Memorandum

From: Shayna Kessler and Hasan Shafiqullah, Co-Chairs, NYSBA Committee on Immigration Representation
Robert Dean, Chair, NYSBA Committee on Mandated Representation
Adriene Holder and Sally Curran, Co-Chairs, NYSBA Committee on Legal Aid .

To: Andrew Brown, NYSBA President

Date: September 15, 2021

Re: Request to adopt American Bar Association Resolution 103B, calling for the United States Attorney General to use the Attorney General certification process to address certain administrative law decisions that subject people with prior contact with the criminal legal system to immigration law consequences that are unlawful and inconsistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations.

The Committee on Immigration Representation, the Committee on Mandated Representation, and the Committee on Legal Aid recognize that there are grave consequences for noncitizens who have had prior contact with the criminal legal system, whether or not that contact resulted in a criminal conviction. The merger of criminal legal and immigration systems has caused a cascade of consequences, resulting in the disparate treatment of immigrants who have contact with the criminal legal system.This interplay between the criminal and immigration systems disproportionately impacts Black immigrants and other immigrants of color, who are also disproportionately arrested, convicted, and sentenced more harshly than white people.[1] These immigration consequences of criminal legal contact can include mandatory civil detention and deportation, inability to obtain lawful permanent residency or citizenship, and ineligibility for protection based upon persecution, torture, domestic violence, human trafficking, and more.[2]

The deep entanglement of the criminal and immigration systems should be resolved through federal legislative reform that disentangles the two systems. Until that reform is enacted, the U.S. Department of Justice ("DOJ") has an opportunity to significantly limit the harsh and unfair

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[1] See, e.g., Carl Lipscombe, Juliana Morgan-Trostle, and Kexin Zheng, The State of Black Immigrants: Black Immigrants in the Mass Criminalization System, NYU Law Immigrant Rights Clinic and The Black Alliance for Justice Immigration 20 (2016) ("while Black immigrants make up only 7.2% of the unauthorized population in the U.S., they make up over 20% of all immigrants facing deportation on criminal grounds"); Automatic Injustice: A Report on Prosecutorial Discretion in the Southeast Asian American Community, Southeast Asia Resource Action Center 3 (Oct. 2016) ("while 29% of other immigration deportations are based on old convictions, 78% of Southeast Asian American immigrants are in deportation proceedings because of old criminal convictions"

[2] See 8 U.S.C. 1227(a)(2), INA 237(a)(2); 8 U.S.C. 1182(a)(2), INA 212(a)(2) (deportability, inadmissibility, and relief ineligibility grounds based on prior certain prior convictions and findings of criminal conduct); 8 U.S.C. 1229b(a)(3), INA 240A(a)(3) (aggravated felony bar to cancellation of removal); 8 U.S.C. 1226(c), INA 236(c) (conviction-based civil detention); 8 U.S.C. 1158(b)(2)(A)(ii), INA 208(b)(2)(A)(ii); 8 U.S.C. 1231(b)(3)(B)(ii), INA 241(b)(3)(B)(ii) (particularly serious crime bar to asylum an withholding of removal); 8 U.S.C. 1254a(c), INA 244(c) (criminal bars to Temporary Protected Status); 8 U.S.C. 1154(a)(1), INA 204(a)(1); 8 U.S.C. 1101(f), INA 101(f) (criminal bars to lawful permanent residence and cancellation of removal under VAWA); 8 U.S.C. 1255(h), INA 245(h) (criminal bars to lawful permanent residence for abused, neglected, and abandoned special immigrant juveniles); 8 U.S.C. 1326(b), INA 276(b) (enhanced federal sentences in immigration-related prosecutions for unlawful reentry into the United States); 8 U.S.C. 1427(a)(3), INA 316(a)(3); 8 U.S.C. 1101(f), INA 101(f) (criminal disqualification—in some instances, permanent—from naturalization eligibility).

consequences that noncitizens face after contact with criminal law enforcement by revisiting a body of administrative opinions that wrongly interpret immigration law. Through the certification process, the U.S. Attorney General can use his authority to review and address prior harmful Board of Immigration Appeals and Attorney General decisions that adversely impact people in immigration proceedings.[3] These prior decisions have resulted in hundreds of thousands of people subjected to detention and deportation, separating families and destabilizing communities.[4] Nevertheless, they are unfounded, based upon interpretations of the law that misconstrue congressional intent.

In its Resolution 103B and the accompanying report and recommendations, the American Bar Association documents the body of administrative law decisions that improperly subject noncitizens – predominantly noncitizens of color – to harsh and unintended immigration consequences.[5] There, they call upon the U.S. Attorney General to withdraw prior opinions and certify to himself the following several matters for reconsideration. First, they call for the Attorney General to issue an opinion affirming that immigration authorities should defer to the intent of the convicting jurisdiction when that jurisdiction vacates, expunges, or otherwise eliminates or modifies a conviction. Likewise, immigration authorities should give full authority to newly enacted sentencing reforms that a local jurisdiction applies retroactively for the purpose of mitigating immigration consequences. Second, when criminal court documents are incomplete or unavailable, noncitizens should nevertheless remain eligible for discretionary immigration relief. Third, under the categorical approach to analyzing penal law provisions, the express language of a statute of prior conviction should be sufficient to establish the "least-acts-criminalized," without a further "realistic probability" showing.[6] This would ensure that people with criminal convictions are not precluded from eligibility for immigration relief based upon an improper analysis of the elements of the crime of conviction. Fourth, they call for the recission of

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[3] For an overview of the Attorney General's referral policy, *see* Alberto R. Gonzalez & Patrick Glen, *Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L.Rev. 841 (2016). Only four Attorney General opinions were issued during the eight years of the Obama Administration, sixteen during the eight years of the Bush Administration. By contrast, fifteen were issued in the immigration context during the four years of the Trump Administration: *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) (limiting continuances); *Matter of Castro Tum*, 27 I&N Dec. 271 (A.G. 2018) (limiting administrative closure); *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (limiting termination); *Matter of A-B-,* 27 I&N Dec. 316 (A.G. 2018) (limiting asylum particular social groups (PSG) based on domestic violence and some other grounds); *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (limiting asylum PSG based on family unit); *Matter of Negusie,* 28 I&N Dec. 120 (A.G. 2020) (eliminating duress exception to persecutor bar to asylum and withholding of removal); *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (introducing de novo review of asylum to second-guess IJ fact-finding; tightening PSG requirements); *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019) (undermining immigration effect of vacatur of criminal convictions); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (denying bond hearings for individuals subject to expedited removal); *Matter of Reyes*, 28 I&N Dec. 52 (A.G. 2020) (criminal convictions); *Matter of O-F-A-S-*, 28 I&N Dec. 35 (A.G. 2020) (Convention Against Torture); *Matter of A-M-R-C-*, 28 I&N Dec. 7 (A.G. 2020) (asylum persecutor bars); *Matter of R-A-F-*, 27 I&N Dec. 778 (A.G. 2020) (Convention Against Torture); *Matter of Castillo-Perez*, 27 I&N Dec. 664 (A.G. 2019) (good moral character); *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018) (asylum); *Matter of J-J-G-, 27 I&N Dec. 808 (BIA 2020)* (exceptional and extremely unusual hardship standard).

[4] See Human Rights Watch, A Price Too High: US Families Torn Apart by Deportations for Drug Offenses (June 16, 2015); Race Forward, Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System (2011).

[5] American Bar Association Resolution 103B, Adopted by the House of Delegates Feb. 22, 2021, available at https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2021/103b-midyear-2021.pdf

[6] For an overview of the categorical analysis, *see* Katherine Brady, "How to Use the Categorical Approach Now," (Immigrant Legal Resource Center, Dec. 2019) https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_dec_2019_0.pdf

decisions that establish criminal bars to asylum and withholding of removal that improperly limit asylum eligibility.

While federal legislative reform is needed to address the unfairly harsh impact of the interplay between the criminal and immigration legal systems, the ABA has outlined key steps that the DOJ can take immediately to reduce this harm. NYSBA should add its support to the establishment of administrative law that comports with congressional intent and sound policy.

The NYSBA Committees on Immigration Representation, Mandated Representation, and Legal Aid urge NYSBA to adopt the ABA Resolution 103B, and to join the many other voices calling for an end to the harsh and unfair immigration consequences of criminal legal system engagement.

New York State Bar Association
Committee on Immigration Representation,
Committee on Mandated Representation, and
Committee on Legal Aid
Proposed Resolution

WHEREAS, the New York State Bar Association (NYSBA) has long supported and encouraged measures to foster equity and racial justice for immigrants and all New Yorkers; and

WHEREAS, in the past, NYSBA has actively promoted and participated in efforts to provide immigrants in New York and nationwide with access to justice by promoting access to legal representation through the establishment of a committee specifically for that purpose, support for policies that invest in universal representation, and through partnerships with the Liberty Defense Project and;

WHEREAS, numerous provisions of immigration law impact people who have had contact with the criminal legal system; and

WHEREAS, the United States Department of Justice ("DOJ") has the authority to rectify a body of administrative opinions previously issued by the DOJ that misinterpret and wrongfully expand the application of the criminal provisions of the immigration laws and which improperly interpret the immigration laws; and

WHEREAS, Improper DOJ administrative opinions have caused hundreds of thousands of disproportionately Black people and other people of color to be civilly detained, deported, denied immigrations status, and criminally incarcerated; and

WHEREAS, the American Bar Association has adopted a resolution calling for the United States Attorney General to limit the immigration law impacts of criminal legal system engagement by utilizing the "certification process to withdraw certain Attorney General opinions and replace them with opinions that are consistent with congressional intent, the U.S. Constitution, and U.S. treaty obligations, and which uphold . . . well-settled legal concepts;" and

WHEREAS, immigration detention and enforcement poses grave risks to immigrant New Yorkers, particularly immigrant New Yorkers who are people of color; and

WHEREAS, NYSBA believes that an immigration system that is welcoming and inclusive will benefit all New Yorkers;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby urges the New York State Governor and the New York State Legislature to adopt the findings and recommendations of the American Bar Association Resolution 103B.

103B

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 17, 2020

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to enact legislation to clarify and explicitly ensure that it does not constitute a violation of federal law for lawyers, acting in accord with state, territorial, and tribal ethical rules on lawyers' professional conduct, to provide legal advice and services to clients regarding matters involving marijuana-related activities that are in compliance with state, territorial, and tribal law.

REPORT

INTRODUCTION

This Resolution addresses the current uncertainty facing lawyers in the provision of advice and legal services to clients within the cannabis industry resulting from the tension between state and federal law over marijuana regulation. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Although the federal government has taken limited steps to accommodate state reforms, the gap between state and federal law has created a tension and uncertainty relating to the criminal prosecution of activity in or relating to marijuana. Regardless of current federal prohibitions, the state-legalized marijuana industry was estimated at $10.4 billion as of the end of 2018, employing some 250,000 Americans.[1]

This Resolution addresses the provision of advice and legal services in jurisdictions where marijuana has been legalized, many of which have amended or interpreted their ethical rules of professional responsibility to explicitly allow lawyers to provide advice and legal services relating to conduct expressly permitted by state law.[2] However, such advice and legal services may nonetheless constitute a violation of federal criminal law. Lawyers are concerned by the very real possibility of criminal prosecution and, at minimum, by ethical qualms arising from the current legally ambiguous nature of providing such legal services. As a result, lawyers and law firms are deterred from representing clients involved in the state-legalized marijuana trade or representing ancillary companies providing services to companies directly involved in the state-legalized marijuana trade.

This policy is necessary to clarify that such provision of advice and legal services in compliance with state law does not constitute unlawful activity pursuant to federal law. This policy is crucial for allowing lawyers to advise clients without fear of criminal liability, assist such clients to comply with both state and federal laws, allow for the development

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[1] Don Reisinger, The Legal Marijuana Industry Is Soaring—And 2019 Could Be Its Best Year Yet, Fortune (December 27, 2018), *available at* https://fortune. com/2018/12/27/legal-marijuana-industry-sales/.

[2] *See* Dennis Rendleman, Ethical Issues in Representing Clients in the Cannabis Business: "One toke over the line?", The Professional Lawyer, Vol. 26, No. 1 (July 2, 2019), available at https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/26/1/ethical-issues-representing-clients-the-cannabis-business-one-toke-over-line/#40. *See also* State Bar of Ariz. Ethics Comm., Formal Op. 11-01 (2011); Colo. Bar Ass'n Ethics Comm., Formal Op. 124 (2012); Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 2013-2 (2013) & 2014-08 (2014); Disciplinary Bd. of Hawaii Sup. Ct., Formal Op. 49 (2015); Ill. State Bar Ass'n, Advisory Op. 14-07 (2014); Los Angeles Cnty. Bar Ass'n Op. 527; Md. State Bar Ass'n Op. 2016-10 (2016); Me. Bd. of Overseers of the Bar, Prof'l Ethics Comm'n, Formal Op. 199 (2010) & 215 (2017); Minn. Lawyers Prof'l Resp. Bd. Op. 23 (2015); N.M. Ethics Advisory Comm., Advisory Op. 2016-01 (2015); N.D. State Bar Ass'n Ethics Comm., Advisory Op. 14-02 (2014); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1024 (2014); Sup. Ct. of Ohio Bd. of Prof'l Conduct, Formal Op. 2016-6 (2016); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm., Formal Op. 2015-100 (2015); R.I. Sup. Ct. Ethics Advisory Panel 2017-01 (2017); San Francisco Bar Ass'n Op. 2015-1 (2015); Wash. State Bar Ass'n, Advisory Op. 201501 (2015).

of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

BACKGROUND ON STATE REFORMS[3]

Over the past two decades, a majority of states have legalized marijuana for at least some purpose[4]. The regulatory approaches pursued by these states vary, as befits our federal system, but each of these states can be divided into one of two basic groups: (1) "Medical Only" states; and (2) "Adult and Medical Use" states.

"Medical Only" states have legalized the use of marijuana—including marijuana that contains tetrahydrocannabinol (THC), the psychoactive cannabinoid produced by the cannabis plant—for the treatment of symptoms associated with certain medical conditions. "Adult and Medical Use" states have adopted broader reforms. Like "Medical Only" states, each of these states has legalized the medical use of marijuana, but they have also legalized adult use of the drug for non-medical purposes as well, in the same way they once legalized consumption of alcohol by adults following the repeal of Prohibition. By the end of 2018, 23 states had adopted "Medical Only" laws, and another 11 states (12, if we include the District of Columbia) had adopted "Adult and Medical Use" laws.[5]

Each of these reform states has adopted a comprehensive body of regulations to replace outright prohibition.[6] The regulations stipulate detailed rules for a litany of marijuana-related activities. For example, Colorado has adopted nearly two hundred pages of regulations governing the supply of marijuana just for the adult use market.[7] Among many other things, this Retail Marijuana Code requires vendors to apply for a special license from the state; maintain detailed records of inventory; limit their advertising; and apply warning labels to all marijuana products. The state has even created a Marijuana Enforcement Division within its Department of Revenue to regulate the state's more than 1,000 licensed marijuana facilities.

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[3] The following sections until the section titled "THE UNCERTAINTY FACING LAWYERS" are extracts from the August 2019 report submitted by Lucian Dervan, Chair of the Criminal Section, repurposed here for consistency on addressing issues with related backgrounds.

[4] The first states to legalize recreational marijuana were Colorado and Washington, followed by Alaska, Oregon and the District of Columbia in 2014. As of today, those states have been joined by California, Maine, Massachusetts, Nevada, Vermont, Michigan, and Illinois. Numerous other states have legalized or decriminalized medicinal marijuana. *See* CRS Report, *The Marijuana Policy Gap and the Path Forward*, R44782, at Figure 2.

[5] Robert A. Mikos, *Only One State Has Not Yet Legalized Marijuana in Some Form* . . . Marijuana Law, Policy, and Authority Blog, https://my.vanderbilt.edu/marijuanalaw/2018/07/only-one-state-has-not-yet-legalized-marijuana-in-some-form/ (July 16, 2018). The "Medical Only" category does not include an additional 16 states that have legalized the medical use of marijuana that is low in THC but rich in cannabidiol (C131), a non-psychoactive produced by the cannabis plant. Id.

[6] For a thorough discussion of how states now regulate marijuana, see Robert A. Mikos, MARIJUANA LAW, POLICY, AND AUTHORITY (2017).

[7] 1 Code of Colorado Regulations 212-2.

BACKGROUND ON FEDERAL PROHIBITION

Even as these state reforms have proliferated—and public support for them has ballooned,[8] federal law governing marijuana has remained essentially unchanged since the passage of the Controlled Substances Act (CSA) in 1970.[9]

Under the CSA, all controlled substances (essentially, all substances—with the notable exceptions of alcohol and tobacco—that can cause dependence) are placed onto one of five Schedules (I-V) using criteria that relate to the substance's medical benefits and its harms.[10] Congress itself placed marijuana on Schedule I when it passed the CSA, reflecting the belief (circa 1970) that marijuana was a dangerous drug without any proven medical benefits that could otherwise redeem it.

This classification means that marijuana—like other Schedule I drugs, such as heroin and LSD—is subjected to the strictest possible regulatory controls. Indeed, the manufacture, distribution, and even possession of Schedule I substances, including marijuana, are criminal offenses outside of very narrowly circumscribed FDA-approved clinical research trials.[11]

THE RESULTING LEGAL QUAGMIRE

There is an obvious tension between marijuana's federal Schedule I status—which prohibits marijuana in virtually all circumstances—and state regulatory reforms—which increasingly authorize marijuana for at least some purposes. While state and federal law often diverge—on everything from environmental to workplace laws—marijuana policy is the only area where the states regulate and tax conduct the federal government nearly universally prohibits.

In recent years, the federal government and the states have reached an uneasy truce that has reduced, but not eliminated, this tension. Guidance memos from the Department of Justice (DOJ) to United States Attorneys around the country once generally counseled deference to state policy as a matter of policy (not law).[12] While those memos were rescinded by then-Attorney General Sessions, and then apparently re-adopted by

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[8] See, e.g., Justin McCarthy, Two in Three Americans Now Support Legalizing Marijuana, Gallup, Oct. 22, 2018 (reporting that 66% of Americans support legalizing marijuana, up from only 12% in 1970).

[9] The CSA is codified at 21 U.S.C. §§ 801 et seq. Congress has recently enacted one notable reform: it narrowed the definition of "marijuana" for purposes of the CSA, and thus the scope of the statute's ban on the drug, when it passed the 2018 Farm Bill. See Robert A. Mikos, *See New Congressional Farm Bill Legalizes Some Marijuana*, Marijuana Law, Policy and Authority Blog, https://my. vanderbilt. edu/marijuanalaw/2018/12/new-congressional-farm-bill-legalizes-some-marijuana/ (Dec. 13, 2018) (noting that 2018 Farm Bill excludes from the definition of marijuana cannabis that contains less than 0.3% THC by dry weight).

[10] 21 U.S.C. § 812(b). These criteria include the substance's accepted medical use (if any), its potential for abuse, and its physical and psychological effects on the body. Id.

[11] See id. at §841 (criminalizing marijuana trafficking); Id. at § 844 (criminalizing marijuana possession).

[12] See Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U. S. Attorneys (Oct 19. 2009); Memorandum from James M. Cole, Deputy Attorney Gen., to All U. S. Attorneys (Aug. 29, 2013).

Attorney General Barr,[13] the Congress has not changed the Controlled Substances Act, nor has the Drug Enforcement Agency re-scheduled Cannabis. Within the last few years, Congress has written some temporary bars against federal criminal enforcement into appropriations legislation. In particular, beginning in 2014, Congress has attached riders prohibiting the DOJ from using any of its budgeted funds to "prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[14] The federal courts have interpreted these riders to bar federal prosecution of persons acting in conformity with state medical marijuana laws.[15]

Notwithstanding these steps, however, the tension between state and federal laws governing marijuana persists. For one thing, spending riders do not shield anyone acting in compliance with any state's Adult Use marijuana laws. Moreover, the protection afforded by such riders is only temporary. If a rider lapses, both medical and non-medical marijuana users and suppliers would be subject to arrest and prosecution by the DOJ, and not just for their conduct going forward. Those using and producing marijuana could also be prosecuted for violations of the Controlled Substances Act they committed while the riders were in effect (so long as the statute of limitations has not expired).[16] Moreover, anyone out of compliance with state regulations would also be subjected to criminal sanction, even if their violations of state regulations were *de minimis*.

Because the spending riders operate only as a restraint on DOJ action, they have not prevented other parties from using federal law against state-compliant marijuana businesses and users. For example, state-licensed and state law-abiding marijuana businesses continue to have difficulty obtaining banking services, due to financial regulations that limit transactions in the proceeds of "unlawful" activities; they pay unusually high federal taxes, due to federal tax code rules that deny them deductions other (federally legal) businesses are allowed to take; they cannot secure federal protection for their trademarks, due to administrative rules that limit such protection to marks used in "lawful" commerce; and they have faced a growing number of private lawsuits under federal law, because the federal RICO statute considers growing and selling marijuana to be actionable racketeering activities.[17]

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[13] See Memorandum from Jefferson B. Sessions, III, Attorney General, to All United States Attorneys (Jan. 4, 2018).

[14] The latest of these riders can be found in Section 538 of the Consolidated Appropriations Act. 2018, Pub. L. No. 115-141, March 23, 2018, 132 Stat. 348.

[15] E.g., United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016) ("We therefore conclude that, at a minimum, [that the spending rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.").

[16] McIntosh, 833 F.3d at 1179 n.5 ("Congress currently restricts the government from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding.").

[17] See Erwin Chemerinsky, et al., Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74, 90-100 (2015); Mikos, Marijuana Law, Policy, and Authority, supra note 2 at 396-412 (detailing these and other obstacles faced by state-licensed marijuana businesses).

What is more, the ongoing tension has generated considerable confusion over the enforceability of some state regulations. Although Congress may not force the states to ban marijuana (e. g., to enact or retain their own state law prohibitions on marijuana activities), just how far the states may depart from the federal government's approach to regulating marijuana remains unclear.[18] State laws regulating a variety of activities—from employment discrimination against marijuana users to taxation of marijuana sales—have been subject to preemption challenges brought by private parties and even state officials.[19]

In short, despite State law, Cannabis remains an illegal controlled substance everywhere in the United States.

No one should be satisfied with the legal and regulatory quagmire that has resulted from the unresolved tension between state reforms and federal law. Although many of the burdens described above fall upon marijuana users and suppliers, not all of these costs are internalized to those violating federal law. For example, the unavailability of even the most basic banking services means that marijuana is a multi-billion dollar cash business. This makes marijuana businesses and their clients targets of crime and significantly hampers the work of the state regulators and tax collectors who govern them.

THE UNCERTAINTY FACING LAWYERS

This tension between federal and state laws directly impacts attorneys with clients in or interested in entering state-authorized marijuana business activities. Regardless of state law, so long as marijuana remains a Schedule I controlled substance such client's marijuana business activities remain federally criminal conduct. Thus, the provision of

[18] See Robert A. Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime, 62 Vand.L.Rev. 1461, 1445-1459 (2009) (explaining the limits on Congress's preemptive power).

[19] E.g., Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10 (Maine 2018) (holding state workers compensation law preempted to the extent it required employer to compensate injured employee for purchase of medical marijuana); Nebraska v. Colorado, 136 S.Ct. 1034 (2016) (denying states' request for leave to file complaint in Supreme Court's original jurisdiction; complaint had sought declaration that regulatory structure created by Colorado's Amendment 64 conflicts with and is thus preempted by the federal CSA).

legal advice and services to assist clients in such conduct may also in itself constitute a criminal offense, whether under a theory of conspiracy[20] or aiding and abetting.[21]

This presents two primary types of difficulties for lawyers. The first is that lawyers providing legal services to state-legal cannabis clients must undertake a real, if (at the moment) small risk of actually being prosecuted for felony violations of the Controlled Substances Act. The second is an ethical concern, and touches on the core of the profession. Many lawyers believe, as an ethical matter, that they should not engage in conduct that violates a criminal law, even if the chance of prosecution is slim, perhaps even vanishingly small. This belief is unrelated to the probability of prosecution, the potential revenue from such regulation, or belief that the law as written is ill-advised.

This potential exposure of lawyers to criminal liability merely for providing legal advice and services deters the provision of accurate counsel and clarity that is desperately needed by businesses operating in the marijuana industry to understand and comply with the state laws and navigate the tension between state and federal laws.

THIS RESOLUTION

Clear statutory guidance is needed that explicitly ensures that attorneys who adhere to their state ethics rules do not risk federal criminal prosecution simply for providing legal counsel to clients operating marijuana businesses in compliance with their state law. This Resolution accomplishes this elegantly by harmonizing federal criminal liability with States' ethical rules regarding the provision of advice and legal services relating to marijuana business. If a state has legalized some form of marijuana activity and explicitly permitted lawyers to provide advice and legal services relating to such state-authorized marijuana activity, such provision of advice and legal services shall not be unlawful under the Controlled Substances Act or any other federal law.

Technically, this Resolution accomplishes this objective by defining both "State Authorized Marijuana Activity" and "State Authorized Marijuana-related Advice and legal services" and then providing that the latter shall not constitute a federal crime.

CONCLUSION

The right to seek the assistance of counsel, in civil and criminal matters, is a bedrock constitutional principle and a vital component of any system that adheres to the rule of

[20] "Section 846 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter I of Title 21 ("Control and Enforcement")—in other words, Section 846 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 801-904. Analogously, Section 963 of Title 21 prohibits conspiracies and attempts to violate any substantive offense established by Subchapter II of Title 21 ("Import and Export")—in other words, Section 963 makes it a crime to conspire to violate or attempt to violate any substantive offense set forth in 21 U.S.C. §§ 951-971." Cited in U.S. Attorney's Manual, § 9-100.020.

[21] See 18 U.S.C. § 2(a): "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

law. Legal counsel is vital to the development of law and regulations. Because of the central importance of the rule of law to the American system of government and the conflict between federal and state laws related to marijuana, it is the purpose of this Resolution to ensure attorneys working in states that have chosen to legalize marijuana are permitted to represent clients, in accordance with state law, without fear of federal criminal prosecution. Until such fear is addressed, lawyers will continue to be deterred from advancing the rule of law and clients will continue to be deprived of much needed legal guidance and counsel.

Respectfully submitted,

Dorothea M. Capone
Chair, Tort Trial and Insurance Practice Section
February 2020

103B

GENERAL INFORMATION FORM

Submitting Entity: Tort Trial and Insurance Practice Section

Submitted By: Dorothea M. Capone, Chair

1. Summary of the Resolution(s).
   This Resolution resolves the current uncertainty facing lawyers in the provision of advice and legal services to clients within the cannabis industry resulting from the tension between state and federal law over marijuana regulation. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Because marijuana-related activities remain federally criminal conduct, the fear of prosecution for conspiring to commit a crime or aiding and abetting a crime is currently deterring lawyers from advising clients operating state-authorized marijuana businesses, who are thus deprived of desperately needed counsel and guidance. This Resolution is necessary to clarify that such provision of advice and legal services in compliance with state law does not constitute unlawful activity pursuant to federal law. This Resolution is crucial for allowing lawyers to advise clients without fear of criminal liability, assist such clients to comply with both state and federal laws, allow for the development of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

2. Approval by Submitting Entity.
   This resolution was been approved by the Tort Trial and Insurance Practice Section Council during the Section's Fall Leadership Meeting on October 19, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?
   No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?
   19A104 called for marijuana to be removed from Schedule 1 of the Controlled Substances Act. This Resolution seeks to build on 19A104 by calling on Congress to ensure that lawyers advising clients operating marijuana businesses permitted under state law are not charged with criminal conduct for providing legal advice to their clients.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?
   Not applicable.

6. Status of Legislation. (If applicable)
   Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
Work with Congress to introduce legislation.

8. Cost to the Association. (Both direct and indirect costs)
None.

9. Disclosure of Interest. (If applicable)
None.

10. Referrals.
Business Law Section
Center for Professional Responsibility
Section of Civil Rights & Social Justice
Criminal Justice Section
Health Law Section
Intellectual Property Law Section
Labor & Employment Law Section
Section of Litigation
Real Property, Trust and Estate Law Section
Section of Taxation

11. Name and Contact Information. (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.)*.

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12. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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EXECUTIVE SUMMARY

1. Summary of this Resolution

   This Resolution resolves the current uncertainty facing lawyers in the provision of advice and legal services to clients within the cannabis industry resulting from the tension between state and federal law over marijuana regulation. A majority of states have legalized marijuana in at least some circumstances, while the federal government continues to ban the drug outright. Because marijuana related activities remain federally criminal conduct, the fear of prosecution for conspiring to commit a crime or aiding and abetting a crime is currently deterring lawyers from advising clients operating state-authorized marijuana businesses, who are thus deprived of desperately needed counsel and guidance. This Resolution is necessary to clarify that such provision of advice and legal services in compliance with state law does not constitute unlawful activity pursuant to Federal law. This Resolution is crucial for allowing lawyers to advise clients without fear of criminal liability, assist such clients to comply with both state and federal laws, allow for the development of laws and regulations, and will align with the ultimate objectives of the Department of Justice: adherence to the rule of law.

2. Summary of the Issue that this Resolution Addresses

   This Resolution addresses the lack of clarity as to whether lawyers may be prosecuted for violating or conspiring to violate any federal act merely by providing advice and legal services to a client relating to a state-authorized marijuana activity or business. Statutory clarity will remove the fear of prosecution, allowing lawyers to advance the rule of law by providing such clients with much needed counsel and guidance on adhering to state laws and navigating the tension between state and federal law.

3. Please Explain How the Proposed Policy Position Will Address the Issue

   This Resolution will provide explicit statutory clarity that exempts from criminal prosecution the provision of advice and legal services relating to statute-authorized marijuana activity or business, consistent with the ethical rules of that state.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified.

   Not applicable / None.