The Cannabis Quandary: Legal Issues vs. Moral Muddle

The Panel

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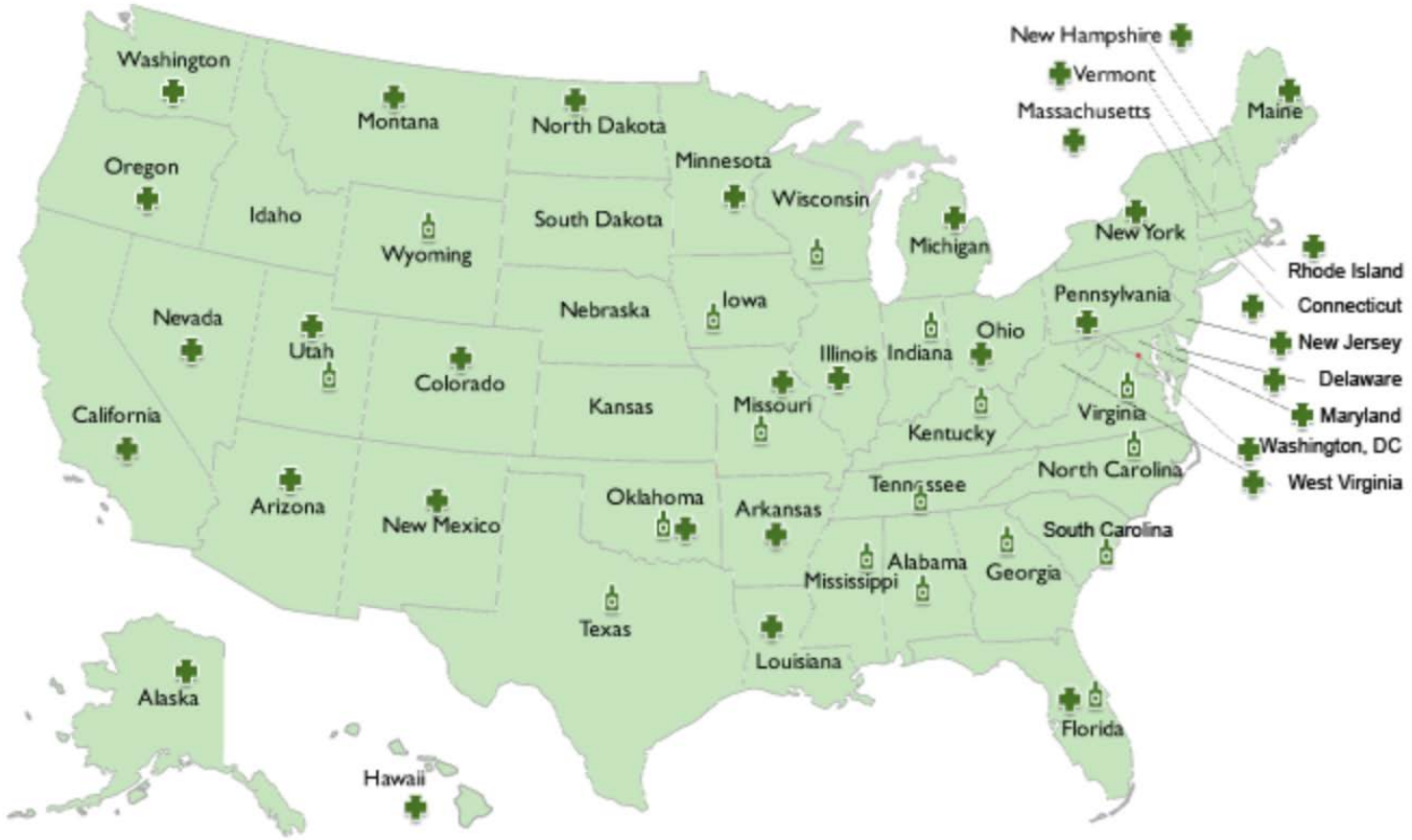
Agenda

- Background
- New York vs. Virginia: Legal Landscape
- Overview of Federal Cannabis Law & Policy
- Practice Considerations – A quick look at:
  - Representing Cannabis Clients
  - Labor & Employment
  - Intellectual Property
  - Criminal Law
- Legal Issues and Morality
- Questions?

Background



Map courtesy of NORML

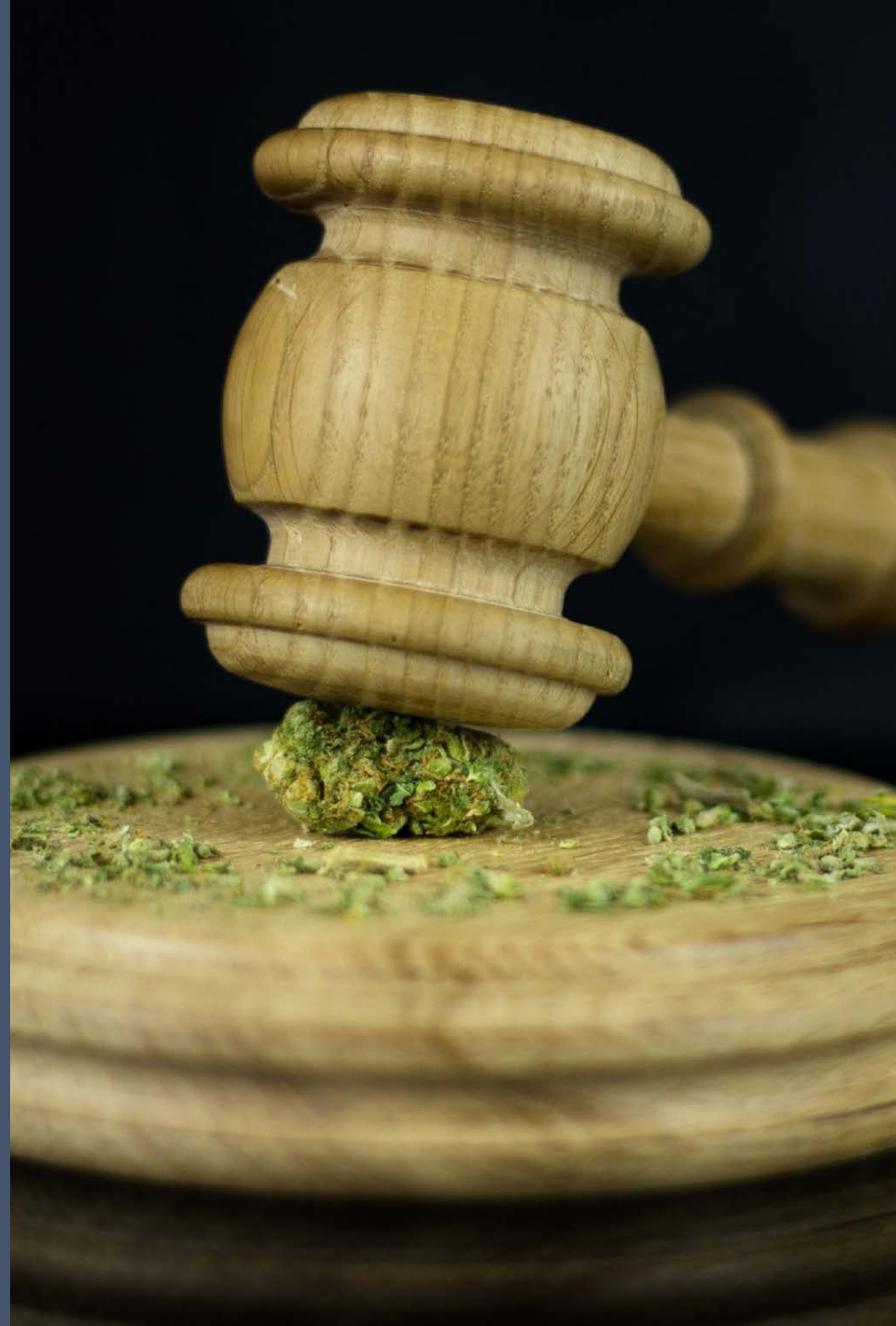
33 states plus Washington, D.C., Puerto Rico, Guam, and the U.S. Virgin Islands

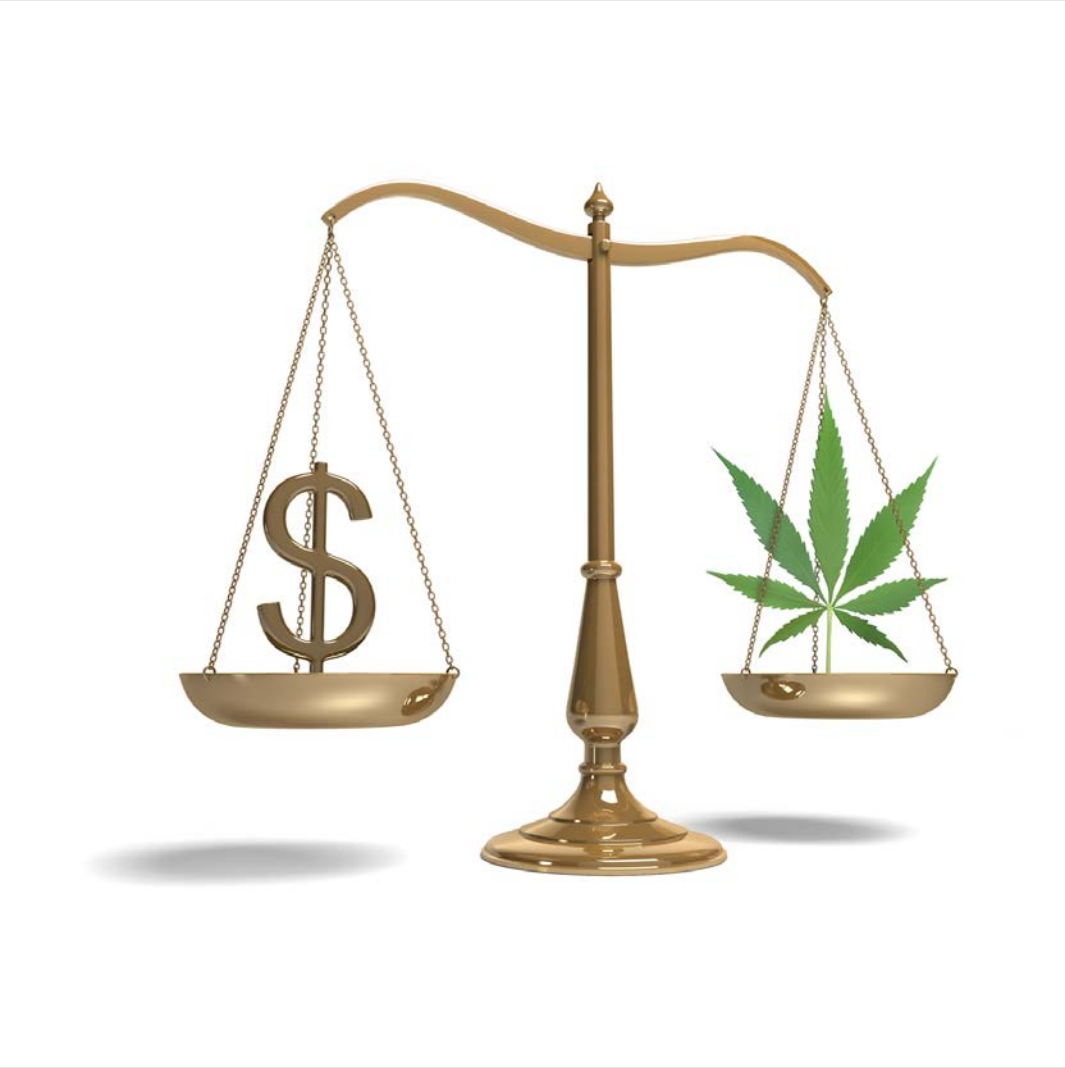
New York vs. Virginia: Legal Landscape

	NEW YORK	VIRGINIA
Medical or Adult Use?	Medical (Compassionate Care Act, 2014)	Medical (VA Code § 18.2-250.1, 2018)
Affirmative Defense or Legal?	Legal	Affirmative Defense
# of Licenses/Facilities	10 companies, each with 4 dispensing and 1 manufacturing location	5 vertically integrated facilities
Who can issue recommendations?	Physician, NP, PA	Physician, NP, PA (As of July 1, 2019)
Qualifying medical conditions	Enumerated list, e.g. cancer, Parkinson's, MS, PTSD, among others	Any diagnosed condition or disease

Federal Cannabis Law & Policy

- Marijuana is still a Schedule I controlled substance
- Cole Memo – 2013
  - Federal gov't will not expend resources to enforce federal marijuana prohibition in states with regulated marijuana programs, except where it would undermine federal initiatives (e.g. prevent violence, prevent distribution to minors, etc.)
- Sessions Memo – 2018
  - Rescinded Cole Memo
  - However, several US Attorneys have stated they will continue to abide by the Cole Memo





Federal Cannabis Law & Policy – Tax & Finance

- Cannabis companies are still taxed on revenue
- 26 U.S.C. § 280E – Expenditures in connection with the illegal sale of drugs
  - NO deductions or credits allowed for companies engaged in trafficking Schedule I and II drugs
  - EXCEPT COGS
- "Two-Business Strategy" and *CHAMP v. Commissioner*
- *Canna Care v. Commissioner*
- FinCEN Memo
  - Issued in 2014 in connection with Cole Memo, has not been rescinded
  - Financial institutions servicing cannabis companies have to file "Marijuana Limited" SAR
- February 13, 2019: House Financial Services Committee hearing titled *Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses*
  - To examine banking difficulties faced by cannabis businesses

Practice Considerations - Representing Cannabis Companies

- **Engagement Agreements**
  - Clearly state that marijuana is still a Schedule I controlled substance under the CSA and that means it is illegal to manufacture, distribute, or dispense marijuana under the CSA
  - "As your attorneys, we will not engage or assist in illegal conduct, but we may discuss the legal consequences of a proposed course of conduct and may counsel or assist you in determining the validity, scope, meaning, or application of the law to that conduct."
- **Malpractice Insurance** – be sure to check with your carrier

Practice Considerations – Labor & Employment

- Federal Preemption
  - *Coats vs. Dish Network*
- Disability Discrimination
  - Treatment vs. Condition
    - *Shepherd v. Kohl's Dep't Stores*
    - *Ross v. RagingWire Telecommunications, Inc.*
  - State law claims tend to be more successful

https://www.nysba.org/Journal/2018/Jul/Medical_Marijuana_in_the_Workplace/

Practice Considerations - IP

- **Trademark**
  - USPTO will not accept trademark applications for federally unlawful industry
  - Start by trademarking the **brand** at the federal level for non-plant-touching products
    - e.g. bags, t-shirts, hats, website
  - State-level trademarks in states with regulatory programs OK
  - Couple state-level trademark for cannabis goods with federal protection for ancillary goods and services
- **Patent**
  - **Can** register federal patent for cannabis plants because patents protect the process/formula **not the product itself**
  - BUT can negate “trade secret” status because you have to disclose a process to patent it

Searching US Patent Collection...

Results of Search in US Patent Collection db for:
cannabis OR marijuana: 5045 patents.
*Hits **1** through **50** out of **5045***

Practice Considerations - Criminal Law

TREND: Refusing to prosecute marijuana possession

- Norfolk Commonwealth's Attorney Gregory Underwood will not prosecute misdemeanor marijuana possession
- Baltimore State's Attorney Marilyn Mosby will not prosecute any Marijuana possession

- Individuals with a record may want to expunge for purposes of getting a job, etc., but **expungement is difficult**

- **Decriminalization** has been discussed but no movement on it thus far

Questions?

New York State Law

Penal Law

Consolidated Laws of New York's Penal code

NY Law Penalties - Marihuana Offenses

MARIHUANA LAW PENALTY GUIDE

Yes, it's spelled correctly. Common spelling is 'Marijuana' but the Penal Code spells it 'Marihuana'

Offense	**Penalty**	**Jail**	**Fine**
POSSESSION			
25 g or less (first offense)	Not Classified	N/A	$ 100
25 g or less (second offense)	Not Classified	N/A	$ 200
25 g or less (third offense)	Not Classified	15 days	$ 250
More than 25 g - 2 oz	Misdemeanor	3 months	$ 500
More than 2 - 8 oz	Misdemeanor	1 year	$ 1,000
More than 8 oz - 1 lb	Felony	4 years	$ 5,000
More than 1 - 10 lbs	Felony	7 years	$ 5,000
More than 10 lbs	Felony	15 years	$ 15,000
In public view	Misdemeanor	90 days	$ 250

Offense	Penalty	Jail	Fine
Offense	**Penalty**	**Jail**	**Fine**
SALE			
2 g or less without profit or 1 marihuana cigarette	Misdemeanor	3 months	$ 500
25 g or less	Misdemeanor	1 year	$ 1,000
More than 25 g - 4 oz	Felony	4 years	$ 5,000
More than 4 oz - 1 lb	Felony	7 years	$ 5,000
More than 1 lb	Felony	15 years	$ 15,000
Using a child to assist	Felony	4 years	$ 5,000
To a minor	Felony	7 years	$ 5,000
Offense	**Penalty**	**Jail**	**Fine**
TRAFFICKING			
Any amount	Felony	15* - 25 years	$ 100,000
* Mandatory minimum sentence			
Offense	**Penalty**	**Jail**	**Fine**
CULTIVATION			
Any amount*	Misdemeanor	1 year	$ 1,000

Offense	Penalty	Jail	Fine
* Cultivating marijuana is also possessing marijuana under current case law.			
Offense	**Penalty**	**Jail**	**Fine**
HASH and CONCENTRATES			
Possession of less than 1/4 oz	Misdemeanor	1 year	$ 1,000
Possession of 1/4 - less than 1 oz	Felony	7 years	$ 5,000
Possession of 1 oz or more	Felony	15 years	$ 15,000
Sale	Felony	15 years	$ 15,000
Offense	**Penalty**	**Jail**	**Fine**
PARAPHERNALIA			
Possession or sale of scales or balances for the purpose of weighing or measuring marijuana	Misdemeanor	1 year	$ 0
Subsequent offense	Felony	7 years	$ 5,000
CIVIL ASSET FORFEITURE			
Property can be seized if convicted of a felony.			
MISCELLANEOUS			
Mandatory driver's license suspension of 6 months for youthful offenders.			

This information is ONLY a GUIDE and is subject to change.
READERS SHOULD CONSULT WITH A QUALIFIED ATTORNEY.

Law Reference

- New York Penal Code: **Section 70 - Sentences**
- New York Penal Code: **Section 80 - Fines**
- New York Penal Code: **Section 220 - Controlled Substances Offenses**
- New York Penal Code: **Section 221 - Marihuana Offenses**
- New York Public Health Law: **Section 3306(d) - Hallucinogenic Substances**
- New York Public Health Law: **Medical use of Marihuana**

Marijuana and its synthetic "equivalents" are considered Schedule I hallucinogenic substances under New York Public Health Law. Synthetic equivalents include resinous extracts and derivatives with similar chemical properties.

Penalty Details

- **Penal Law 220.34** - Sale of any amount of Concentrated Cannabis is a class C Felony subject to no more than 15 years imprisonment and a fine not to exceed $15,000.
- **Penal Law 220.44** - Sale of any amount of Concentrated Cannabis on a school bus, on the grounds of a child day care or educational facility, or in a publically accessible area within 1000 feet of the real property line of such a facility is a class B Felony subject to no more than 25 years imprisonment and a fine not to exceed $30,000.
- **Penal Law 220.48** - Sale of any amount of Concentrated Cannabis by a person 21 years old or more to a person 17 years old or younger is a class B Felony subject to no more than 25 years imprisonment and a fine not to exceed $30,000.
- **Penal Law 220.50** - Possession or sale of scales or balances for the purpose of weighing or measuring marijuana is a class A misdemeanor and is punishable by up to 1 year of imprisonment. Any subsequent conviction of possession or sale of paraphernalia is a class D felony and is punishable by up to 7 years imprisonment and a fine of up to $5000.
- **Penal Law 480.05** - If convicted of a felony offense the following may be forfeited, unless the forfeiture would be disproportionate from what the defendant gained from the offense: the proceeds from the offense, instruments used in the offense (including a car).

Penal Law - Table of Contents

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N.Y.S.
Laws: YPDcrime.com, CityofYonkers.org, CityofYonkersPolice.com, CityofYonkersPolice.org, JMBwebdesigns.com, NYScriminalLaws.com, YonkersPD.com, YonkersPD.org, YonkersPolice.com,YonkersPolice.org, YPDcrime.info - A comprehensive on-line digest of New York's criminal code.

NOTE: Penal Law code reviewed as of 01/01/2019. Several corrections/updates were made.

Tunatura/Shutterstock

Recreational marijuana FAQ

What we know – and what we don't – about legalizing pot in New York.

By REBECCA C. LEWIS

FEBRUARY 4, 2019

Gov. Andrew Cuomo unveiled a plan to legalize and tax recreational marijuana as part of his executive budget proposal. The section spelling out the many, many details of marijuana legalization spans a whopping 191 pages. That gives lawmakers, advocates and opponents a lot to sift through. Some questions are answered in the bill, while other questions will likely spark ongoing debate over the next year. Here are some of the most pressing questions regarding what now seems like the nearly inevitable legalization of recreational marijuana in New York.

How many other states allow legal marijuana?

A total of 10 states and the District of Columbia have fully legalized recreational marijuana for adult use: California, Nevada, Oregon, Washington, Alaska, Colorado, Michigan, Massachusetts, Vermont and Maine. New York would be somewhat unusual among these states by legalizing marijuana through a statute, rather than through a ballot referendum with additional laws and regulations established after the fact. The only other state to go this route was Vermont, whose law went into effect in July 2018.

But isn't this still technically illegal on the federal level?

Marijuana is still considered a Schedule I drug by the Drug Enforcement Administration, meaning the federal government considers it to have the highest risk for abuse and no accepted medical use. Under President Barack Obama, the Justice Department eased its enforcement of federal drug laws in states that had legalized marijuana. The Trump administration reversedthat decision, but no state has faced serious consequences for its medical or recreational marijuana programs yet.

Who will oversee recreational marijuana?

Cuomo has proposed creating a new Office of Cannabis Management to oversee not just recreational marijuana but medical marijuana and industrial hemp as well. The office would be part of the Division of Alcoholic Beverage Control in the state Liquor Authority. It would be in charge of licensing growers, processors and distributors, as well as certifying patients for medical use.

What happens to the state's existing medical marijuana program?

Much of the debate surrounding the legalization of recreational marijuana has centered around criminal justice and potential tax revenue. The fate of the state's medical marijuana program, established in 2014 through the Compassionate Care Act, has played a smaller role in the conversation. Under Cuomo's new budget proposal, patients with a "serious condition" must still receive certification from a doctor for medical marijuana, only now the Office of Cannabis Management would register patients, rather than the state Department of Health, which currently handles the program. This is still for the most part restricted to a limited number of conditions previously enumerated by the state, but Cuomo's proposal expands the list slightly to include Alzheimer's disease, muscular dystrophy, dystonia, rheumatoid arthritis and autism. It also gives the executive director of the Office of Cannabis Management the authority to add more conditions. Medical providers must also still register with the state after completing a short educational course. Overall, the proposal mostly transfers the program intact to the Office of Cannabis Management.

Are there any changes for patients using medical marijuana?

One notable change to the program is that patients would be able to grow their own marijuana at home, with a limit of four plants per registered patient. Patients previously were not allowed to grow marijuana, and the new proposal does not extend to recreational users. Further regulations regarding home growing would be determined by the executive director of the Office of Cannabis Management.

The program still faces a larger existential question in the face of recreational legalization, which only time will answer: whether the program will survive. Right now, medical marijuana is both expensive and difficult to come by. According to the Times Union, it can cost some patients close to $1,000 a month, and over a third of those who registered never got the drug last year. The possible proliferation of recreational marijuana may drive people away from the medical program in favor of self-medicating. Doctors involved with the program hope that competition from the recreational market will drive down medical marijuana prices. Those in the medical marijuana industry say allowing them to also sell recreational marijuana would lower prices.

While the circumstances are not identical to New York, Colorado did not see a significant decrease in medical marijuana patients following recreational legalization. Colorado also instituted a lower tax rate for medical products compared to its recreational counterparts.

What happens to those convicted of marijuana-related crimes?

The Office of Cannabis Management could review and seal past marijuana convictions, although the speed at which this might occur is not made clear in Cuomo's proposal. The process may involve resentencing for those currently imprisoned to reflect lesser charges under new laws.

Does this mean there will be no more marijuana arrests?

While marijuana would be legal under Cuomo's proposal, that does not mean that people will no longer be arrested on marijuana-related charges. Aside from DWI and DUI charges (discussed in more detail below), growing a cannabis plant or selling marijuana without a license would still be against the law. Depending on the pricing and availability of the drug, there is a good chance that a black market would still exist that does not comply with new state regulations. For the most part, those found in violation of new laws and regulations would be charged with misdemeanors.

So how much can I legally carry at once?

According to The Buffalo News, you would be able to carry up to 1 ounce of cannabis or 5 grams of concentrated cannabis. This is also the same amount that a retailer would be allowed to sell to a single person in one day.

What about hemp?

The cannabis plant comes in many varieties, not just those with high concentrations of tetrahydrocannabinol, or THC, the plant's main psychoactive component. Hemp comes from the cannabis sativa L variety of plant, which has a a THC concentration below 0.3 percent and is used for industrial purposes like clothing, paper, biofuel, food, body care and bioplastics. The state estimates hemp can be used to manufacture over 25,000 different products.

Hemp has long been classified as a Schedule I drug under federal law, lumped together with marijuana as a drug as dangerous as heroin. That changed in December 2018 when President Donald Trump declassified hemp as part of the 2018 Farm Bill, making it legal on the federal level, though leaving specifics on regulations up to individual states.

An industrial hemp pilot program already existed in New York under the state Department of Agriculture and Markets, established in 2015 and expanded in 2017 to include businesses and farmers. Cuomo's new proposal differentiates between industrial hemp, encompassing nearly all nondrug-related uses of the plant, and hemp cannabis, which refers specifically to cannabis grown to cultivate cannabidiol, a popular form of hemp oil.

John Gilstrap of Hudson Hemp, an industrial hemp company participating in the pilot program, predicted that hemp will become a multibillion-dollar industry, outpacing the recreational marijuana business. "The recreational is always a sexy topic to talk about," Gilstrap told City & State. "But people who are really into the science or to the business recognize that really, it's the molecules, it's all about the molecules in the end."

How will recreational marijuana be taxed?

The governor proposed imposing three taxes on recreational marijuana. The first would occur during cultivation, at a rate of $1 per gram of cannabis flower or $0.25 per gram of cannabis trim. The second is a 20 percent tax on the sale of marijuana from a wholesaler to a retail dispensary. The third is a 2 percent tax on the same sale, but with proceeds going toward the county where the dispensary is located. Cuomo predicted this will generate $300 million in new revenues each year. However, he estimated that the first legal sale of recreational marijuana would not occur until at least April 2020, and if other states are any indication, it may take several more years for New York to see robust returns.

How will that new tax revenue be used?

Many have already begun debating how best to use marijuana tax money, such as investing in public transportation or reinvesting it into communities of color that were hurt by marijuana policing. Cuomo's proposal earmarked money for the administration of the program and other program-related expenses; small-business development and loans; substance abuse and mental health treatment; and public health education. Each expense seems to be directly or indirectly related to the recreational marijuana program. Cuomo also said the Office of Cannabis Management could recommend other uses for the revenue.

Currently, it does not appear that the governor is specifically setting aside any of the money for the state's general fund.

Will driving become more dangerous?

The short answer is maybe. In states where recreational marijuana has become legal, traffic accidents have increased. While studies haven't proven a direct causal link between the two, the correlation is troubling. Part of the problem, according to state Sen. Todd Kaminsky, is that there is not enough public education about the dangers of driving high. Despite the fact that research has shown that driving while under the influence of marijuana slows reaction timesand increases the likelihood of crashes, and a general consensus that driving while high is bad, Kaminsky referenced polling that shows there still seems to be a disconnect about just how dangerous driving high can be. "If we don't have a conversation about road safety parallel to every other one about legalization, we're not going to be prepared and we're going to have fatalities," Kaminsky told City & State. He held a roundtable with stakeholders last month to begin discussing the issue.

Is there a test for driving while high?

Adding to the complications of safe driving in the age of recreational marijuana is that unlike with alcohol, there is no accurate field sobriety test for marijuana intoxication levels. Currently, the only way to determine someone's blood THC content is through a blood test, which attorney and cannabis law expert Elizabeth Kase said can back up the court and quickly cost lots of

money. Breathalyzer-like devices claiming to accurately detect THC are in development, but are not yet on the market.

There is also the matter of determining what level of THC in the blood constitutes impairment. Some states have set the level at 5 nanograms per millimeter of blood. But even this is imperfect, since different ingestion methods of the same amount of marijuana can lead to widely varying levels of THC in the blood.

In order to address some of the concerns regarding impairment, Cuomo plans to convene a traffic safety commission as part of his marijuana proposal.

What if you don't want recreational marijuana in your town?

As part of his proposal, Cuomo included the ability for counties and municipalities with populations over 100,000 to "opt out" of the new regulations by banning the cultivation, processing, distribution and sale of recreational marijuana within their jurisdictions. This does not mean that possession of marijuana would be illegal, but for the general consumer, one would need to purchase it somewhere else. New York is not the first state to provide this option, with many municipalities in Michigan choosing to opt out of its new recreational marijuana program. So far, North Hempstead on Long Island is the only places to opt out.

Kase warned that allowing municipalities to opt out can impede the rollout of the program. She pointed to Massachusetts, which has similar opt-out options and local zoning issues, where she said it has taken the recreational marijuana program longer than planned to get up and running following its 2016 ballot initiative. Currently, the state has eight dispensaries. "I think you're going to see more and more of this in upscale neighborhoods," Kase said. "That is going to put a crimp and cramp in the rollout – potentially."

How strict will New York's regulations be?

The answer to this question is still hard to determine as many specific regulations need to be established. But given the restrictive nature of New York's medical marijuana program, it wouldn't be a surprise if the state institutes a similarly strict recreational program.

How will sales and licensing work?

The state plans to offer individual licenses for cultivation, processing, distributing, retail and on-site consumption. Anyone with a cultivation license to grow marijuana would not be allowed to also have a retail license to sell it. A single entity can, however, hold a processing and distribution license. The idea is to avoid the vertical integration of the marijuana business and ensure a separation between the companies growing the product and those who ultimately sell it to consumers. This structure is different than the state's medical marijuana industry, in which the company that grows and processes the drug is the same that runs the dispensaries. There is an exception for organizations currently registered with the medical marijuana program that would

allow them to produce and sell recreational marijuana without being subject to the restrictions applied to other companies.

On-site consumption licenses permit consumers to use or ingest marijuana products within their premises. Those with a retail license may also have one for on-site consumption, though there are restrictions about consumption within locations that are also dispensaries. And don't expect to be able to purchase marijuana products at bars, as any location with a liquor license would not be allowed to have a retail license for marijuana.

Will there be a cap on licenses?

Cuomo's proposal may set a limit on the number of licenses issued, but leaves that decision up to the unnamed executive director of the Office of Cannabis Management. That person could choose a number, or choose not to impose a limit. If the rules turn out anything like the medical marijuana program, licensing could be fairly restrictive. Only 10 medical marijuana companies are allowed to operate in the state, up from five initially, and each can only have a maximum of four dispensaries.

Correction: The town of Hempstead will vote later this month on a one-year moratorium on dispensaries and sales of recreational marijuana. An earlier version of this story misrepresented the town's stance on the drug.

Clarification: Only counties and municipalities with populations over 100,000 can opt out of the new marijuana law.

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5 Things People Get Wrong About Medical Marijuana in Workers' Comp

Here's what one medical director says the workers' comp industry should think about before embracing the drug.

By: Katie Dwyer | June 11, 2019

Topics: Opioids | Workers' Comp | Workers' Comp Forum

There's been lots of talk about medical marijuana as a safe alternative to opioids for the treatment of chronic pain, a common diagnosis among workers' compensation patients. But according to medical experts, the discussion is fraught with imprecise language, lack of scientific evidence and conjecture.

“There’s no data to confirm this, but anecdotally the industry is seeing more requests for reimbursement for medical marijuana,” said Marcos Iglesias MD, MMM, FAAFP, FACOEM, Senior Vice President, Chief Medical Officer at Broadspire.

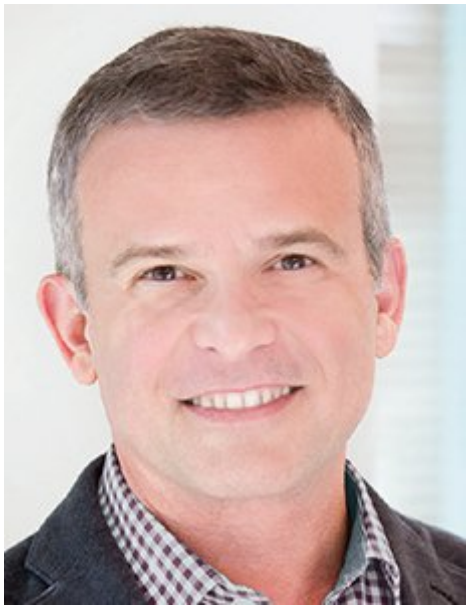
“But what I’m seeing is a tremendous lack of accurate knowledge. There are a lot of myths and misconceptions about marijuana, in general, and to me that’s the big concern. How should our industry be responding to these requests as they become more common?”

Iglesias laid about the five most pervasive misconceptions about marijuana in workers’ comp. Here are the notions payers should question as medical marijuana becomes a more widely accepted and requested form of treatment:

1. Medical marijuana is safer than recreational marijuana.

Medical marijuana is not fundamentally different from recreational marijuana. The distinction is one of semantics but has no practical implication for the uses or side effects of the drug.

“They are the same compound. Marijuana doesn’t know if it’s medical or recreational, or legal or illegal. It’s a substance,” Iglesias said. “The language is more of a legal or social construct, but not a medical one.”



Marcos Iglesias, senior vice president and chief medical officer, Broadspire

This misuse of language creates the false impression that medical marijuana is safer, more effective or more legitimate than recreational marijuana. There is no guarantee that those assumptions are accurate. Similarly, many believe that cannabidiol — or CBD — is safer than THC because it is not psychoactive and won’t give users a “high.”

“While it’s true that CBD doesn’t create the euphoric feeling that THC does, it still is a psychoactive compound. In fact, it’s touted as a treatment for anxiety and depression, which by definition would make it psychoactive,” Iglesias said. “It’s not a major misconception, but it underscores that we really don’t understand what we’re talking about when we talk about marijuana.”

2. Marijuana is an effective treatment for pain.

A 2017 study showed that marijuana is indeed effective at treating chronic pain, but there are caveats to those findings that the public frequently overlook. For one, marijuana was not proven effective for all types of chronic pain.

“That particular study looked only at chronic neuropathic pain. There are other types of chronic pain that are not addressed,” Iglesias said.

Even for neuropathic pain, the fact remains that opioids, antidepressants and antiepileptic drugs are more effective.

The other caveat is that pain was only reduced moderately. The study subjects were not ‘cured.’ Even for neuropathic pain, the fact remains that opioids, antidepressants and antiepileptic drugs are more effective.

“This doesn’t mean that marijuana is not effective and is not worth studying further, it just means that the evidence behind it as a treatment for chronic pain is tenuous. Today’s science does not allow us to make the broad pronouncements we’re making about the efficacy of marijuana,” Iglesias said.

3. Marijuana has no serious adverse effects.

While there have been no recorded marijuana overdose deaths, that does not mean that long-term use is without negative consequences.

“Cannabis use disorder, or addiction to marijuana, is very real,” Iglesias said. “A study published last year found that about 30 percent of frequent marijuana users are addicted, and as many as 12 percent of those people suffer severe symptoms.”

Those symptoms include the inability to function in any type of life role, meaning they cannot work, take on family responsibilities, or otherwise be a productive member of their communities.

Chronic users — whether for medical or recreational purposes — also pose a significant danger to those around them if they are impaired while driving or operating a piece of equipment. Workplace safety is a top concern cited by risk managers regarding legalized marijuana.

Read more about why marijuana impairment testing must be made a priority in workers’ comp.

“They are expressing concern around how to protect their workers, and that naturally leads to questions about impairment testing. How can they determine if someone is impaired?” Iglesias said.

Currently, there is no test that can accurately determine if someone is impaired from marijuana use. Unlike with breath alcohol testing, there hasn’t been enough research done to determine a blood level of THC at which impairment can be safely presumed.

“With breath alcohol testing, we’ve got decades of evidence that shows that if you’re at 0.08, presumptively you’re impaired. We don’t have the data and the science in the marijuana realm. It’s going to take us a while to get there,” Iglesias said.

4. Marijuana is the answer to the opioid crisis.

In states that have legalized medical marijuana, studies have shown that increased marijuana use is correlated with reduced opioid overdose deaths.

“Several studies have confirmed this link, but we still can’t be sure of the cause and effect relationship,” Iglesias said. Additionally, the correlation seems to weaken with time. Opioid overdoses may noticeably drop initially after marijuana legalization but will slowly start to creep up again.

“There’s also other evidence that shows that individuals who use marijuana actually increase use of opioids and have higher incidence of opioid use disorder,” Iglesias said. “Again, the answer is not as clear cut as everybody wants it to be. I’m skeptical when people make pronouncements that this is going to solve as big a problem as we have with opioids.”

“We have a drug problem in this country. We have it with opioids, but we have it with other drugs as well.” – Marcos Iglesias, SVP & Chief Medical Officer, Broadspire

Narrowing the options down to marijuana and opioids, Iglesias said, is also a “false choice” because both have their side effects, and neither is very effective at treating chronic pain. Rather, medical providers should look more broadly at the alternatives available.

“We have a drug problem in this country. We have it with opioids, but we have it with other drugs as well. We also have a chronic pain problem, especially in workers’ comp,” Iglesias said.

“What has been shown to work most effectively in chronic pain are things like self-management of activity, sleep and stress. Acupuncture, massage, and sometimes physical therapy can help. The answer is not going to come in a neatly-packaged silver bullet. It’s going to be a number of interventions, but the foundation needs to be education. Training individuals to manage pain as opposed to trying to find a cure for pain.”

5. Medical marijuana is approved by the FDA and regulated like any other medication.

Despite limited evidence supporting its use as a pain treatment, medical marijuana still has not gone through the formal FDA approval process that other prescription medications are subject to. And there are no evidence-based guidelines detailing indications, dosage amounts or contraindications.

However, the FDA did approve last year a CBD extract available by prescription under the name Epidiolex.

“Epidiolex has the safeguards any other medication would have in terms of manufacturing process, quality control and FDA approval process. I think that lays out a great blueprint for studying and approving other similar products,” Iglesias said.

“I think that will get us away from what I see as the biggest problem that we’ve entered in as a society, which is doing medicine by referendum.” – Marcos Iglesias, SVP & Chief Medical Officer, Broadspire

“I think that will get us away from what I see as the biggest problem that we’ve entered in as a society, which is doing medicine by referendum. So, in states that have approved medical marijuana laws, it’s essentially because either the legislature or the public thinks that this drug should be used.

“I think that’s highly dangerous, because it’s allowing people without scientific knowledge to decide what’s safe and effective, and to skirt the mechanisms that we’ve instituted to safeguard the public.”

Epidiolex, however, signifies that the medical and pharmaceutical community can effectively research marijuana compounds to determine proper usage and dosing. As marijuana grows in popularity, more research will add to the bank of scientific evidence and more trials will likely be conducted to create more FDA-approved prescriptions.

“I do think that we’re going to find at least some beneficial effects of marijuana, but more importantly we’ll learn enough about it to be able to give safe and accurate recommendations,” Iglesias said. **&**

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July 02, 2019 **FEATURE**

Ethical Issues in Representing Clients in the Cannabis Business: “One toke over the line?”

By Dennis A. Rendleman

Share this:

One toke over the line sweet Jesus One toke over the line Sittin’ downtown in a railway station One toke over the line Awaitin’ for the train that goes home, sweet Mary Hopin’ that the train is on time Sittin’ downtown in a railway station One toke over the line[1]

When clients or potential clients visit a lawyer, they are hoping to find answers to problems. When the client is looking to establish a marijuana business in a state that allows medicinal and/or recreational use of marijuana, the need for legal advice is heightened beyond the normal complexity of starting any new business. The marijuana business is highly regulated in each jurisdiction that has allowed it, and the regulations are as complicated as any administrative rules ever adopted.

At present there are numerous areas of the law in which state law and federal law are either in direct conflict or, at least, inconsistent. Examples include, treatment of drones under federal aviation law versus privacy law at the state and local level[2]; issues of voting rights versus voting suppression.[3] There also are significant disputes as to the authority of state law versus municipal and home rule authority. For example, state legislatures restricting home rule authority of municipalities in areas of immigration/sanctuary/welcoming cities, minimum wage, and civil rights protections for various minorities.[4] More recently, twenty-six Illinois counties have passed “gun sanctuary” resolutions purporting to direct county employees not to enforce various proposed state laws that the municipalities believe unconstitutionally restrict the Second Amendment.[5]

Most significantly, as of 7 November 2018, thirty-three states and the District of Columbia have laws permitting the manufacture, distribution and use of either recreational or medical marijuana or marijuana component laws or a combination. Indeed, during the course of composing this paper, the number of states adopting some legislation addressing cannabis in some form has changed so rapidly and become nuanced such that, while in 2017 there were only eight states where is was legal to use marijuana,[6] now few states have not addressed the issue and some that have not legalized use, have decriminalized possession of small amounts.[7]In the election of 2018, Michigan became the first midwestern state to vote by referendum to legalize recreational marijuana by 14% of the vote and medical marijuana was adopted by both Oklahoma and Utah.[8]

Regardless, the current federal Controlled Substances Act, 18 U.S.C. § 801 et seq., prohibits the production, distribution, sale, use, or possession of marijuana. The federal statute provides no exception for medical or other uses authorized or regulated by state law.[9]

In this world of rapidly changing and conflicting laws, a lawyer who wants to ensure a client operates within a state's law but is confronted with conflicting federal law, must address the ethical precept that prohibits a lawyer from assisting a client in committing a crime or fraud. This paper argues that because the ABA Model Rules of Professional Conduct are rules of reason, it is unreasonable to prohibit a lawyer from providing advice and counsel to clients and to assist clients regarding activities permitted by relevant state or local law, including laws that allow the production, distribution, sale, and use of marijuana for medical or recreational purposes so long as the lawyer also advises the client that some such activities may violate existing federal law.

Conflicting Cannabis Laws

Federalism is a fundamental component of the U.S. Constitution with state government and federal government operating in both separate and contiguous spheres.[10] One area in which concurrent authority has existed is in criminal law, but there is ongoing controversy regarding contradictory federal and state laws covering cannabis.[11]

For most of American history, marijuana was legal to grow and consume. Beginning in the 1910s, however, a number of states moved to criminalize the drug for the first time…. During the 1920s and 1930s, marijuana came to be associated in the public imagination with both crime and black and Hispanic migrant workers….In 1937…, Congress passed the Marijuana Tax Act, which led to dropping marijuana from the Federal Pharmacopoeia, the list of permissible medicines approved by the federal government. [T]he American Medical Association ("AMA") opposed the reclassification of marijuana, ….[W]ith the passage of the CSA [Controlled Substances Act] in 1970 [m]arijuana was classified, along with LSD, heroin, and other serious narcotics as a Schedule I drug, defined as a drug with a high likelihood of addiction and no safe dose. Under the CSA, the manufacture, distribution and possession of Schedule I narcotics is prohibited and punishments can extend to life in prison for large volume manufacturers and dealers. (internal citations omitted)[12]

Contrary to the extreme treatment of marijuana under the CSA in 1970, there has been a steady trend in the opposite direction in both public policy and state law. A number of states have also decriminalized the possession of small amounts of marijuana.[13]

In the fall of 2013, reacting to the public policy changes brought about by the electorate in individual states and action by Congress (the Rohrabacher-Farr (now Rohrabacher-Blumenauer) Act) prohibiting the federal Department of Justice ("DOJ") from using any money to prosecute medical marijuana in states where its use is legal under state law,[14] the DOJ announced it would not prioritize enforcement of federal marijuana laws in states with their own robust marijuana regulations, specifying eight federal enforcement priorities to help guide state lawmaking.[15]

However, on January 4, 2018, the then Attorney General, Jefferson B. Sessions, III, repudiated that policy and issued a new memo that directed local U.S. Attorneys to "to follow well-established principles when pursuing prosecutions related to marijuana activities"[16] However, that Attorney General resigned upon request from the President; the acting attorney general did not alter Sessions' action.[17] During his confirmation hearing, new Attorney General William P. Barr stated that he saw no reason for the DOJ to "go after" companies that are in compliance with state laws.[18]

Legal commentators have noted that the relationship between federal law and state law is muddled:

The U.S. Supreme Court has upheld the federal government's ability to enforce the CSA [Controlled Substances Act] even against those complying with more lenient state marijuana laws. Because Congress has the authority under the Commerce Clause to prohibit even the purely intrastate cultivation and possession of marijuana, no state can erect a legal shield protecting its citizens from the reach of the CSA. But at the same time, states' decisions to eliminate state marijuana prohibitions are simply beyond the power of the federal government. The federal government cannot command any state government to criminalize marijuana conduct under state law. From that incontrovertible premise flows the conclusion that if states wish to repeal existing marijuana laws or partially repeal those laws (such as by allowing regulated medical or recreational use), they may do so without running afoul of federal preemption.[19](internal citations omitted)

However, the wall between federal law and state law seems to hold strong when there is no other option. In *U.S. v. Schostag*,[20] the Circuit Court of Appeals upheld a District Court ruling denying the defendant's motion to modify his parole. Schostag was prescribed medical marijuana under Minnesota law for treatment of chronic pain. On supervised release for possession of a firearm and attempted possession of methamphetamine, the use and/or possession of marijuana was prohibited, even for medical purposes. Because the federal law still prohibited marijuana the fact that Minnesota authorized medical marijuana was insufficient to change the conditions of parole.[21]

This has been further reinforced recently by the U.S. Customs and Border Protection agency confirming its policy of treating marijuana as a banned substance such that one who participates in the now legal Canadian cannabis industry will be treated as "drug traffickers" and be prohibited from entering the United States. Moreover, possession of marijuana at the border will remain illegal even if the traveler is crossing from Canada into a state that has legalized medicinal or recreational use.[22]

Lawyer's Representation Is Not Endorsement, but Lawyer Must Provide Candid Advice

ABA Model Rule 1.18 addresses the status of individuals who consult lawyers. Model Rule 1.18(a) states: "A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."[23]

Because an individual becomes a prospective client does not either imply or mandate that a full attorney/client relationship will result. Either the prospective client or the lawyer may determine that an attorney/client relationship will not be appropriate. Should the lawyer and the prospective client determine to proceed with a formal relationship, Model Rule 1.2(b) makes clear that the lawyer's representation of the client is not an endorsement of the client's "political, economic, social or moral views or activities." [24]

Additionally, regardless of the client's position and whether the lawyer endorses that position, Model Rule 2.1 requires the lawyer to exercise independent professional judgment and render candid advice.[25] Equally important, Model Rule 2.1 authorizes a lawyer to include not only the law, but other considerations such as "moral, economic, social and political factors" in advising the client.

As noted in Comment [2] to Rule 2.1, "[p]urely technical legal advice … can sometimes be inadequate."[26] Rather, "[a] client is entitled to straightforward advice expressing the lawyer's honest assessment" according to Comment [1].[27] Indeed, Comment [5] warns that "when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 [Communication] may require the lawyer offer advice if the client's course of action is related to the representation."[28]

U.S. v. McIntosh[29] illustrates the important role lawyers play in providing advice to help clients safely navigate conflicting state and federal laws. On December 16, 2004, Congress adopted a "rider" to an omnibus appropriations bill funding federal government operations that prohibited any funds appropriated to the Department of Justice from being used to prevent listed states from implementing their state laws regarding medical marijuana. In the 9th Circuit Court of Appeals, ten cases from California and Washington state involving various federal indictments were consolidated. All claimed that the rider should thwart the DOJ prosecutions.[30] The court concluded that the rider would not be violated if the DOJ was prosecuting defendants for conduct that was not authorized by the state medical marijuana laws. Therefore, the defendants were entitled to evidentiary hearings to determine if their conduct was authorized by the state medical marijuana laws. To meet this standard, upon remand, the district court determined that a defendant had to show by "a preponderance of the evidence that he has strictly complied with California's medical marijuana laws."[31] The draft plan originally released to regulate medical marijuana in California was 211 pages.[32]

It is highly probable that a client who is involved in the marijuana industry in California, will need the candid advice and counsel of a lawyer to understand the application of these plans, regardless of how the inconsistency between state and federal law is ultimately resolved.

Existing ABA Model Rules and Ethics Opinions

The ABA Model Rules of Professional Conduct do not prohibit a lawyer from counselling or assisting a client regarding participation in or withdrawal from business and other opportunities that have occurred because a state law permits medical and/or recreational use of cannabis.

ABA Model Rule of Professional Conduct 1.2(d) reads:

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 [9] elaborates on this provision:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Directly related in this circumstance, Model Rule 8.4(b) states: "It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects".

Model Rule 1.2(d) contemplates legality as a binary concept, not an ambiguous situation with conflicting federalism issues. Cases discussing Model Rule 1.2(d) mirror this distinction. For example, a Colorado lawyer advised a client to offer his ex-wife real estate in exchange for favorable testimony in criminal case; an Indiana lawyer advised a father to ignore a court order and not return his child to the mother; a New Jersey lawyer was disbarred for advising a client to invent defense evidence for a drunk-driving case.[33]

Reviewing other provisions in the Model Rules for insight, it is noteworthy that the Preamble and Scope to the Model Rules paragraph [14] states: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."

Model Rule 2.1, Advisor, is relevant:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Excerpts from Model Rule 2.1, Comments [1] and [2] are on point:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. … However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. … Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations … are predominant.

Existing Rules and Ethics Opinions from Other Jurisdictions

A number of states have addressed the Rule 1.2(d) issues presented by state legalization of medical and recreational marijuana with either or both rule changes and ethics opinions. In general, the debate has been between a strict "textual" approach versus a more client-centric policy approach founded on reasonableness.

Several states have issued ethics opinions permitting lawyers to represent clients in the marijuana business relying on the state's Rule 1.2(d) as written. The State Bar of Arizona was the first to issue an opinion. Arizona Ethics Opinion 11-01 (2011) concluded that a lawyer does not violate the Arizona Rules of Professional Conduct when the lawyer advises and assists a client under the Arizona Medical Marijuana Act, but the lawyer also must explain to the client that the client's conduct may violate the Controlled Substance Act.[34]

The Colorado Bar Association reached the same conclusion in Opinion 125 (2013)[35] as did the Connecticut Bar Association in Opinion 2013-02 (2013). Connecticut noted specifically, "It is our opinion that lawyers may advise clients of the requirements of the Connecticut Palliative Use of Marijuana Act. Lawyers may not assist clients in conduct that is in violation of federal criminal law. Lawyers should carefully assess where the line is between those functions and not cross it."[36] The Washington State Bar Association opined that a lawyer may advise a client setting up and operating a marijuana business under Washington law and, as a matter of competence, should advise the client of federal law.[37]

The state disciplinary agencies in Florida, Massachusetts, and Minnesota have resolved the issue by advising that lawyers will not be disciplined for advising clients attempting to comply with state marijuana laws.[38] For example, the Florida State Bar, in lieu of either an amendment to the state rules of professional conduct or an ethics opinion, adopted a non-prosecution disciplinary policy that reads:

The Florida Bar will not prosecute a Florida Bar member solely for advising a client regarding the validity, scope, and meaning of Florida statutes regarding medical marijuana or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy.[39]

Illinois illustrated the "belt and suspenders" approach when the Illinois State Bar Association issued Professional Conduct Advisory Opinion 14-07[40] and the Illinois Supreme Court amended the Illinois Rules of Professional Conduct. Citing the Preamble at paragraph [14] ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."), Advisory Opinion 14-07 concludes a lawyer may provide legal services to a client under the Illinois cannabis law. However, the opinion also urged the Illinois Supreme Court to amend Illinois Rule 1.2(d) to specifically authorize such lawyer conduct.

Effective January 1, 2016, the Supreme Court of Illinois amended the Illinois Rules of Professional Conduct, Rule 1.2(d) as follows:

(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

(1) discuss the legal consequences of any proposed course of conduct with a client,

(2) and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and

(3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.[41]

Comment 10 to the Illinois Rules succinctly expresses the purpose for this amendment:

Paragraph (d)(3) was adopted to address the dilemma facing a lawyer in Illinois after the passage of the Illinois Compassionate Use of Medical Cannabis Pilot Program Act effective January 1, 2014. The Act expressly permits the cultivation, distribution, and use of marijuana for medical purposes under the conditions stated in the Act. Conduct permitted by the Act may be prohibited by the federal Controlled Substances Act, 21 U.S.C. §§801-904 and other law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by Illinois law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (d)(3) is not restricted in its application to the marijuana law conflict. A lawyer should be especially careful about counseling or assisting a client in other contexts in conduct that may violate or conflict with federal, state, or local law.[42]

The Ohio Board of Professional Conduct reached the opposite conclusion in Opinion 2016-6. Strictly construing Ohio Rule 1.2(d), it found that Rule 1.2(d) prohibits a lawyer from assisting a client in a marijuana business allowed under state law because the lawyer knows marijuana is illegal under federal law.[43] But subsequent to the advisory opinion, the Ohio Supreme Court amended Ohio Rule 1.2(d) by adding a (d)(2) which reads:

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law. [44]

Also in the stricter textual category is the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee and Professional Guidance Committee that jointly concluded that under Pennsylvania Rule 1.2(d) a lawyer could not counsel or assist a client on the manufacture, distribution, dispensation and possession of marijuana as they are crimes under federal law regardless of whether authorized under state law. However, a lawyer may explain the potential consequences of a proposed course of conduct, including discussion of state and federal law.[45]

Perhaps most illustrative of the unsettled, but evolving, state approaches is found in Maine. Originally, the Maine Professional Ethics Commission concluded that role of the lawyer is limited. “While attorneys may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law, the Rule forbids attorneys from counseling a client to engage in the business or to assist a client in doing so.”[46] This statement provided little guidance.

Several years later, the Commission re-evaluated that opinion noting that the consensus from other states was that lawyers “may ethically assist a client in legal matters expressly permissible under state law even if it may violate applicable federal law within certain parameters.”[47]However, it continued to emphasize that Maine lawyers should stress to marijuana clients the risks that exist from the conflict between state and federal law. The Commission also recommended that the Maine Supreme Court amend its applicable rule of lawyer conduct.[48]

As of the date of this article, in addition to Illinois, a number of other states including Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont and Washington have also addressed this question.[49]

Most recently, California, adopted new California Rules of Professional Conduct Rule 1.2.1 and, most relevant, Comment 6:

Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite such a conflict, to

assist a client in conduct that the lawyer reasonably believes is permitted by California statutes, regulations, orders, and other state or local provisions implementing those laws. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy.[50]

What is the Crime?

While the focus heretofore has been on the distinction between the federal Controlled Substances Act and various state laws making the use of medicinal and/or recreational marijuana legal or decriminalized. It also has been argued that lawyers who counsel or assist a client in any state marijuana related activities may be charged with federal crimes of aiding, abetting, being an accessory to a crime or a co-conspirator. This is particularly possible for, as Tom Wolfe quoted a New York Judge in *The Bonfire of the Vanities*, "a grand jury would 'indict a ham sandwich,' if that's what you wanted."[51]

In that vein, this author has discovered only one U.S. lawyer who has been charged in connection with representation of a client engaged in a marijuana business.[52] And that appears to have been more based upon local politics than actual criminal conduct. First, it was San Diego, California; second, the prosecutor was a high profile political figure who opposed the legalization of medical marijuana and who resigned from office to run for higher office in the midst of the case after California had voted to allow recreational marijuana. The prosecutor sought to search the lawyer's client files to find evidence to support claim that the lawyer removed evidence from the client's facility prior to a medical marijuana facility inspection. The illegal conduct alleged against the client was processing of pot infused products such as topical creams and canisters for vaping that were allegedly illegal under the medical marijuana law.[53]

While this demonstrates the risks a lawyer may encounter in a hostile environment, it also illustrates why a marijuana client needs legal advice. No disciplinary action was ever taken against the lawyer.

Application of Model Rules When State and Federal Laws Conflict

The Model Rules of Professional Conduct are primarily intended for adoption by state supreme courts as state rules to govern the conduct of lawyers admitted to practice law in jurisdictions. The Model Rules are also frequently used as models for various federal district and circuit courts, although those courts generally rely upon the states for primary admission and discipline of lawyers. Indeed, Congress has clarified that state supreme court disciplinary rules apply to lawyers employed by the Department of Justice and other agencies.[54]

Model Rule 1.2(d) was intended by the drafters to prohibit a lawyer assisting a client in clear criminality. ABA Formal Opinion 85-352 addressed the somewhat analogous question of a lawyer's ability to advise and advocate for a client on the preparation of tax returns. At issue was how "aggressive" a lawyer could be in pursuing positions that were not explicitly stated in prior

rulings by the IRS. After advising that the ethical standards for tax matters were no different than for any other civil matter, the Committee concluded that, on this question, there was no difference between the roles of “advisor” or “advocate”. While there are particular practices in the field of taxation, the general principle remains that a lawyer may advise and represent a client by pursuing a course of conduct in filing a return that the lawyer in good faith believes is “warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law.”

This is an application of the language in Rule 1.2(d) colloquially referred to as the “good faith exception”. The Rule explains that a lawyer “may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” As New York State Bar Association Opinion 1024 noted: “Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy.”[55]

Adopting this interpretation of Model Rule 1.2(d) would make amendment of the Model Rules unnecessary. While amendment may be appropriate on a state by state basis, it is not appropriate for the Model Rules. Indeed, to suggest such an amendment is necessary and appropriate would require a de facto determination of the legal question of whether the federal or state law has primacy.

While, as noted above, several states with medical or recreational marijuana laws have chosen to amend their rules of lawyer conduct to address the perceived conflict, it is not necessary. But, regardless of whether a state has amended its rules of conduct to match its rules on marijuana, at a minimum, one can argue that since the lawyer is admitted to practice by a state, the state has precedence over the ethical governance of lawyers.

This point is supported by the action of the federal district court in Colorado. The federal court had followed the practice of adopting the Colorado Rules of Professional Conduct in “lockstep” with the state. However, upon the state’s adoption of Comment 14 to Colorado Rule 1.2(d) that allowed Colorado attorneys to assist clients with conduct-permitted under the Colorado marijuana laws, but not under federal law, the federal court diverged. Instead of adopting Colorado Comment 14, the federal court limited the attorney’s conduct to advising the client. This has been interpreted to mean not assisting the client in any conduct.[56]

While there have been no disciplinary actions confronting the conflict between the ethics rules of a federal court versus the ethics rules of the state, the open question is whether a lawyer admitted to both the state and federal bars in Colorado or any other state would be subject to discipline for advising and assisting a non-federal, state-only client.

A Lawyer May Ethically Advise a Client When State and Federal Laws Conflict

It is the opinion of this author that a lawyer does not violate the Model Rules of Professional Conduct, specifically Rule 1.2(d) or Rule 8.4(b), when a lawyer advises and/or assists a client under state law in operating or withdrawing from a business of medical or recreational marijuana to the extent that it is authorized by that jurisdiction. As do several of the state ethics opinions, the author recognizes that the lawyer who provides legal advice and services to a client in the cannabis business must be extremely careful and fully advise the client of the conflicting laws and the risks and challenges resulting. Indeed, Rules 1.1: Competence[57] and 1.4: Communication (a)(2) and (b)[58] mandate such conduct by the lawyer.

The fact that a conflict exists between federal authorities and thirty-four jurisdictions over cannabis and that this conflict is reflected in contradictory laws is not something that was contemplated by the drafters of Rule 1.2(d). Rather, the rule contemplates a more straightforward situation where a client intends direct illegality, such as that discussed in ABA Formal Opinion 463 (Client Due Diligence, Money Laundering and Terrorist Financing).[59] It does not require an interpretation of Rule 1.2(d) that forces a lawyer to choose between state or federal law when both are applicable to a client in the jurisdiction in which the lawyer practices and no other authority—the courts, Congress, the Executive Branch—has chosen to make the law clear. The lawyer's obligation is to fully advise the client on all applicable law.

The activities that may be considered within a normal representation for other clients may take a different cast when a marijuana business allowed by state law is involved. For example, a lawyer who served as general counsel for two medical marijuana dispensaries was publicly censured in Colorado. The lawyer had established IOLTA accounts at a bank to use for paying taxes and bills for each of the dispensaries. However, the bank did not allow accounts that were connected with cannabis businesses.[60] Though the lawyer knew of the bank's policy, he did not disclose the purpose of the accounts to the bank. Consequently, the lawyer was found to have violated Colorado Rule 8.4(c) prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation (comparable to ABA MRPC Rule 8.4(c)).[61]

Similarly, should the present conflict between the state and local laws and the federal government change, the lawyer will be required to reevaluate the nature and scope of representation that is allowed. For example, if the U.S. Supreme Court were to rule that a state's recreational marijuana law was unconstitutional and that the CSA was supreme, a lawyer in that state would be confronted with a Rule 1.2(d) issue if a client wanted the lawyer's representation for establishment of a recreational marijuana business. Model Rule 1.2, Comment [13] is instructive in explaining "[i]f a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law…the lawyer must consult with the client regarding the limitations on the lawyer's conduct." This would not, however, restrict the lawyer from advising or representing the client in, for example, bringing a marijuana business into compliance or in winding down such business. Nor would Rule 1.2(d) contradict a lawyer's advocacy under Rule 3.1 for modification or reversal of any change.[62]

Conclusion

A lawyer does not violate the Model Rules of Professional Conduct, particularly Rules 1.2(d) and 8.4(c), by advising and/or representing a client in establishing, operating, or withdrawing from a medical or recreational business involving marijuana permitted by state law despite the existence of a conflict in laws between federal, state, and/or local jurisdictions. However, it is incumbent on the lawyer to fully inform the client of such conflicts and the potential risks involved. To do otherwise would deprive the client of legal advice and representation when it is most needed.

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13. *States That Have Decriminalized*, NORML, http://norml.org/aboutmarijuana/item/states-that-have-decriminalized (last visited Mar. 6, 2019).

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19. Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74 (2015); *See also* Gonzales v. Raich, 545 U.S. 1 (2005).

20. No. 17-2530 (8th Cir. 2018).

21. A comparable conflict arises for colleges and universities that receive federal funds (which includes student aid). Even though state law may authorize medical or recreational marijuana, a university must abide by federal law—not just the CSA, but also the federal Drug Free Campus Act and the Smoke Free Campus Act. *See, e.g.*, Marissa Plescia, *Medical marijuana legal in Illinois, illegal on campus*, The Daily Illini (Oct. 29, 2018), https://dailyillini.com/features/2018/10/29/medical-marijuana-legal-in-illinois-illegal-on-campus/.

22. Luiza Ch. Savage, *U.S. Official: Canadian marijuana users, workers and investors risk lifetime border ban*, Politico (Sept. 13, 2018), https://www.politico.com/story/2018/09/13/canada-weed-pot-border-783260.

23. Model Rules of Prof'l Conduct R. 1.18 (2017).

24. Model Rules of Prof'l Conduct R. 1.2(b) reads: "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."

25. Model Rules of Prof'l Conduct R. 2.1, Advisor, reads: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

26. Model Rules of Prof'l Conduct R. 2.1 cmt. [2] (2017).

27. Model Rules of Prof'l Conduct R. 2.1 cmt. [1] (2017).

28. Model Rules of Prof'l Conduct R. 2.1 cmt. [5] (2017).

29. 833 F.3d 1163 (9th Cir. 2016).

30. John Hudak, *McIntosh decision limits DOJ powers, but medical marijuana advocates should worry*, Brookings (Aug. 19, 2018), https://www.brookings.edu/blog/fixgov/2016/08/19/mcintosh-decision-limits-doj-powers-but-medical-marijuana-advocates-should-worry/.

31. U.S. v. McIntosh, 2017 WL 2695319 (N.D. Calif.).

32. Brooke Edwards Staggs, *California releases plan to regulate medical marijuana industry*, The Cannifornian (Apr. 28, 2017), http://www.thecannifornian.com/cannabis-news/california-news/california-releases-plan-regulate-medical-marijuana-industry/.

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34. Ariz. Ethics Op. 11-01 (2011) ("[W]e decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits.")

35. Colo. Bar Ass'n Ethics Comm., Formal Op. 125 (2013).

36. Conn. Bar Ass'n, Informal Op. 2013-02 (2013).

37. Wash. State Bar Ass'n, Advisory Op. 201501 (2015), http://mcle.mywsba.org/IO/print.aspx?ID=1682.

38. *See* The Massachusetts Board of Bar Overseers & Office of the Bar Counsel Policy on Legal Advice on Marijuana, https://www.massbbo.org/Announcements?id=a0P36000009Yzb3EAC. *See also* Minn. Lawyers Prof'l Responsibility Bd. Op. 23 (2015).

39. Gary Blankenship, *Board Adopts Medical Marijuana Advice Policy*, The Florida Bar (June 15, 2014), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/575B2BA3C91F53DD85257CF200481980.

40. Ill. State Bar Ass'n Prof'l Conduct Advisory Op. 14-07 (2014).

41. Ill. Sup. Ct. R. 1.2.

42. *Id.*

43. Ohio Bd. of Prof'l Conduct Op. 2016-6 (2016).

44. Ohio R. Prof'l Conduct, R. 1.2(d)(2), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf .

45. Pa. Joint Formal Op. 2015-100 (2015).

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48. *Id.*

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50. Cal. Bar R. 1.2.1, *available at*http://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-1.2.1_%5B3-210%5D-all.pdf.

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52. There have been a few cases where lawyers were disciplined for conduct related to their personal use of marijuana, *see, e.g.*, *In re* Edwards**,** 97 CH 28 (Ill. 1997), *In re* Barton, 22 DB Rptr. 266 (Ore. 2008), *In re* Quinlisk, 2016PR00091 (Ill. 2017).

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https://www.voiceofsandiego.org/topics/news/da-drops-felony-charges-against-lawyer-who-defended-marijuana-businessman/.

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60. The Department of Justice issued a memorandum discussing its policy on prosecution of financial crimes in connection with cannabis business. *See* James Cole, Memorandum for all United States Attorneys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20(2).pdf. Ironically, the Colorado credit union that sought approval from the Federal Reserve was successful in litigation to obtain federal recognition, Fourth Corner Credit Union v. Federal Reserve Bank of Kansas, No. 16-1016 (10th Cir. 2017). Subsequent to the reverse and remand ordered by the 10th Circuit and in settlement of the matter, the Federal Reserve Bank of Kansas City granted, with conditions, the Colorado credit union a "master account" required to do business with other banks. *Marijuana Credit Union Granted Conditional Account by Federal Reserve Bank* (Feb. 9, 2018), https://www.westword.com/marijuana/colorado-marijuana-credit-union-granted-conditional-account-by-federal-reserve-bank-9969837. Review of bank practices reveal numerous banks, included industry leaders, have accepted business from the marijuana industry. *See* Tom Angell, *More Banks Working With Marijuana Businesses, Despite Federal Moves,* Forbes (June 14, 2018), https://www.forbes.com/sites/tomangell/2018/06/14/more-banks-working-with-marijuana-businesses-despite-federal-moves/#483ab571b1b2. Indeed, Treasury Sec. Steven Mnuchin, has suggested in several appearances before congressional committees that

he would like to see marijuana businesses be able to access banking services. Tom Angell, *Trump Treasury Secretary Wants Marijuana Money In Banks*, Forbes (Feb. 6, 2018), https://www.forbes.com/sites/tomangell/2018/02/06/trump-treasury-secretary-wants-marijuana-money-in-banks/#487efef83a53.

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Bloomberg - Daily Labor Report

Marijuana leafs are pictured. The New York City Council on April 9, 2019, approved a measure that would ban employers in the city from testing new hires for pot. Mayor Bill de Blasio (D) must still approve the bill.

Photographer: CHAIDEER MAHYUDDIN/AFP/Getty Images

News

New York City Looks to Bar Marijuana Testing for Job Applicants

Posted April 9, 2019, 2:51 PM

- Bill part of city drive to ease legal consequences of marijuana use
- Exceptions provided for safety, security positions; testing under labor contracts allowed

New York City employers wouldn't be allowed to require job candidates to submit to drug testing for marijuana as a condition of hiring, under a bill approved by the City Council.

The bill (Intro. No. 1445-A), passed April 9 on a 41-4 vote, was part of a city drive to reduce the legal consequences of marijuana use. City police and prosecutors have vastly cut down on arrests and prosecutions for low-level marijuana crimes, and the council passed a resolution in March urging the state to legalize recreational marijuana.

"We need to be creating more access points for employment, not less," said Public Advocate Jamaane Williams (D), who sponsored the bill in his capacity as a citywide elected official who presides over the council. "And as we move toward legalization, it makes absolutely no sense that we're keeping people from finding jobs or advancing their careers because of marijuana use."

The bill would make exceptions for jobs involving safety and security, as well as jobs tied to a federal or state contract.

Construction Jobs Excluded

Testimony by construction contractor organizations led to an exclusion of all workers on construction sites from the bill, not just those operating heavy machinery. Also not covered are police officers; other law enforcement or criminal investigation personnel; workers in jobs

requiring a commercial driver’s license; and workers who care for or supervise children, medical patients, or people with disablities.

Jobs with a significant impact on health and safety, as determined in city rules, are also excluded. Drug testing provided under collective bargaining agreements also wouldn’t be covered.

The bill, which still requires approval from Mayor Bill de Blasio (D), would take effect a year after final enactment. It adds to the city Fair Chance Act, passed in 2015, which bars most employers from inquiring about or considering the criminal history of job applicants after extending conditional offers of employment.

Marijuana Legalization Dead for Now in NY, Sponsor Says, But Decriminalization Still on Table

Concerns still remained on certain public safety aspects of legalizing marijuana, such as technology for testing impairment of drivers who used the substance.

A bill to legalize marijuana for adult recreational use won't pass this year, the sponsor of the bill said Wednesday morning, but a measure that would expunge past criminal records and decriminalize small amounts of the drug could still move in the coming days.

New York will not legalize marijuana for recreational, adult use this year, but state lawmakers approved a handful of reforms aimed at decriminalizing the drug to avoid leaving Albany for the year without any movement on the issue.

After negotiations on a broader measure to regulate and tax the drug stalled in recent days, lawmakers opted **to pass** legislation early Friday morning that will remove criminal charges for possessing small amounts of marijuana and allow for automatic expungement of past convictions.

It's not what Democrats leading the charge for legalization wanted, as they were willing to hold out until a final deal on the legislation could be reached. But it was clear earlier this week that wasn't going to happen by the end of the legislative session.

Supporters of the bill described closed-door discussions on marijuana legalization like trying to hit a moving target. When one lawmaker's concerns were thought to be resolved, another would express their own worries over legalization.

Lawmakers ultimately determined that they didn't have the votes to move forward with any measure that would have established a framework to regulate and tax the drug. Their attention turned, instead, to a much smaller measure that would reduce penalties for possessing small amounts of the drug and clear past convictions for low-level marijuana-related offenses.

Members of the State Assembly quickly coalesced around the idea. It was slower to gain support in the state Senate, but members there were ultimately convinced.

The bill passed in the Senate, 39 to 23, and later in the Assembly with a comfortable margin. It's expected to be signed by Gov. Andrew Cuomo, who said a statement earlier this week that he will sign the measure.

Assembly Speaker Carl Heastie, D-Bronx, said Thursday that the decriminalization measure will be a primer for next year's negotiations around legalizing the drug, though those are likely to be just as tense, if not more so, given that it's an election year for the Legislature.

"In government, people have to realize that sometimes you don't get everything you want in the first shot," Heastie said. "I do think on decriminalization, it will help undo some of the long-time injustices that communities have had, particularly communities of color."

The **legislation** will make possession of small amounts of marijuana punishable by small fines and classify them as violations rather than crimes. The fine for possessing less than an ounce of the drug will be capped at $50, according to the bill. The fine for possessing between one and two ounces of marijuana, or marijuana-related substances, will not exceed $200.

The legislation will also allow automatic expungement of low-level marijuana convictions, such as possessing small amounts of the drug. Any record of those convictions with the state will be automatically expunged, or erased, according to the bill. Those convictions will not show up on any subsequent criminal history searches.

That change is intended to remove barriers that can sometimes make it difficult for past offenders to secure employment or housing. New York Attorney General Letitia James recently wrote to lawmakers urging them to include the provision in any final marijuana bill they pass this session. Criminal justice advocates have also pushed for expungement.

Sen. Jamaal Bailey, D-Bronx, sponsored the bill in the Senate, where it was introduced days earlier as an alternate plan for lawmakers to consider in the event that legalization didn't pan out. He said the bill won't diminish future plans to legalize the drug.

"When you're talking about real equality, real equality means economic equality as well," Bailey said. "It's great to get the criminal justice aspect, and I'm glad we're going to be taking a step in the right direction today. But to truly be able to impact the lives of disproportionately affected communities, we have to be able to reinvest in these communities that have been so decimated by this war on drugs."

If the broader bill to legalize marijuana was the whole loaf lawmakers were looking for on the issue, the decriminalization bill could be considered a slice.

The larger measure, called the Marijuana Regulation and Taxation Act, would have established a regulatory framework for growing, selling, and taxing marijuana in New York. Lawmakers were divided on where tax revenue from the drug should go, but many agreed that a portion of it should be diverted to communities impacted by the state's drug laws.

It also would have expanded the state's medical marijuana and hemp industries. A standalone bill addressing the state's medical marijuana laws failed to move in the end, but legislation to

The Changing Landscape of Cannabis Legalization: Compliance and Ethics Program Challenges

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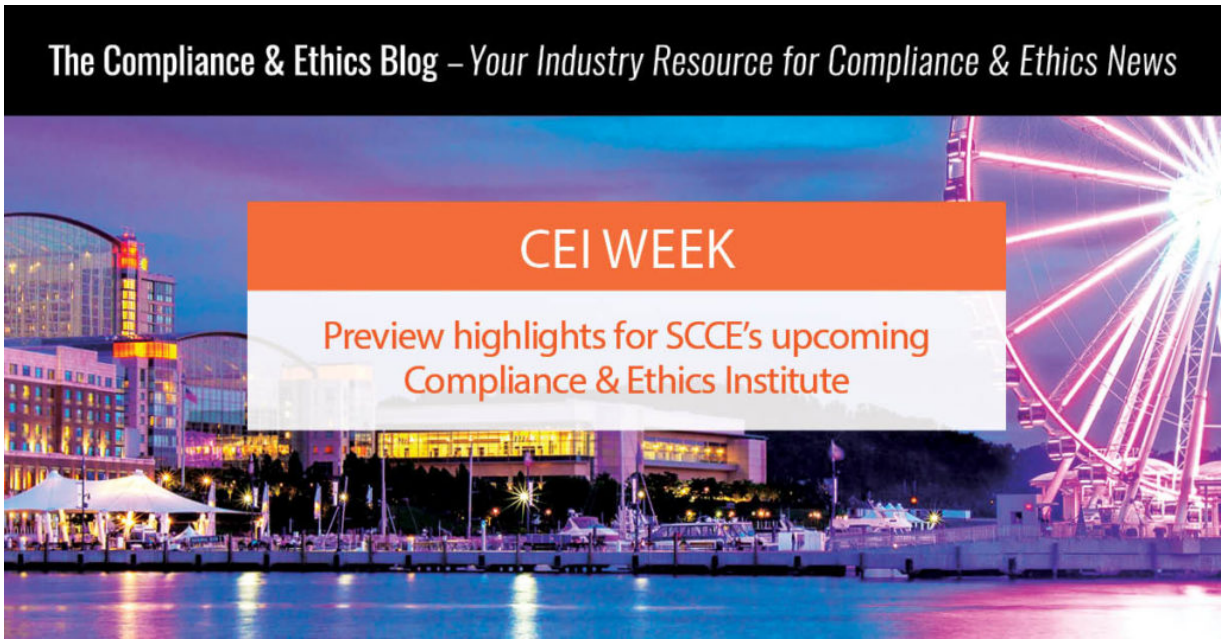
May 23, 2019 by SCCE Leave a Comment



By Amy E. McDougal, CCEP[1]
Session DG11: Compliance & Cannabis in the Workplace: Navigating the Changing Landscape of Legalization
September 17, 2019, 1:30 – 2:30 PM

A Colorado sales manager flies to South Dakota to interview a potential new vendor. While driving a car rented by the company, the employee is rear-ended while stopped at a light and is injured. The employee's urine is tested as a routine, post-accident measure for worker's compensation and is positive for THC metabolite because the employee recreationally consumes marijuana. Will state law in Colorado require your company to pay worker's compensation? Will your insurance carrier cover the payments? Can the company legally terminate the employee? Should the employee be terminated for a no-fault accident? Will the rental company bring an action against your company based on the drug screen done on your manager?

If you haven't already pondered how the legalization of cannabis will impact your corporate compliance and ethics program, the time has arrived. The past few years have brought a dizzying flurry of state legislation aimed at decriminalizing and legalizing cannabis or "marijuana". Across the country, states are legalizing marijuana for medical and/or recreational purposes. Currently, 47 states, the District of Columbia and the territories of Puerto Rico and Guam lawfully permit some form of marijuana for use in medical treatment, and some of these

jurisdictions permit recreational use. Since cannabis products are used by people, and companies employ people to do work, this poses new risk areas for every company.

The production, sale, distribution, and use of marijuana remains illegal under federal law. This creates tangible friction between federal and state laws including employment laws. While additional protections beyond the federal employment rights laws have historically been available in some states, as states legalize marijuana for medicinal or recreational use, they are taking vastly different approaches leading to a substantial challenge for corporations that operate in more than one state.

No two state laws are the same with respect to what constitutes lawful use of marijuana and what protections are afforded to employees who consume cannabis products. For example, while some states explicitly state that an employer is not required to accommodate the use of medical marijuana, others provide affirmative protection for workers who lawfully use medical marijuana. In addition, at the time of this article eight states and the District of Columbia have legalized recreational marijuana. It is reasonable to expect this number will continue to increase, creating additional concerns for employers who seek to balance a drug-free work environment with the rights of their employees to receive recommended medical treatment or engage in lawful recreational use.

Given this ever-shifting legal landscape and how rapidly the law is developing, it is important to incorporate this risk area into your periodic risk assessment process so appropriate oversight, policies, procedures and monitoring can be proactively established.

When assessing the risks from the presence of marijuana in the workplace and an employer's obligations to its workforce, there are many federal laws that come into play including the Americans with Disabilities Act, Family and Medical Leave Act, Drug Free Workplace Act, Federal Acquisition Regulations, and the National Industrial Security Program for workplaces that have employees with security clearances. These laws are in addition to the newly passed state laws on cannabis and can have an expansive effect on employers' and employees' rights.

The Drug Free Workplace Act (DFWA) is one sweeping law that prohibits all cannabis in the workplace. It requires some federal contractors and all recipients of federal grants to agree that they will provide drug-free workplaces as a precondition to receiving a contract or grant from federal agency. The DFWA applies to federal contractors who have contracted with a federal agency for the provision of services, not goods, in excess of the Simplified Acquisition Threshold. As of July 2018, this threshold was $250,000. Comparatively, recipients of federal grants of any amount must adhere to the requirements of the DFWA.

For federal contractors, the requirements of the Drug Free Workplace program include a statement/policy, training and education, monitoring, auditing, reporting, and discipline. If your company is subject to the DFWA, this program should already be in place. However, a DFWA program does not ensure that employees will never consume cannabis products. Whether it was

prescribed, or an employee uses it recreationally, our current drug testing systems are not able to detect when cannabis was consumed – either in the workplace, or at home. Thus, the risk assessment and corporate policies need to address this issue before it becomes an issue in states where cannabis is legalized in some capacity. Otherwise, termination of employees who have consumed cannabis can become a legal minefield.

If your company is not subject to the DFWA, what then? In Alaska, Colorado and the District of Columbia, the law explicitly states that an employer is not required to permit or accommodate the consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace. The law expressly states it is not intended to affect the ability of employers to have policies restricting the consumption of marijuana by employees. How far corporate policies can go into an employees' non-working time is yet to be seen, but all indications are we will see a wide range of approaches that vary dramatically by state.

It is very important for employers who are required or seek to have drug-free workplace programs to have the necessary oversight, policies, training, monitoring, and auditing required to maintain a drug-free workplace. In states with more liberal consumption policies, clarity will be king for employers and employees alike. Join me at CEI 2019 at the National Harbor to discuss these issues and more!

regulate the hemp industry was able to pass. The measure establishes licensing standards and requires lab testing and labeling for products, such as cannabidiol, or CBD.

Democrats had an array of concerns over the omnibus bill, some of which had to do with road safety. There's currently no quick and easy way to measure someone's intoxication from marijuana, so some Democrats feared that enforcing the state's laws on driving while intoxicated would be difficult. Few officers in the state are trained to recognize and verify drug intoxication.

There was also a disagreement over the revenue that would have been generated from marijuana sales. Supporters of the bill wanted those funds to be reinvested in communities disparately impacted by the state's drug laws. Others wanted to use the money in other ways, like to fund the Metropolitan Transportation Authority, or invest in infrastructure.

In the end, Democrats in the Senate couldn't get the votes on a final version of the bill pitched behind closed doors on Tuesday. The bill was sponsored by Sen. Liz Krueger, D-Manhattan, and Assembly Majority Leader Crystal Peoples-Stokes, D-Buffalo. Both have vowed to continue their efforts next year.

Advocates who supported the legalization bill scrambled in the final days of this year's legislative session to convince lawmakers that the decriminalization bill would slow future efforts on the issue. Members of the Senate initially failed to commit to the bill, but came around when it was clear that they would have to either approve that legislation, or nothing at all this year.

Dan M. Clark

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Assembly Speaker Carl Heastie, D-Bronx, told reporters earlier in the day that his chamber planned to vote on the measure, which will likely be approved later Thursday evening.

“In government, people have to realize that sometimes you don’t get everything you want in the first shot,” Heastie said. “I do think on decriminalization it will help undo some of the longtime injustices that communities have had, particularly communities of color.”

The legislation will make possession of small amounts of marijuana punishable by small fines and classify them as violations rather than crimes. The fine for possessing small amounts will be capped at $50, according to the bill. The fine for possessing more than an ounce of marijuana-related substances will not exceed $200.

The legislation will also allow expungement of low-level marijuana convictions, such as possessing small amounts of the drug. Any record of those convictions with the state will be expunged, or erased, on request, according to the bill. Those convictions will, thereafter, not show up on any criminal history searches.

Bailey said they’ll continue to work on legislation that would legalize marijuana in New York when lawmakers reconvene for next year’s legislative session in January.

“It’s great to get the criminal justice aspect, and I’m glad we’re going to be taking a step in the right direction today,” Bailey said. “But to truly be able to impact the lives of disproportionately affected communities, we have to be able to reinvest in these communities that have been so decimated by this war on drugs.”

The changes will take effect a month after the bill is signed into law by Gov. Andrew Cuomo, who said earlier this week that he supports the measure.

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A bill to legalize marijuana for adult recreational use won’t pass this year, the sponsor of the bill said Wednesday morning, but a measure that would expunge past criminal records and decriminalize small amounts of the drug could still move in the coming days.

State Sen. Liz Krueger, D-Manhattan, who sponsors the bill, confirmed Wednesday morning that her proposal to legalize and tax marijuana would not become law this year after a majority of Democrats failed to coalesce around the measure.

“Through months of negotiation and conversation with the governor’s office and my legislative colleagues, we made great strides to improve our bill and bring more people on board,” Krueger said. “We came very close to crossing the finish line, but we ran out of time.”

Krueger’s bill, which is sponsored in the Assembly by Assembly Majority Leader Crystal Peoples-Stokes, D-Buffalo, would have set up a regulatory framework to legalize the drug

and authorize growers, distributors and retailers. The bill would have diverted tax revenue from the drug to several areas, including communities previously impacted by the state's drug laws.

But, as of Wednesday, concerns still remained on certain public safety aspects of legalizing marijuana. There's currently no mainstream way to quickly test someone's intoxication for the drug, so, for example, charging someone with a driving offense could be complicated if an officer doesn't have the right training.

Krueger said they couldn't clear those hurdles in the end, but that she would be back next year to continue her push for the bill, which will likely be amended in the future to address those concerns.

"I will continue to push for a tax-and-regulate adult-use program with all the right safeguards in place, one that centers on restorative justice and reinvestment in the communities most harmed by decades of failed prohibition policies," Krueger said.

Attention will now turn to legislation sponsored by State Sen. Jamaal Bailey, D-Bronx, which wouldn't legalize the drug, but would decriminalize it in small amounts and allow for the expungement of past convictions.

The bill would make possession of small amounts of marijuana punishable by small fines, and would classify them as violations, rather than crimes. The fine for possessing small amounts would be capped at $50, according to the bill. The fine for possessing more than an ounce of marijuana-related substances would not exceed $200.

The legislation would also allow automatic expungement of low-level marijuana convictions, such as possessing small amounts of marijuana. New York Attorney General Letitia James recently wrote to lawmakers urging them to include the provision in any final marijuana bill they pass this session.

The bill was introduced over the weekend, meaning it's been on the books long enough for lawmakers to pass by now if they want to. New York requires bills to age three days before they can come up for a vote, unless the governor allows them to be considered immediately.

Lawmakers were scheduled to conclude this year's legislative session Wednesday, but sources have said it's likely to extend through at least Thursday at this point.

Legislation to legalize marijuana for adult recreational use in New York doesn't have unanimous support in the State Senate partly because some Democrats in the chamber

want tougher penalties for those convicted of selling large amounts of the drug on the black market.

After meeting behind closed doors with other Democrats to discuss a newly amended version of the legislation Wednesday, the bill's sponsor said a top concern was over the leniency of the measure.

"We limit criminal penalties so much that there are some concerns that there's not enough of a criminal penalty for larger, illegal distribution," said state Sen. Liz Krueger, D-Manhattan, who sponsors the bill.

The discussion was not a preview for passage; they didn't count votes at the meeting, Krueger said. It was, instead, an opportunity for members to express what they'd like to see addressed in a future version of the bill.

Democrats who were previously cautious about the legislation appeared to be closer to lending their support for the most recent version, Krueger said.

The new version directs part of the revenue from the sale of legal marijuana to law enforcement agencies around the state for additional training and personnel. A major concern among some Democrats earlier this year was over the lack of training and resources for officers to detect when a driver is impaired by marijuana. The new bill appears to address that.

The bill would also direct the State Police to establish a pilot program for the testing and development of new technologies to detect drivers who are driving under the influence of the drug, according to the bill.

Testing done through that program, which would last a year, would not be allowed to be used by police to charge a driver with a crime, according to the bill. It would only be in place as a trial run for technologies to test whether a driver is impaired.

Lawmakers are also considering whether to create a lower-level charge for driving while impaired by marijuana, which currently doesn't exist in state law. That would allow defendants to face lesser charges for the crime, which often happens when someone is accused of drinking while driving.

But the proposed penalties for selling marijuana without a license from the state, and consequently outside regulations, remain too low for all Democrats to lend their support in the Senate, Krueger said.

Selling more than three ounces of marijuana without a license from the state would result in either a fine or a class A misdemeanor charge, for example. The latter penalty carries up to a year in jail if convicted.

Other crimes, like unlawfully selling marijuana prescribed for medical purposes or selling the drug to someone underage, would be class E felonies, according to the bill. Those carry a heavier sentence, which can be as long as four years in prison.

Many other concerns that were previously expressed by members over legalization, Krueger said, have been assuaged through educating lawmakers about the provisions of the bill, and the drug itself.

"I do feel we're making a lot of progress and I do feel like there's been enormous education among people about the mythology versus the facts," Krueger said.

Democrats in the Assembly are planning to have a similar conversation, but hadn't as of Wednesday afternoon. Assembly Majority Leader Crystal Peoples-Stokes, D-Buffalo, has been lobbying members in the chamber to support the bill and has said in recent weeks that she's confident it will pass the Assembly before the end of session.

Gov. Andrew Cuomo has been pessimistic in recent weeks about the chances of legalizing the drug in New York this year. He's said he's not pushing hard on the issue, as he has with others, because the Senate had previously said they didn't have the votes for legalization.

Lawmakers, meanwhile, have said the path to legalization would be easier if Cuomo was more outspoken on the issue and became personally engaged with the Legislature's efforts to decriminalize the drug.

Progress appears to have been made in the past month, at least. A spokesman for Cuomo said last week that staff from his office and both chambers of the Legislature have talked about legalizing marijuana during recent three-way meetings, though lawmakers were not present for those discussions.

Opponents of legalizing marijuana have been active at the Capitol as well, as of late. They've argued that the measure would invite large companies to come into New York and dominate the market, rather than provide a boost to the state's regional economies. They also had the same concerns over traffic safety.

Lawmakers will have until next Wednesday to come to an agreement on legalizing marijuana if they want to do so this year. They're scheduled to leave Albany for the year after June 19.