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**I-502 and Lawyers:
Guidance from the Supreme Court**

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When the voters approved I-502 decriminalizing “recreational” marijuana in November 2012, it focused a sharp light on RPC 1.2(d). Under that provision, lawyers are generally permitted to advise clients on the legal consequences of conduct but are generally prohibited from assisting clients in committing a crime. Washington’s rule is patterned on the corresponding provision of the ABA Model Rules and nothing in the legislative history or the case law of either one suggests that these twin concepts are particularly unusual or controversial.

Although I-502 decriminalized marijuana (subject to regulation) at the state level, marijuana manufacture, sale and possession remain federal crimes under the Controlled Substances Act. At the same time, many of the practical aspects of working with clients in marijuana-related businesses—such as land use planning, employment law and contract preparation—are clearly on the “assisting” side of RPC 1.2(d)’s divide. To add further uncertainty, although the Controlled Substances Act has been upheld as constitutional within the past decade by the U.S. Supreme Court in the “medical” marijuana context, the U.S. Department of Justice has an announced policy of generally not prosecuting marijuana-related businesses as long as they are complying with strict state regulatory systems. Finally (as I write this), Congressional proposals to limit

federal funding for enforcement address “medical” marijuana, but do not include “recreational” marijuana.

Against this backdrop, the Washington Supreme Court recently approved a comment to RPC 1.2(d) that balances this jurisdictional dichotomy with the practical considerations that lawyers face in light of I-502. In this column, we’ll first look at the Supreme Court’s approach and then note some of the “unfinished business” remaining in this area.

The Court’s Comment

The Supreme Court added a new comment—Comment 18—to RPC 1.2 that specifically addresses I-502:

“Special Circumstances Presented by Washington Initiative 502
(Chap. 3, Laws of 2013)

“At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope, and meaning of Washington Initiative 502 (Chap. 3, Laws of 2013) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders and other state and local provisions implementing them.”

The Supreme Court’s use of a comment is significant in a regulatory sense. Because comments are issued directly by the Supreme Court, they offer the Court’s own guidance on the meaning and application of the accompanying rules.

In this instance, the Supreme Court surveyed a variety of proposals and had the benefit of earlier debate before the Colorado Supreme Court on the

identical issue. Nationally, proposals have ranged from the outright prohibition on any assistance to marijuana-related businesses in violation of federal law to blanket disciplinary immunity for assistance to marijuana-related businesses permitted by state law. The Colorado Supreme Court, too, ultimately opted for a comment similar to the one our Court adopted. In contrast to Colorado, however, the Washington formulation more explicitly acknowledges the current federal enforcement policy through its preface.

The new Washington comment reflects a pragmatic approach to a difficult issue that states around the country are wrestling with as the number of jurisdictions decriminalizing or considering decriminalizing “medical” or “recreational” marijuana continues to increase. Our Supreme Court’s accent on current federal enforcement policy effectively acknowledges that state law cannot nullify the federal government’s ability to enforce federal law. In *Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 (W.D. Wash. May 25, 2006) (unpublished), for example, the federal district court in Seattle found that Washington’s “medical” marijuana statute did not prevent the federal government from enforcing the Controlled Substances Act. In tying the comment to federal enforcement policy, the Supreme Court also effectively acknowledges that present policy may change depending on many unpredictable factors that are not within its control. Finally, the Washington comment recognizes that having created a regulated industry under I-502, businesses in that industry will likely

need the same kinds of routine legal services that their counterparts in more traditional businesses have long depended on lawyers to provide.

Although these same issues have in theory existed since the voters approved “medical” marijuana in 1998, the broad sweep of I-502 put these issues front and center for potentially a much larger spectrum of Washington lawyers.

Unfinished Business

However useful the Supreme Court’s comment is for lawyers working with marijuana-related businesses, the comment leaves some “unfinished business” in two particular areas: personal use of marijuana by lawyers; and lawyers who themselves invest in marijuana-related businesses.

On personal use, RPC 8.4(b) classifies as professional misconduct “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects[.]” RPC 8.4(i) does the same for an “act which reflects disregard for the rule of law[.]” RPC 8.4(n) contains a general prohibition on “conduct demonstrating unfitness to practice law.” RPC 8.4(k) also includes the violation of the attorney’s oath as professional misconduct. The oath contained in APR 5(d), in turn, includes the requirement that the lawyer concerned will—among other things—“abide by” federal law. In the context of alcohol, the Supreme Court has generally required a “nexus” between the conduct involved and the practice of law. *In re Curran*, 115 Wn.2d 747, 801 P.2d 962 (1990), addresses the “nexus” requirement in considerable detail. This

traditional analysis suggests that discrete personal use at home would be treated differently in a regulatory context than a lawyer who habitually appeared in court under the influence.

On investing in marijuana-related businesses, RPC 1.8(a) sets a very high bar for lawyer investments in client businesses—particularly when the lawyer is also providing legal advice to the client concerned. The rule requires both that the client consent in writing after thorough disclosure and that the terms of the deal are “fair and reasonable to the client[.]” *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007), and *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014), discuss RPC 1.8(a) at length. Although violation of RPC 1.8(a) exposes a lawyer to regulatory discipline, deals gone bad are also a frequent source of civil damage claims against lawyers and their firms. Regardless of whether a lawyer is investing with a client in a marijuana-related business or simply running one as the lawyer’s own standalone side business, lawyer involvement would also need to be consistent with I-502 and its implementing regulations. A lawyer, for example, who is a participant in a criminal enterprise outside the scope of I-502 would likely find little regulatory solace in the Supreme Court’s recent comment.

As I-502 is implemented, other areas of sensitivity to lawyers may surface. The WSBA Committee on Professional Ethics is planning an advisory opinion addressing some of the “unfinished business” in light of the approach the

Supreme Court took in the new comment. Although advisory opinions are just that—“advisory”—the Supreme Court’s comment provides useful insights to the Court’s approach in this area.

Summing Up

I-502 creates an unusual set of issues for lawyers in light of differing state and federal law. This area is unlikely to remain static. Although the Supreme Court’s recent comment provides very useful clarification today, lawyers practicing in this area will likely need to pay careful attention to continuing developments.

ABOUT THE AUTHOR

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