



NEW YORK STATE BAR ASSOCIATION  
**GENERAL PRACTICE SECTION**

## **Hot Tips from the Experts: Additional Materials**

**Cannabis Law in NY @ 50,000 Feet**

Sara E. Payne

**Dead or Alive? Absence and the  
Presumption of Death**

Dwayne Weissman

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**New York Hilton Midtown**

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# Cannabis Law in NY @ 50,000 Feet

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## Federal Law: What is Cannabis?

The legal landscape is complex and dynamic. Consider, *e.g.*:

- Single Convention on Narcotic Drugs of 1961, amended by 1972 Protocol (“Single Convention”) (18 U.S.T. 1407), Art.1 § 1(b)
- Controlled Substances Act (“CSA”) § 102(16) (21 U.S.C. § 802)
- DEA Final Rule, Dkt. No. DEA-342, 81 F.R. 90194 (eff. Jan. 13, 2017) (“Marihuana Extract Rule”) (amend. 21 CFR 1308.11(d)(58))
- FDA: Epidiolex Approval Letter, Appl. No. 210365Orig1s000 (eff. June 25, 2018), at [https://www.accessdata.fda.gov/drugsatfda\\_docs/nda/2018/210365Orig1s000Approv.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/nda/2018/210365Orig1s000Approv.pdf) (last visited Jan. 8, 2018)
- DEA Final Order, Dkt. No. DEA-486, 83 F.R. 48950 (eff. Sept. 28, 2018) (amend. 21 CFR Pts 1308, 1312) [*scheduling Epidiolex at Schedule V*]
- 2018 Farm Bill § 7605 (enacted Dec. 20, 2018) (amend. 2014 Farm Bill § 7606 (7 U.S.C. § 5940, *et seq.*))
- FDA: Statement on signing of Agricultural Improvement Act and the agency’s regulation of products containing cannabis and cannabis-derived compounds, at <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm628988.htm> (Dec. 20, 2018) (last visited Jan. 7, 2019)
- Canada: “Cannabis Act”, R.S.C., ch. 16 (June 21, 2018)

# New York State: Industrial Hemp Agricultural Research Pilot Program

NY Agriculture & Markets Law Article 29 (eff. June 15, 2015)

- Legislative purpose: Establish an agricultural pilot program, as authorized by federal law, for the growing of hemp to provide research-based knowledge for use by farmers/businesses to develop a hemp industry
- Defines “industrial hemp”: the plant *Cannabis sativa L.* and **any part of that plant**, whether growing or not, with “not more than” **0.3% THC** (dry weight) NY Agric. & Mkts. Law § 505(1)
  - Essentially identical to Hemp under 2018 Farm Bill § 10113 (7 U.S.C. § 1621) (amend. 1946 Act § 297A)
- Currently, over 150 licensees, to grow and/or process hemp and CBD
- Regulations at 1 NYCRR Pt 159

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# New York State: Compassionate Care Act

NY Pub. Health Law §§ 3360-3369-e (enacted July 5, 2014)

- Authorizes medical marijuana within New York State
  - Ten registered organizations are currently authorized to grow, manufacture, transport, and dispense
  - Certified health care providers (~1.7k) can recommend to certified patients (~59k) w/ qualifying conditions: cancer, HIV/AIDS, ALS, Parkinson’s, MS, damage to nervous tissue/spinal cord with intractable spasticity, epilepsy, IBS, neuropathies, Huntington’s, PTSD, chronic pain, seizures, and any condition for which an opioid could be prescribed
- Regulations at 10 NYCRR Pt 1004

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## New York State: Regulated Adult Use

NY Department of Health, *Assessment of the Potential Impact of Regulated Marijuana in New York State* (July 13, 2018)

- Gov. Cuomo's Jan. 2018 budget address: called for NYS agencies to evaluate health, public safety, and economic impacts of adult use marijuana
- DOH concluded: "The positive effects of regulating an adult (21 and over) marijuana market in NYS outweigh the potential negative impacts"
  - Ensure consumer & industry safety
  - Remove research restrictions, to develop knowledge
  - Large market (\$1.7-3.5B) = large tax potential (\$250-675M) = funding for infrastructure and communities
  - Social justice: reduce disproportionate criminalization and incarceration of minority communities.
- Seed-to-Sale: "Incorporating proper metrics and indicators will ensure rigorous and ongoing evaluation"

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## New York State: Regulated Adult Use

# State of the State

*(buckle up)*

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## Counseling & Assisting Clients

### US DOJ “Cole Memo” (August 29, 2013)

- Confirms policy of non-enforcement as to individuals acting under state laws legalizing/regulating marijuana

### NYSBA Ethics Opinion 1024 (Sept. 29, 2014)

- In light of **current** federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with the state medical marijuana law, notwithstanding federal narcotics law

### US DOJ “Cole Rescission Memo” (Jan. 4, 2018)

- Prosecutors should weigh all relevant law enforcement priorities when deciding to prosecute marijuana activity
- “[P]revious nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately”

## Counseling & Assisting Clients

### Consolidated Appropriations Act, 2018 (March 23, 2018), § 538

- None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States . . . , to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

### *U.S. v McIntosh*, 833 F.3d 1163 (9th Cir. 2016)

- DOJ cannot spend money to prevent states from giving practical effect to their respective MMJ programs

### Nationwide consensus

- As a matter of public policy, attorneys should be allowed to provide cannabis-related entities with legal services as permitted in their respective states.

## Counseling & Assisting Clients

NYSBA Committee on Standards of Attorney Conduct:  
Considering proposed amendments to NY RPC 1.2

- If approved, to House of Delegates
- If approved, to Appellate Divisions

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## Counseling & Assisting Clients

Risks of counseling and assisting clients

- Potential loss of attorney-client privilege
  - Co-conspirator
  - *Even if your client is merely a landlord, banker, accountant, vendor, for a cannabis business*
- Potential loss of licenses
- Potential seizure of assets
- Inability to deduct business expenses
- Challenges in banking
- Challenges obtaining insurance coverage
- No bankruptcy protection

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NEW YORK STATE BAR ASSOCIATION  
GENERAL PRACTICE SECTION

HOT TIPS PROGRAM--JANUARY 15, 2019

***Dead Or Alive?  
Absence And The Presumption Of Death***

Ms. Disa Peer was blessed with loving family and friends. She was known to be an avid reader, especially of the writings of Mark Twain. In addition, Ms. Peer was thought to be a free spirit. At times, she would take a solitary hike in the nearby nature preserve, returning home at dusk. On occasion, she would take a solo road trip and communicate with family and friends after a day or two, advising where she was, where she was going and when she intended to return home.

Several years ago, on a crisp Winter day, Ms. Disa Peer did not respond to cell phone calls or e-mails. A neighbor noticed the daily newspapers were accumulating at her doorstep. The neighbor notified Mr. Tommy Trustt, the relative that Disa had introduced her to some time ago and provided the telephone number as an emergency contact.

Some time went by and Ms. Disa Peer was nowhere to be found.

Mr. Trustt contacted Ms. Peer's long-time attorney and learned that a Will had been drafted and that Mr. Trustt was the nominated Executor. The attorney also advised Mr. Trustt that his conference notes reflected that Ms. Peer had several life insurance policies and a few Bank Accounts In Trust Form ("Totten Trusts").

**What to do?**

Attached hereto is NYS Estates, Powers And Trusts Law Section 2-1.7. Presumption of death from absence; effect of exposure to specific peril

.....

The Surrogate's Court makes a determination that Ms. Disa Peer is deceased. The Court appointed fiduciary marshals testamentary assets and begins to distribute pursuant to the probated Will. In addition, the named beneficiaries of Ms. Peer's life insurance policies and "Totten Trust" accounts make claims to the respective insurance companies and financial institutions.

All of a sudden, Ms. Disa Peer appears in Town and tells the Surrogate's Court Clerk: "The report of my death was an exaggeration."

**What to do?**

Attached hereto is NYS Surrogate's Court Procedure Act Section 2226. Rights of alleged decedent upon return

.....

Now it is time for me to disappea...

[PREV](#)

[SECTION 2-1.6](#)

[Disposition Of Property Where A Person Dies Within One Hundred Twenty Hours Of Another Person Or Any Other Event \(A\) Except As Provided I... \(/Legislation/Laws/EPT/2-1.6/\)](#)

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[SECTION 2-1.8](#)

[Apportionment Of Federal And State Estate Or Other Death Taxes; Fiduciary To Collect Taxes From Property Taxed And Transferees Thereof \(A... \(/Legislation/Laws/EPT/2-1.8/\)](#)

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## Section 2-1.7

Presumption of death from absence; effect of exposure to specific peril (a) A person who is absent for a continuous period of three years...

Estates, Powers & Trusts (EPT)

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Presumption of death from absence; effect of exposure to

specific peril

(a) A person who is absent for a continuous period of three years, during which, after diligent search, he or she has not been seen or heard of or from, and whose absence is not satisfactorily explained shall be presumed, in any action or proceeding involving any property of such person, contractual or property rights contingent upon his or her death or the administration of his or her estate, to have died three years after the date such unexplained absence commenced, or on such earlier date as clear and convincing evidence establishes is the most probable date of death.

(b) The fact that such person was exposed to a specific peril of death may be a sufficient basis for determining at any time after such exposure that he or she died less than three years after the date his or her absence

commenced.

(c) The three-year period provided herein shall not apply in any case in which a different period has been prescribed by statute.

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[SECTION 2-1.6](#)

[Disposition Of Property Where A Person Dies Within One Hundred Twenty Hours Of Another Person Or Any Other Event \(A\) Except As Provided I... \(/Legislation/Laws/EPT/2-1.6/\)](#)

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[SECTION 2225](#)

[Determination Of Distributees, Devisees, Legatees, Beneficiaries And Distributive And Beneficial Shares In Any Proceeding Where The Court...](#)  
(/Legislation/Laws/SCP/2225/)

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[SECTION 2227](#)

[Summary Statement Each Decree Whereby An Account Is Judicially Settled Must Contain In The Body Thereof A Summary Statement Of The Accoun...](#)  
(/Legislation/Laws/SCP/2227/)

## Section 2226

Rights of alleged decedent upon return If letters shall issue upon the estate of an alleged decedent and if thereafter the person alleged...

Surrogate's Court Procedure (SCP)

SHARE



Rights of alleged decedent upon return

If letters shall issue upon the estate of an alleged decedent and if thereafter the person alleged to be dead shall return he or she shall on demand receive the property then in the hands of the fiduciary after reserve for any unpaid administration charges and shall have only the further rights to compel an accounting on the part of his or her fiduciary and to enforce the decree made thereon. His or her fiduciary shall not be liable for moneys or assets disbursed or delivered by him or her in good faith and the person alleged to be dead may not, upon his or her return, review any matter or recover any property embraced in any account of his or her fiduciary which may have been finally settled by decree entered prior to the date when his or her fiduciary shall have had actual notice that he or she is still living.

