



**Bob Ferguson**  
**ATTORNEY GENERAL OF WASHINGTON**

April 25, 2024

**Via Electronic Mail**

Ms. Erin L. Lennon  
Clerk  
Washington State Supreme Court  
P.O. Box 40929  
Olympia, WA 98504-0929  
E-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)

**RE: Proposed Amendments to RPCs 1.2 and 8.4**

Dear Ms. Lennon:

Thank you for the opportunity to comment on the Proposed Rules Published for Comment in February 2024. I write on behalf of the Attorney General's Office to submit comments on the proposed amendments to Rules of Professional Conduct 1.2 and 8.4.<sup>1</sup>

The Attorney General's Office strongly supports the proposed amendments. Our office brought the urgent need for these amendments to the attention of the proponent, the Washington State Bar Association, following the U.S. Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*. *Dobbs* unleashed a wave of state legislation and policy changes across the country that are hostile to the values of autonomy and privacy in reproductive and other health care decisions, contrary to Washington State's public policy.<sup>2</sup> Some of these laws threaten to punish or chill speech itself—including truthful speech about accessing care that is lawful in Washington.

In the face of this new legal landscape of disparate state laws, licensed attorneys may fear that they could be subject to professional discipline for advising a client about their legal rights—including the right to provide and receive health care that is lawful and protected under Washington law. The

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<sup>1</sup> The Attorney General's Office is also submitting a separate comment letter addressing the proposed changes to CR 1, 7, 26, 28, 30, 39, 43, 45, and 59; GR 11.3; JuCR 11.23; and RAP 9.6, 9.7, 9.14, 10.2, 13.5, 18.6, 18.8, and 18.25.

<sup>2</sup> "A law of another state that authorizes the imposition of civil or criminal penalties or liability related to the provision, receipt, attempted provision or receipt, assistance in the provision or receipt, or attempted assistance in the provision or receipt of protected health care services that are lawful in the state of Washington is against the public policy of this state." RCW 7.115.020(2). Protected health care services include (but are not limited to) abortion, contraception, IVF, and gender-affirming care. RCW 7.115.010(3), (4).

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proposed amendments will provide much-needed guidance and assurances to counsel that they will not be disciplined for providing candid legal advice to clients in need.

Such concerns are far from hypothetical. Of particular concern are new state laws that purport to apply across state lines and target speech and conduct related to health care that Washington law protects. Idaho's criminal ban on abortions, Idaho Code § 18-622, which went into effect shortly after the *Dobbs* decision, is one such example. In a 2023 letter, Idaho Attorney General Raúl Labrador opined that Idaho Code § 18-622 "prohibits an Idaho medical provider from ... referring a woman across state lines to access abortion services" and "requires the suspension of a health care professional's license" for doing so.<sup>3</sup> Attorney General Labrador further opined that Idaho Code § 18-603 "prohibits the promotion of abortion pills," and makes it a felony to publish any "notice or advertisement of" abortion services.<sup>4</sup> Under Attorney General Labrador's interpretation, these criminal laws would apply to and penalize abortion care lawfully obtained or provided in Washington, and would even target truthful speech about the availability of such care.<sup>5</sup> Additionally, in 2023, Idaho Governor Brad Little signed into law HB 242, which makes it a felony to travel with a minor across state lines for an abortion or to help a minor obtain abortion medication without parental consent.<sup>6</sup> This law, too, targets reproductive health care that is lawfully obtained or provided within Washington State.

In Texas, too, there is ongoing litigation and debate over state efforts to restrict interstate travel for abortion care and to prohibit the "aiding or abetting" of abortion. *See* SB 8 (banning abortion after six weeks and creating liability for anyone who "aids and abets" the performance of an abortion); *Fund Texas Choice v. Paxton*, No. 1:22-CV-859-RP, 2023 WL 2558143 (W.D. Tex.) (litigation over HB 1280 and Texas Attorney General Ken Paxton's statements that Texas may prohibit travel that "help[s]" a pregnant person who also travels to another state to seek an abortion, and that Attorney General Paxton would be "looking at" whether his office could prosecute abortion funds that facilitate out of state abortion care). The Texas state government has also resurrected several state laws, passed prior to *Roe v. Wade* (Articles 1191-1194 and 1196), which criminalized abortion and imposed accomplice liability for anyone who assisted in procuring an abortion.<sup>7</sup> In February 2023, District Judge Robert Pitman addressed the extraterritorial application of these state laws, finding that HB 1280 does not regulate abortions that take place outside of Texas, but

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<sup>3</sup> Letter from Raúl Labrador, Att'y Gen. of Id., to Hon. Brent Crane, Id. House of Reps. (Mar. 27, 2023) <https://bit.ly/45bs0GN>.

<sup>4</sup> *Id.*; *see also* Caroline Kitchener and Susan Svrluga, *U. of Idaho may stop providing birth control under new abortion law*, THE WASHINGTON POST (Sep. 26, 2022), <https://wapo.st/45fo8V0> (U. of Idaho's general counsel advised university employees not to "promote" abortion or refer students for abortion care, lest they be held criminally liable for a felony).

<sup>5</sup> Attorney General Labrador's actions are the subject of ongoing litigation. *Planned Parenthood Great Northwest v. Labrador*, No. 1:23-cv-00142-BLW (D. Idaho filed Apr. 5, 2023), *appeal pending*, No. 23-35518 (9th Cir. argued and submitted Mar. 27, 2024).

<sup>6</sup> *See* 2023 Idaho Laws Ch. 310 (H.B. 242).

<sup>7</sup> *See* Tex. Rev. Civ. Stat. Ann. arts. 4512.1-4512.6.

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that the pre-*Roe* laws do arguably apply to those who assist in procuring an abortion outside of Texas.<sup>8</sup>

Similar restrictions are a growing threat nationwide. In 2022, the National Right to Life Committee circulated a model law that would make it a crime to give “information to a pregnant woman or someone seeking the information on her behalf” about “self-administered abortions or the means to obtain” an abortion.<sup>9</sup> The Guttmacher Institute reports that as of April 1, 2024, fourteen states have introduced legislation that would restrict *support* for abortion.<sup>10</sup> On April 11, 2024, the Tennessee Senate advanced a bill that would criminalize adults “concealing” or “procuring” abortions for pregnant minors; as one state senator commented: “Under the legislation as drafted, I’m not sure you can have an honest conversation with your grandparents, with your older sibling who’s an adult, with your priest, with your pastor, with an attorney, with a mental health provider. The communications themselves are potentially a criminal act here.”<sup>11</sup> Unfortunately, in all likelihood, the list of restrictive laws that implicate care provided lawfully in Washington—and legal advice and other speech regarding the availability of such care—will only continue to grow.

A wave of legislation similarly restricts access to gender-affirming care, particularly for young people.<sup>12</sup> Some states have not stopped at restricting access to the care itself, but have also taken steps to punish those who help others access it: for example, Texas Attorney General Paxton has opened investigations into families who help their loved ones access care.<sup>13</sup>

These alarming developments highlight both the growing need for legal advice regarding the availability of reproductive and gender-affirming health care amid a landscape of diametrically opposed state laws, and potential threats to the ability of Washington lawyers to provide candid and fulsome legal advice amid efforts to criminalize or chill speech itself.

Accordingly, the Attorney General’s Office urges the Court to adopt the WSBA’s proposed amendments to the Comments to RPC 1.2 and 8.4. The proposed Comments clarify that RPC 1.2(d), which prohibits lawyers from assisting clients “in conduct that the lawyer knows is criminal,” and RPC 8.4(b), which makes it professional misconduct for a lawyer to “commit a

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<sup>8</sup> *Fund Texas Choice*, No. 1:22-CV-859-RP, 2023 WL 2558143 (Feb. 24, 2023), at \*1. The litigation is ongoing as of April 2024.

<sup>9</sup> Letter from NRLC General Counsel to NRLC Committee re: NRLC Post-*Roe* Model Abortion Law (June 15, 2022) <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf>.

<sup>10</sup> <https://www.guttmacher.org/state-legislation-tracker> (last visited April 12, 2024).

<sup>11</sup> Anita Wadhvani, *Tennessee Senate passes bill making it a crime to aid a minor seeking an abortion*, TENNESSEE LOOKOUT (Apr. 11, 2024), <https://tennesseelookout.com/2024/04/11/senate-passes-bill-making-it-a-crime-to-aid-a-minor-seeking-an-abortion/>.

<sup>12</sup> Human Rights Campaign, *Map: Attacks on Gender Affirming Care by State*, <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map> (last visited April 12, 2024).

<sup>13</sup> Emma Tucker and Rebecca Riess, *Texas appeals court blocks state from investigating families seeking gender-affirming care for trans youth*, CNN (Mar. 30, 2024), <https://www.cnn.com/2024/03/30/us/texas-gender-affirming-care-investigation-blocked/index.html>.

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criminal act,” do not prohibit lawyers from counseling clients regarding Washington’s reproductive and gender-affirming health care laws, and that they permit lawyers to assist a client in conduct that the lawyer reasonably believes is permitted by Washington law—even if the client’s or lawyer’s conduct might violate the law of another state that purports to regulate the same conduct.

\* \* \*

We are grateful for the opportunity to comment in support of these important proposed amendments, and we appreciate the Court’s consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristin Beneski".

KRISTIN BENESKI  
First Assistant Attorney General

KB:kw

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Martinez, Jacquelynn](#)  
**Subject:** FW: AGO Comments on Proposed Amendments  
**Date:** Thursday, April 25, 2024 1:01:59 PM  
**Attachments:** [1 AGO Comment Court Rules 4.25.24.pdf](#)  
[2 AGO Comment RPCs 4.25.24.pdf](#)

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**From:** Warren, Kim A (ATG) <Kim.Warren@atg.wa.gov>  
**Sent:** Thursday, April 25, 2024 12:02 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Beneski, Kristin (ATG) <kristin.beneski@atg.wa.gov>  
**Subject:** AGO Comments on Proposed Amendments

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Dear Ms. Lennon:

Please find attached comments from the Attorney General's Office on proposed amendments to RPC 1.2 and 8.4 and to CR 1, 7, 26, 28, 30, 39, 43, 45, and 59; GR 11.3; JuCR 11.23; and RAP 9.6, 9.7, 9.14, 10.2, 13.5, 18.6, 18.8, and 18.25. Please let me know if you need further information.

Thank you.

Best regards,

Kim Warren

Executive Assistant to

Kristin Beneski

First Assistant Attorney General