijuana.

As noted above, a majority of the Standing Committee voted to recommend these proposed amendments to the CRPC. However, other Standing Committee members, including representatives of the Office of Attorney Regulation Counsel, do not support these recommendations. I also note that Proposed Comment [2A] to CRPC 8.4 is consistent with the views expressed by the Colorado Bar Association Ethics Committee in its Formal Opinion 124, “A Lawyer’s Medical Use of Marijuana” (April 23, 2012). That committee has approved in principle an addendum to Formal Opinion 124 that would extend its rationale to a lawyer’s personal use of marijuana, in a manner compliant with Colorado law. That committee also has communicated to the Standing Committee its support of a rule that insulates an attorney from discipline for providing legal advice on marijuana-related conduct that is lawful under Colorado law, solely because that conduct also violates federal law.

I am enclosing separate documents setting forth the proposed new comment and rule. I have emailed Word versions of the enclosures, with this cover letter, to Chris Markman. The Standing Committee respectfully asks the Court to favorably consider the proposed changes.

Sincerely,



Marcy G. Glenn
of Holland & Hart LLP

Enclosure

cc: Chris Markman, Esq. (via email, w/enclosures)
Standing Committee on the Colorado Rules of Professional Conduct (via email,
w/enclosures)

1 **PROPOSED NEW RULE 8.6**

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3 Notwithstanding any other provision of these rules, a lawyer shall

4 not be in violation of these rules or subject to discipline for

5 counseling or assisting a client to engage in conduct that, by virtue

6 of (1) Article XVIII. Miscellaneous, Section 14, Medical use of

7 marijuana for persons suffering from debilitating medical

8 conditions, or (2) Article XVIII, Miscellaneous, Section 16,

9 Personal use and regulation of marijuana, the lawyer reasonably

10 believes to be either permitted or within an affirmative defense to

11 prosecution under state criminal law, and which the lawyer

12 reasonably believes is in compliance with legislation or regulations

13 implementing such provisions, solely because that same conduct,

14 standing alone, may violate federal criminal law.