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## **Proceed with Care: Advising Marijuana Businesses**

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In the wake of voter approval of “recreational” marijuana in Oregon and Washington, their respective Supreme Courts both recently issued guidance to lawyers on advising marijuana businesses. In February, the Oregon Supreme Court approved an amendment to the text of RPC 1.2 that permits lawyers to both advise and assist clients in state-authorized marijuana businesses. The Oregon Supreme Court’s action followed a November order of the Washington Supreme Court approving a comment to its version of RPC 1.2 along the same lines. Both Supreme Courts took a practical approach to an equally practical problem. In this column, we’ll look at both the problem and the solution.

### ***The Problem***

Oregon’s version of RPC 1.2(c)—which generally permits lawyers to advise clients on the consequences of contemplated action while generally prohibiting lawyers from assisting clients with illegal conduct—is similar to its Washington cousin, RPC 1.2(d). Both, in turn, are patterned on ABA Model Rule 1.2(d).

The practical problem is that regardless of state treatment of marijuana, it remains prohibited under the federal Controlled Substances Act. As the Oregon Supreme Court put it in the context of “medical” marijuana in *Emerald Steel*

*Fabricators, Inc. v. BOLI*, 348 Or 159, 178, 230 P3d 518 (2010): “To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so.” The U.S. District Court in Seattle made a similar observation regarding “medical” marijuana in *Assenberg v. Anacortes Housing Authority*, 2006 WL 1515603 at \*4 (May 25, 2006) (unpublished): “[T]he Supreme Court has upheld Congress’s authority under the commerce clause to enact the CSA and prohibit the intrastate use of marijuana, even when that use complies with a state’s medical marijuana law.”

Although “advising” marijuana businesses on the legal landscape falls within the classic—and generally permissible—role of lawyers as counselors, “assisting” is a dicier proposition in light of marijuana’s continued prohibition under federal law. Yet, it is precisely the kind of mundane but essential tasks that lawyers routinely perform such as negotiating leases and handling land use applications that marijuana businesses require like their counterparts in more traditional ventures.

### ***The Solution***

Oregon and Washington took similar paths in crafting a solution to this practical problem. In Oregon, the solution was in the form of a rule amendment. In Washington, the solution was in the form of a comment. Unlike Washington, Oregon does not have comments to our RPCs—leaving our Court without that

option. Both approaches, however, are express statements by the respective Supreme Courts. Accordingly, they are inherently more authoritative than advisory ethics opinions from the state bars.

In February, the Oregon Supreme Court approved (subject to a confirming order) a new subsection “d” to RPC 1.2:

“Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”

In November, the Washington Supreme Court adopted a new comment “18” to its version of RPC 1.2:

“[18] 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.”

Under both approaches, lawyers are able to assist clients with marijuana-related businesses as long as the assistance conforms to activities authorized by the new state regulatory systems. In other words, negotiating a lease for a business authorized by state regulators to sell marijuana would be permitted. By contrast, assisting an international drug cartel in skirting the state regulatory systems would not.

In doing so, Oregon and Washington followed Colorado (Colorado RPC 1.2, Comment 14) and Nevada (Nevada RPC 1.2, Comment 1) regionally in

addressing the dilemma created by state decriminalization of “recreational” and/or “medical” marijuana while it remains illegal under federal law. (Alaska, which also decriminalized “recreational” marijuana in last November’s election, has the issue under review.) Although in theory this dilemma has existed since Oregon and Washington both began permitting “medical” marijuana over a decade ago, the urgency of finding a solution accelerated significantly with the more recent decriminalization of “recreational” marijuana because the economic stakes are so much greater. Further, the recent Congressional year-end budget bill limiting U.S. Justice Department funding for federal enforcement only addresses “medical” marijuana.

At the same time, the contours of personal use by lawyers and lawyers investing in marijuana-related businesses remain to be written. These issues are not new, with *In re Eads*, 303 Or 111, 734 P2d 340 (1987), illustrating the former and *In re Taylor*, 316 Or 431, 851 P2d 1138 (1993), addressing the latter. The recent decriminalization of “recreational” marijuana, however, paints these issues in a new light under both substantive law and the RPCs.

#### **ABOUT THE AUTHOR**

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