

Advisory Opinion #2018-01

(adopted October 9, 2018)

Question: *Does a judge's personal use of marijuana violate the Alaska Code of Judicial Conduct?*

Opinion: Judges are required to “comply with the law” (Canon 2A, Alaska Code of Judicial Conduct). While personal marijuana use is lawful under Alaska state law, it remains illegal under United States federal law. The specific language of Canon 2A is:

In all activities, a judge shall exhibit respect for the rule of law, comply with the law, and avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The Commentary to this provision emphasizes that: “Actual improprieties under this standard include violations of law, court rules, and other specific provisions of this Code.”

Colorado is the only other state having legalized personal use of marijuana that has issued an opinion addressing the specific question of whether a judge's personal marijuana use violates their Code of Judicial Conduct. Relying on their Code provision 1.1 that provides not only that a judge “shall comply with the law” but also a specific provision addressing conduct by a judge that violates a criminal law, that opinion concludes that Colorado judges violate their Code by using marijuana as the use of marijuana is a federal crime. Colorado's Code has an unusual provision excluding minor violations of criminal law from their ethical requirements. Rule 1.1 (B) of the Colorado Code provides: “Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.” Consequently, much of the Colorado opinion surrounds whether marijuana use is a “minor violation” of federal criminal law, before concluding that it is not a minor offense within the meaning of their Code provision.

In Alaska we not only look to our Code for a minimal standard for discipline but also as a guide to ethical conduct. Our ethics advisory opinions further that purpose by applying provisions of the Code to specific fact situations such as the one proposed here. There are two aspects of Canon 2A that are implicated here: (1) a judge must respect and follow the law and (2) a judge must avoid the appearance of impropriety. The requirement that a judge shall comply with the law includes federal law as well as state and local laws.

Alaska law surrounding marijuana use is unique among the states. In a 1975

Supreme Court opinion, *Ravin v. State*¹⁰, the right to privacy in the Constitution of the State of Alaska was held to protect the right to personal use of marijuana in the home. While recognizing the special privacy that the home provides, the court did recognize that there are limitations to that right of privacy in the home:

No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it is private, that is, it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated.¹¹

Judge's personal rights in some areas are limited by the Code of Conduct. Judges are limited in speech, financial endeavors, and political activity to preserve their impartiality and ability to hear cases. Our Code of Conduct provides limitations on judges that are reasonable and necessary to provide confidence in the integrity and impartiality of our courts.

As long as federal law criminalizes marijuana use, Alaska judges who choose to use marijuana will violate the Alaska Code of Judicial Conduct. Marijuana use violates federal law and its use by a judge would reflect a lack of respect for the law by showing a selective attitude towards the law suggesting that some are appropriate to follow but others are not. Public use of marijuana by a judge would further create an appearance of impropriety. This restriction on judges, even in their personal use in the home, is reasonable and necessary to preserve public confidence in the judiciary.¹²

¹⁰ 537 P2d 494 (Alaska 1975)

¹¹ Id. At 504

¹² Indeed, at least in an earlier time, a judge's puff on a joint passed around at a Rolling Stones concert attracted considerable public and media attention. *In re Gilbert*, 668 N.W. 2d 892 (Michigan 2003) One never knows when an iPhone is out and ready to take a picture of a momentary indiscretion.