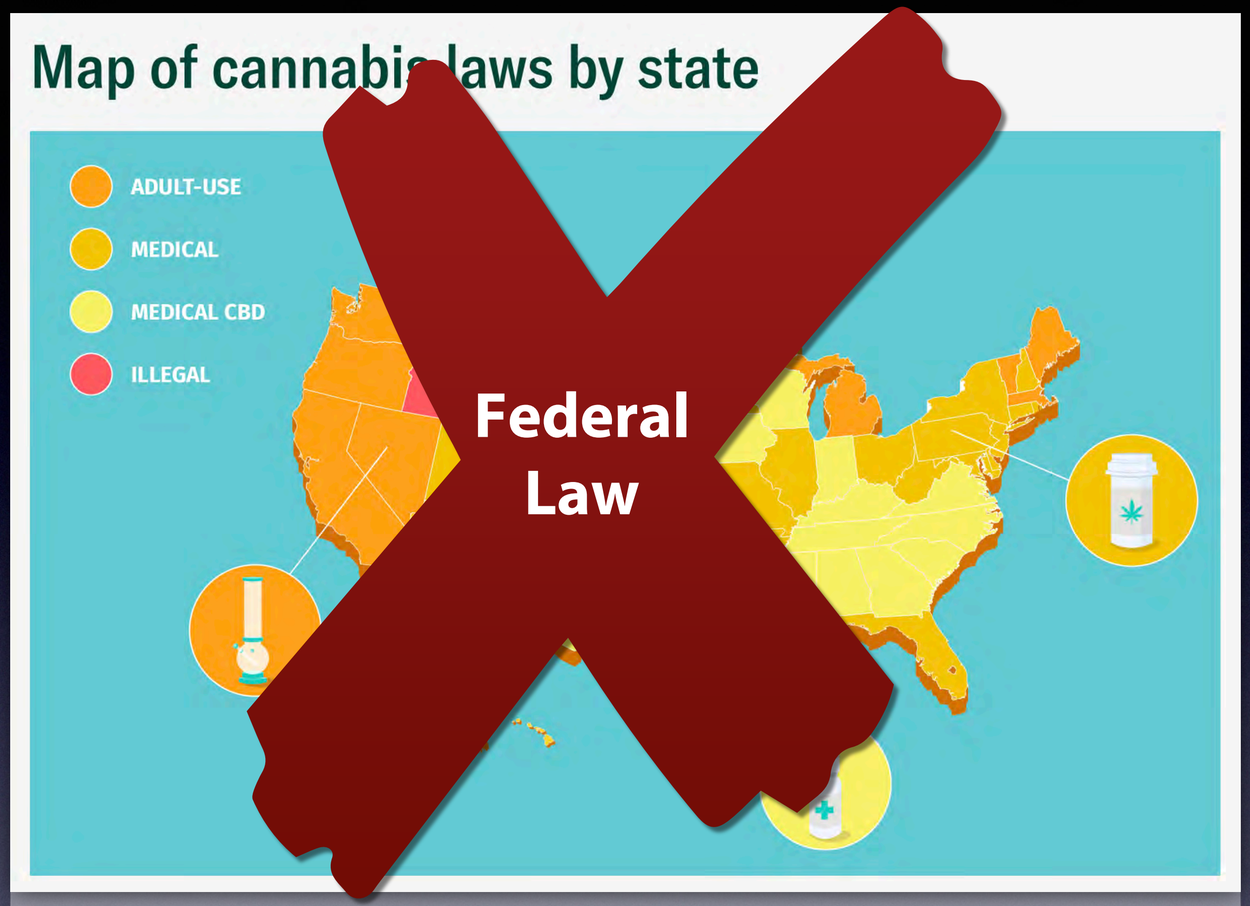


# The Ethics of Cannabis Practice

## Federalism, Sovereignty & the RPC

# The Beginning: Federalism & Sovereignty

Oyez

CASES JUSTICES TOUR NEWS

Gonzales v. Raich

## Conclusion

Sort: by seniority by ideology

6-3 DECISION FOR ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

MAJORITY OPINION BY JOHN PAUL STEVENS

No. In a 6-3 opinion delivered by Justice John Paul Stevens, the Court held that the commerce clause gave Congress authority to prohibit the local cultivation and use of marijuana, despite state law to the contrary. Stevens argued that the Court's precedent "firmly established" Congress' commerce clause power to regulate purely local activities that are part of a "class of activities" with a substantial effect on interstate commerce. The majority argued that Congress could ban local marijuana use because it was part of such a "class of activities": the national marijuana market. Local use affected supply and demand in the national marijuana market, making the regulation of intrastate use "essential" to regulating the drug's national market. The majority distinguished the case from Lopez and Morrison. In those cases, statutes regulated non-economic activity and fell entirely outside Congress' commerce power; in this case, the Court was asked to strike down a particular application of a valid statutory scheme.

# The RPC:
# Client Assistance and Personal Conduct

**RPC 1.2**
**SCOPE OF REPRESENTATION AND**
**ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

**(a)** Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

**(b)** A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

**(c)** A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

**(d)** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**RPC 8.4**
**MISCONDUCT**

It is professional misconduct for a lawyer to:

**(a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

**(b)** commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

**(c)** engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

**(d)** engage in conduct that is prejudicial to the administration of justice;

**(e)** state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

**(f)** knowingly

(1) assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law, or

(2) assist or induce an LLLT in conduct that is a violation of the applicable rules of professional conduct or other law;

**(g)** commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, honorably discharged veteran or military status, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;

**(h)** in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, lawyers, or LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments;

**(i)** commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes a felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding;

**(j)** willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear;

**(k)** violate his or her oath as an attorney;

**U.S. Department of Justice**

Executive Office for United States Attorneys

Office of the Director

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ALL APPELLATE CHIEFS
ALL OCDETF COORDINATORS
ALL TRIBAL LIAISONS

FROM: Monty Wilkinson
Director

SUBJECT: Policy Statement Regarding Marijuana Issues in Indian Country

ACTION REQUIRED: None. Information Only.

CONTACTS:

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Associate Deputy Attorney General
Office of the Deputy Attorney General
(202) 305-4127
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With a number of states legalizing marijuana for use and production, some tribes have requested guidance on the enforcement of the Controlled Substance Act (CSA) on tribal lands by

# Ethical Implications

*Counseling or Assisting a Client*

RPC 1.2(d):

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment [18] to RPC 1.2 (revised 9/25/2018):

> 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.

Comment [8] to RPC 8.4 (effective 9/25/2018):

> 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 RPC 1.2 Washington Comment [18].

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*Personal Conduct*

RPC 8.4 (emphasis added):

> It is professional misconduct for a lawyer to:
>
> ***
>
> (b) commit a **criminal act that reflects adversely on the lawyer's** honesty, trustworthiness or **fitness as a lawyer** in other respects;[9]
>
> ***
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>
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> (k) **violate his or her oath as an attorney** [see APR 5(g)];
>
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> (n) **engage in conduct demonstrating unfitness to practice law**.

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WSBA

**Opinion:** 201501
**Year Issued:** 2015
**RPC(s):** RPC 1.1, 1.2, 1.2(d), 1.8(a), 8.4, 8.4(b), 8.4(i), 8.4(k), 8.4(n)
**Subject:** Providing Legal Advice and Assistance to Clients Under WA State Retail Marijuana Law, I-502, and the Cannabis Patient Protection Act; Lawyer Participation in Retail and Medical Marijuana Business; Lawyer Purchase of Marijuana in Compliance with State Law

---

FACTS:

A. Background Facts Regarding I-502 and the Cannabis Patient Protection Act

In November 2012, Washington voters passed Washington Initiative Measure No. 502 ("I-502"), which allows creation of a system for the production, processing, and retail sale of marijuana for recreational use under state law.[n.1] As stated in Section 1 of I-502, one purpose of I-502 was "to stop treating adult marijuana use as a crime and to try a new approach that * * * (3) Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol." Since 2012, much governmental and private effort has been devoted to the establishment of a licensing and regulatory system for the retail marijuana business under the jurisdiction of what is now known as the Washington State Liquor and Cannabis Board (the "WSLCB").

In April 2015, the Washington State Legislature passed and Governor Inslee signed the Cannabis Patient Protection Act (the "CPPA"), which substantially updated prior Washington law regarding medical uses of marijuana. [n.2] The CPPA is effective July 24, 2015.

Both I-502 and the CPPA were adopted in the shadow of the federal Controlled Substances Act, 21 USC §§ 801-904 (the "CSA"), which, on its face, prohibits the production, possession, sale, and use of marijuana for any purpose. [n.3] Under the CSA, and the "Supremacy Clause" contained in Article VI, Section 2 of the United States Constitution, federal authorities may prosecute people in Washington for violating the CSA, even if their conduct complies with state law, because a state law cannot override federal law. [n.4]

In spite of the tension between Washington state law on the one hand and the CSA on the other, both the Washington Attorney General and the United States Attorney General have devoted considerable time and effort to crafting Washington state law provisions regarding I-502 and what is now the CPPA subject to certain federal guidelines described further below. See, e.g., Press Release, Joint statement from Gov. Inslee and AG Ferguson regarding update from AG Eric Holder on implementation of Washington's voter-approved marijuana law (Aug. 29, 2013), available at

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>
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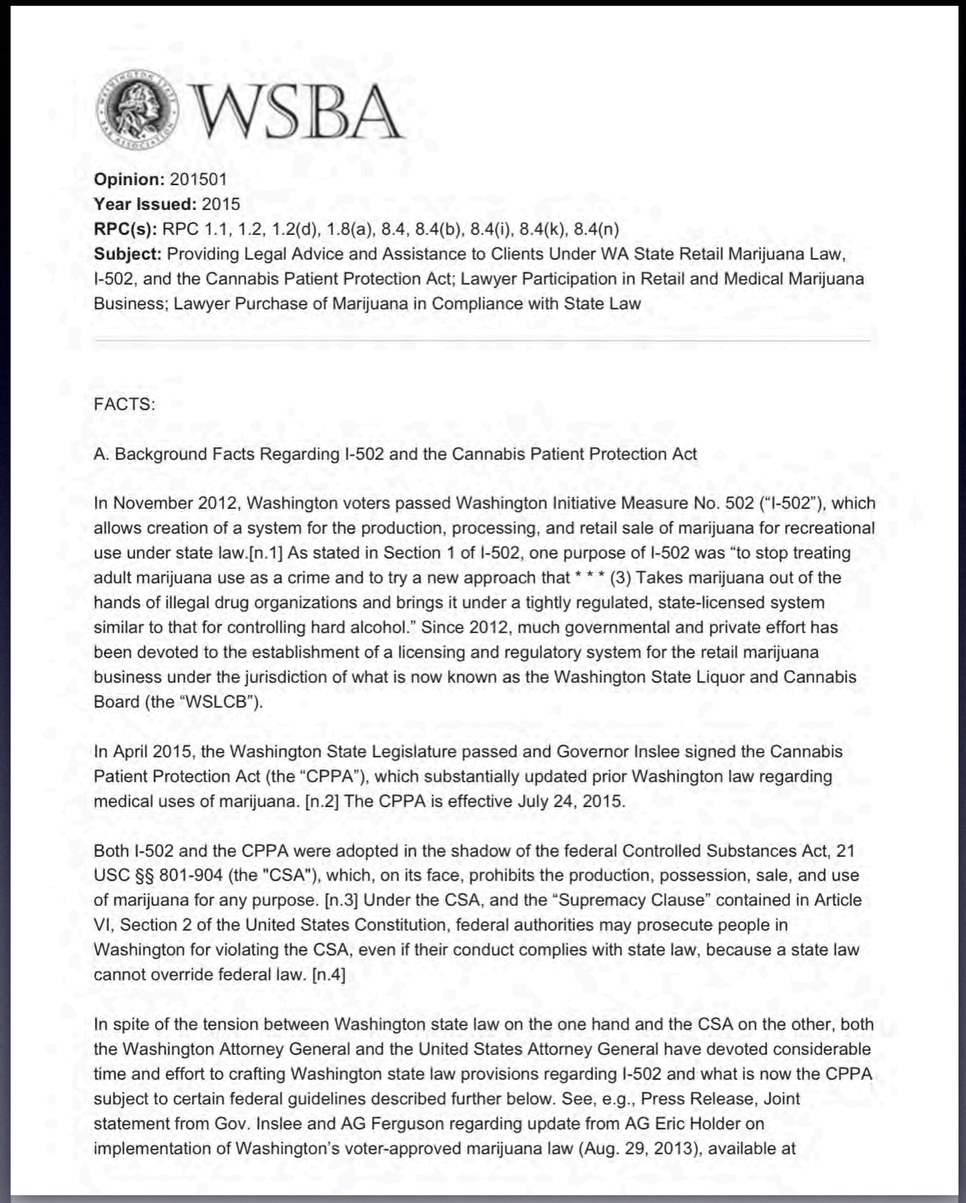
# WA Ethics Opinion 201501–2015

1. May a lawyer advise a client about interpretation and compliance with I-502 without violating the RPC? **Yes, qualified.**
2. May a lawyer provide advice and assistance to a client in the formation and operation of a business entity to comply with I-502 without violating the RPC? **Yes, qualified.**
3. May a lawyer own and operate a business under I-502 without violating the RPC? **Yes, qualified.**
4. May a lawyer purchase and consume marijuana under I-502 without violating the RPC? **Yes, qualified.**



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FROM: Monty Wilkinson
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SUBJECT: Policy Statement Regarding Marijuana Issues in Indian Country

ACTION REQUIRED: None. Information Only.

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With a number of states legalizing marijuana for use and production, some tribes have requested guidance on the enforcement of the Controlled Substance Act (CSA) on tribal lands by

**Office of the Attorney General**
**Washington, D. C. 20530**

January 4, 2018

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Jefferson B. Sessions, III
Attorney General

SUBJECT: Marijuana Enforcement

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 *et seq.* It has established significant penalties for these crimes. 21 U.S.C. § 841 *et seq.* These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.

Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.[1] This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

[1] Previous guidance includes: David W. Ogden, Deputy Att'y Gen., Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); James M. Cole, Deputy Att'y Gen., Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014); and Monty Wilkinson, Director of the Executive Office for U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).

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# Barr: I wouldn't go after businesses relying on Obama-era marijuana policy

BY JACQUELINE THOMSEN - 01/15/19 02:58 PM EST

104 COMMENTS

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# Live Questions?

## May a lawyer purchase and consume marijuana under I-502 without violating the RPC?

OATH OF ATTORNEY

State of Washington, County of _____ ss.

I, _____, do solemnly declare:

1. I am fully subject to the laws of the State of Washington and the laws of the United States and will abide by the same.

2. I will support the constitution of the State of Washington and the constitution of the United States.

3. I will abide by the Rules of Professional Conduct approved by the Supreme Court of the State of Washington.

4. I will maintain the respect due to the courts of justice and judicial officers.

5. I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor. I will never seek to mislead the judge or jury by any artifice or false statement.

6. I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with the business of my client unless this compensation is from or with the knowledge and approval of the client or with the approval of the court.

7. I will abstain from all offensive personalities, and advance no fact prejudicial to the honor or

**Rule 8.4. Misconduct.** It is professional misconduct for a lawyer to:
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(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) Engage in conduct that is prejudicial to the administration of justice;
(e) State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

**COMMENT**

[1] Because use, possession, and distribution of marijuana in any form still violates federal law, attorneys are advised that engaging in such conduct may result in federal prosecution and trigger discipline proceedings under SCR 111.

[Added; effective May 1, 2006; as amended; effective February 10, 2017.]

# Live Questions?

May a lawyer properly practicing cannabis law in one jurisdiction be disciplined in another jurisdiction?

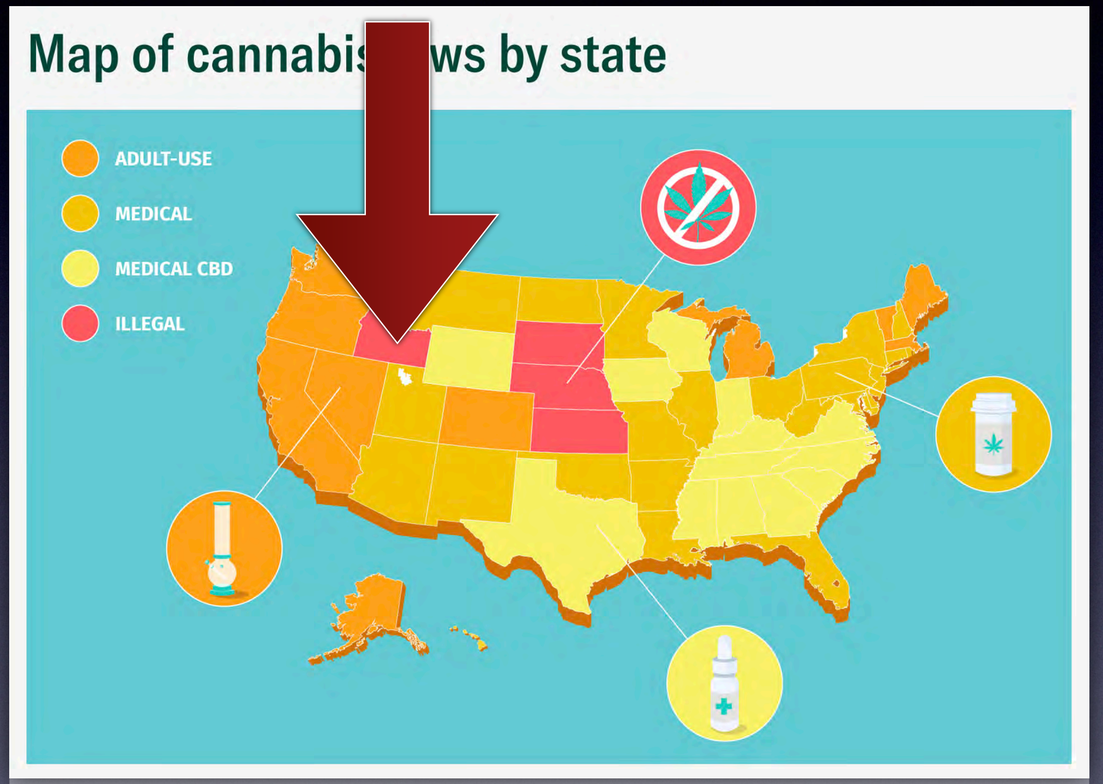
## Rule 8.5: Disciplinary Authority; Choice of Law

Share this:

*Maintaining The Integrity of The Profession*

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.