

WSBA NWSidebar

Posted: January 10, 2019

New Marijuana-Related Amendments to the RPCs

**By Mark J. Fucile
Fucile & Reising LLP**

In the wake of the voters' approval of Initiative 502 in November 2012 permitting and regulating "recreational" marijuana production, sale and use, questions immediately arose regarding the extent to which lawyers could advise and assist clients in state-authorized marijuana businesses. Washington RPC 1.2(d), like its ABA Model Rule counterpart, generally permits lawyers to advise clients on the legality of proposed conduct but prohibits lawyers from assisting clients "in conduct that the lawyer knows is criminal[.]" The tension was—and remains—that marijuana production, sale and use are prohibited by federal law. The Obama Administration Justice Department, however, issued guidelines suggesting that prosecutorial resources would not be focused on state-regulated marijuana activities.

The Washington Supreme Court resolved this tension in 2014 with a new Comment 18 to RPC 1.2 that permitted lawyer assistance to state-approved marijuana businesses "[a]t least until there is a subsequent change of federal enforcement policy[.]" The WSBA Committee on Professional Ethics then followed with an advisory opinion—No. 201501—that relied on the then-new comment and provided additional practical guidance to lawyers in this emerging area. In 2018, however, the Trump Administration withdrew the earlier

Department of Justice guidelines—leaving considerable ambiguity about the key predicate phrase in Comment 18.

In light of the Trump Administration’s position, the CPE and the Board of Governors recommended a new formulation of Comment 18 to the Supreme Court. The Supreme Court adopted the proposal this past September. The new wording is similar to language used in several other states and decouples the comment from federal enforcement policy:

“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.”

At the same time, the Supreme Court adopted a companion comment to RPC 8.4, which governs professional misconduct, to clarify that a lawyer who complies with RPC 1.2(d) does not violate RPC 8.4 either. New Comment 8 to RPC 8.4 reads:

“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* Washington Comment [18] to RPC 1.2.”

As I write this in early December, the CPE is working on a revision to Advisory Opinion 201501 to reflect these amendments.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.