## Tracy, Mary

**From:** OFFICE RECEPTIONIST, CLERK
**Sent:** Tuesday, August 26, 2014 8:05 AM
**To:** Tracy, Mary
**Subject:** FW: Comment on Proposed Amendment to RPC 1.2

For you.

Thank you
Desireé

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**From:** Leslie Weatherhead [mailto:LeslieW@leehayes.com]
**Sent:** Monday, August 25, 2014 5:13 PM
**To:** OFFICE RECEPTIONIST, CLERK
**Subject:** Comment on Proposed Amendment to RPC 1.2

I write to comment on the proposed revision to RPC 1.2, in opposition. I offer the comment on my own behalf only, and do not purport to speak for my firm or any other organization with which I am privileged to be associated.

My opposition has nothing to do with the ongoing public debate about the merits of marijuana prohibition, which I consider to be a healthy debate, nor about the underlying dangers or benefits of marijuana consumption, on which much of that debate is centered.

My opposition has two simple premises:

**First**: that, as recited in the opening line of Preamble to our Rules of Professional Conduct: "The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law . . ."; and

**Second:** this proposed amendment to Rule 1.2, which seems to be intended to give lawyers a free pass for violations of existing federal law, unacceptably undermines the rule of law.

The Bar (and the Court) ought to be steadfastly insistent upon respect for the rule of law. In this case, the law is in one of its periods of occasional and interesting flux: the voters of the state of Washington have decided that the production and recreational consumption of marijuana ought to be permitted within certain constraints. However, federal lawmakers have not followed suit: federal law still unambiguously forbids the production and use of marijuana, and valid precedent from the Supreme Court of the United States still holds that enactment to be a valid enactment under Congress' constitutional power under the Commerce Clause. The current administration has issued a highly ambiguous pronouncement suggesting, in effect, that it *might* exercise its discretion not *necessarily* to institute prosecutions under federal law; but of course that announcement does not change substantive federal law one whit.

It is *possible* that Congress may revise the federal Controlled Substances Act to change the treatment of marijuana. It is *possible* that the federal courts may change their views on the constitutionality of the Act (or that they may be induced to apply the common law doctrine of *desuetude* to the Justice Department's published statement regarding intention not to prosecute) and declare the Act a dead letter. But they have not done so: the law remains what it was, for better or worse.

The first clause of the proposed change to RPC 1.2 mistakes a fundamental principle: "law enforcement policy" does not define the law. The statute law, and not a current official's outlook on enforcement priorities, presents the relevant standard against which citizens must weigh their conduct; a thing which the law makes illegal does not become legal merely because of an official's expedient (for reasons of efficiency, economics, or politics) decision not to prosecute a violation.

The second clause, "a lawyer may counsel", adds nothing to existing rules. There has been no suggestion that any lawyer transgresses by listening to her client, and offering counsel on the lawfulness, or not, of the client's stated hopes, plans, or intentions. That is the fundamental role of lawyers since the profession began: to help citizens understand when what they want to accomplish does, or does not, conform to the requirements of the law.

The third clause, "may assist a client" is inimical to the rule of law. Production and possession of marijuana are criminal offenses under 18 United States Code §951 et seq. To "assist" in the commission of a criminal offense is itself a criminal offense under 18 United States Code §2. I respectfully submit that it ill becomes the Bar or the Court to adopt a rule selectively providing that the commission of a federal crime will not violate Rules of Professional Conduct that otherwise require that lawyers, of all people, adhere to the requirements of valid laws. Even laws they think are stupid and wrong.

It may be that lawyers will deliberately violate federal law, perhaps even as acts of civil disobedience in hopes of catalyzing changes to that law. They may hope that juries nullify federal law in their verdicts. That is a historical privilege of American juries since colonial times, and in fact legal change has followed consistent refusals by juries to enforce unjust laws (in our state, for example, juries recognized the battered spouse syndrome long before the courts and legislature did). But those who are sworn to uphold the rule of law –lawyers and the courts -- should take care to recognize that nullification is not *our* role. Our role is to uphold the rule of law, which as our Preamble recognizes is the bedrock foundation of our democracy and our liberty. We should not imperil that fundamental principle over a transient, evolving policy debate.

Respectfully,

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