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Impending Legalization - Hot Topics in Cannabis Law

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Recent Cannabis Law Decisions

May 2019

James K. Landau, Esq.

Employment Law – Coats v. Dish Network, LLC, 350 P.3d 849 (2015)

- Petitioner Coats registered for and obtained a state-issued license to use medical marijuana to treat painful muscle spasms caused by his quadriplegia. Coats consumes, medical marijuana at home, after work, and in accordance with his license and Colorado state law.

Coats v. Dish Network, LLC, 350 P.3d 849 (2015)

- In May of 2010, Coats tested positive for THC during a random drug test. Coats informed DisBetween 2007-2010, Coats worked for the Dish Network as a telephone customer service representative. h that he was a registered medical marijuana patient and planned to continue using medical marijuana. Thereafter, Dish fired Coats for violating the company’s drug policy.

Coats v. Dish Network, LLC, 350 P.3d 849 (2015)

- In a split decision, the court of appeals affirmed the motion court's decision to dismiss petitioner's suit based on the prohibition of marijuana use under the federal Controlled Substances Act ("CSA"). The majority ruled that under Colorado's Lawful Activities statute, the term "lawful" means "that which is 'permitted by law.'" Applying this definition, the majority reasoned that to be "lawful" for purposes of the statute, activities that are governed by both state and federal law must be permitted by and not contrary to both state and federal law.

Coats v. Dish Network, LLC, 350 P.3d 849 (2015)

- The Colorado Supreme Court affirmed. In doing so, it stated that "the term 'lawful' . . . Is not restricted in any way, and we decline to engraft a state law limitation onto the term." It also held that because Coats' marijuana use was unlawful under federal law, it does not fall within the protections of Colorado's Lawful Activities statute.

Employment Law – Noffsinger v. SSC Niantic Operating Co., 273 F.Supp.3d 326 (D. Conn. 2017)

- **Plaintiff suffers with PTSD and was prescribed medical marijuana to treat her PTSD. She registered with the state and began taking one capsul of a synthetic form of cannabis each night as prescribed.**

Noffsinger v. SSC Niantic Operating Co., 273 F.Supp.3d 326 (D. Conn. 2017)

- She was originally employed as a therapist at a long-term care and rehabilitation facility. She was recruited for a better position at another nursing facility nearby. She was initially offered the job and accepted and was told to give her current employer notice. She did, but then failed an onsite drug test at the new employer and they rescinded the offer. Plaintiff's prior employer had already filled her position, so she was unable to remain employed there.

Noffsinger v. SSC Niantic Operating Co., 273 F.Supp.3d 326 (D. Conn. 2017)

- **Plaintiff sued defendant in Connecticut Superior Court. Defendant then removed the case to federal court on the basis of diversity jurisdiction and moved to dismiss claiming that the Colorado medical marijuana law was pre-empted by the CSA, ADA and the Food, Drug, and Cosmetic Act.**

Noffsinger v. SSC Niantic Operating Co., 273 F.Supp.3d 326 (D. Conn. 2017)

- In denying the motion to dismiss, the District Judge reasoned that the main objectives of the CSA are to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. But, the CSA does not make it illegal to employ a marijuana user. Nor does it purport to regulate employment practices in any manner.

Property Rights/RICO – Safe Streets Alliance v. Hickenlooper, et. al., 859 F.3d 865 (10th Cir. 2017)

- The Reillys own a parcel of land in Pueblo County Colorado that is part of the Meadows at Legacy Ranch, a development. The Reillys' property is adjacent to the site of a recreational "marijuana grow" operating out of a newly constructed building located just a few feet from the Reillys' property line. The Reillys allege harm from the grower's operations.

Safe Streets Alliance v. Hickenlooper, et. al., 859 F.3d 865 (10th Cir. 2017)

- The Reilly's brought civil RICO claims against a host of individuals and entities purportedly affiliated with that neighboring marijuana enterprise (the "Marijuana Growers").

Safe Streets Alliance v. Hickenlooper, et. al., 859 F.3d 865 (10th Cir. 2017)

- The Marijuana Growers moved to dismiss the Reillys' complaint because the alleged injury to the Reillys' property was speculative and no proof was provided of a concrete financial loss.

Safe Streets Alliance v. Hickenlooper, et. al., 859 F.3d 865 (10th Cir. 2017)

- **The District Court dismissed these RICO claims with prejudice, concluding that the Reillys had not pleaded a plausible injury to their property that was proximately caused by the Marijuana Growers' activities in violation of the CSA.**

Safe Streets Alliance v. Hickenlooper, et. al., 859 F.3d 865 (10th Cir. 2017)

- The 10th Circuit reversed. In doing so, the Court noted that “RICO is founded on the concept of racketeering activity” and that under RICO, “racketeering activity includes dealing in a controlled substance or listed chemical as defined in the CSA.” Accordingly, the 10th Circuit determined that the Reilly adequately alleged that Marijuana Growers are each engaged in racketeering activity.

Property Rights/RICO – Ainsworth v. Owenby, et al., 326 F.Supp.3d 1111 (U.S.D.C. D. Oregon 2018)

- **Plaintiffs were property owners displeased with the effects of an alleged marijuana production and processing operation hosted on nearby land. Plaintiffs brought claims based on state law nuisance and RICO. Defendants moved to dismiss the RICO claims for failure to state a claim.**

Ainsworth v. Owenby, et al., 326 F.Supp.3d 1111 (U.S.D.C. D. Oregon 2018)

- **The Court granted Defendants' motion to dismiss the RICO claims because it found that Plaintiffs had failed to allege a compensable property injury under the civil RICO statute.**

Contract Law – Green Cross Medical, Inc. v. Gally, 242 Ariz. 293 (Ct. App. Ariz. 2017)

- Defendant Gally is the owner of commercial property located in Winslow, Arizona. Gally entered into a lease with Plaintiff for the property to allow Plaintiff to operate a medical marijuana dispensary. Within 2 weeks of entering into the lease, Green Cross received a letter from Gally's attorney, stating that Gally was revoking the lease. Green Cross commenced the lawsuit for breach of contract.

Green Cross Medical, Inc. v. Gally, 242 Ariz. 293 (Ct. App. Ariz. 2017)

- The parties filed cross-motions for summary judgment. For the first time, Gally argued that he was entitled to judgment as a matter of law because the lease was illegal and therefore unenforceable as the tenant had not obtained the necessary license to operate a dispensary. The motion court granted Gally's motion and denied Green Cross' motion. Green Cross appealed.

Green Cross Medical, Inc. v. Gally, 242 Ariz. 293 (Ct. App. Ariz. 2017)

- The Court of Appeals first concluded that the lease was not illegal under Arizona law, because the AMMA protects the rights of dispensaries to enter into leases and contracts if they are in compliance with the AMMA.

Green Cross Medical, Inc. v. Gally, 242 Ariz. 293 (Ct. App. Ariz. 2017)

- Next the Court analyzed the validity of the lease based on the fact that the sale and use of marijuana for medical purposes is illegal under the CSA.

Green Cross Medical, Inc. v. Gally, 242 Ariz. 293 (Ct. App. Ariz. 2017)

- The Court recognized that “there is a tension between the CSA and the AMMA because the CSA still criminalizes the sale, use, or possession of medical marijuana whereas the AMMA offers immunity and protections for those persons operating in compliance with the AMMA. Nevertheless, it held that refusing to enforce such contracts would undermine the medical marijuana program the voters approved.

Contracts – Bart Street III v. ACC Enterprises, LLC, 2018 WL 4682318 (USDC D. Nev. 2018)

- Plaintiff is in the business of money lending and Defendant are allegedly the owners and operators of a cannabis cultivation plant in Nevada. On August 16, 2016, Defendants executed a promissory note agreement with Plaintiff which involved a loan for $3.5 million and then executed a second note in September of 2015 for an additional $1.2 million. Defendants allegedly breached the terms of both promissory notes.

Bart Street III v. ACC Enterprises, LLC, 2018 WL 4682318 (USDC D. Nev. 2018)

- Defendants moved to dismiss the complaint. One argument raised by Defendants was that Plaintiff cannot state a claim for the enforcement of the notes because it would require the Court to enforce an illegal contract for the operation and expansion of a marijuana business.

Bart Street III v. ACC Enterprises, LLC, 2018 WL 4682318 (USDC D. Nev. 2018)

- Applying Nevada law, the Court determined that it could provide a remedy for Plaintiff that both complies with Nevada substantive law and does not conflict with federal law. Because of the explicit legal directives in the notes (such as paying off prior lenders and acquiring land), enforcing such terms does not mandate any action that would violate the CSA under federal law; nor does it provide any discretion to Defendants that would enable them to use the funds for the cultivation or possession of cannabis.

James K. Landau

James K. Landau is a member of McCarthy Fingar LLP, a full service law firm with offices in White Plains. Mr. Landau has over 30 years of commercial litigation experience. Prior to joining McCarthy Fingar LLP, Mr. Landau spent the bulk of his experience
at Proskauer Rose LLP and Brown Raysman Millstein Felder & Steiner LLP. Mr. Landau has represented companies of all sizes and individuals in federal, state and local courts and tribunals, including arbitrations before the American Arbitration Association and mediations.

Mr. Landau's practice focuses on a broad range of matters, including commercial real estate litigation, commercial landlord-tenant litigation, commercial collection work, commercial arbitrations, bankruptcy litigation, intellectual property litigation, employment disputes, partnership dissolution proceedings, and mortgage foreclosure actions. Mr. Landau also frequently counsels employers and employees in connection with the enforceability of
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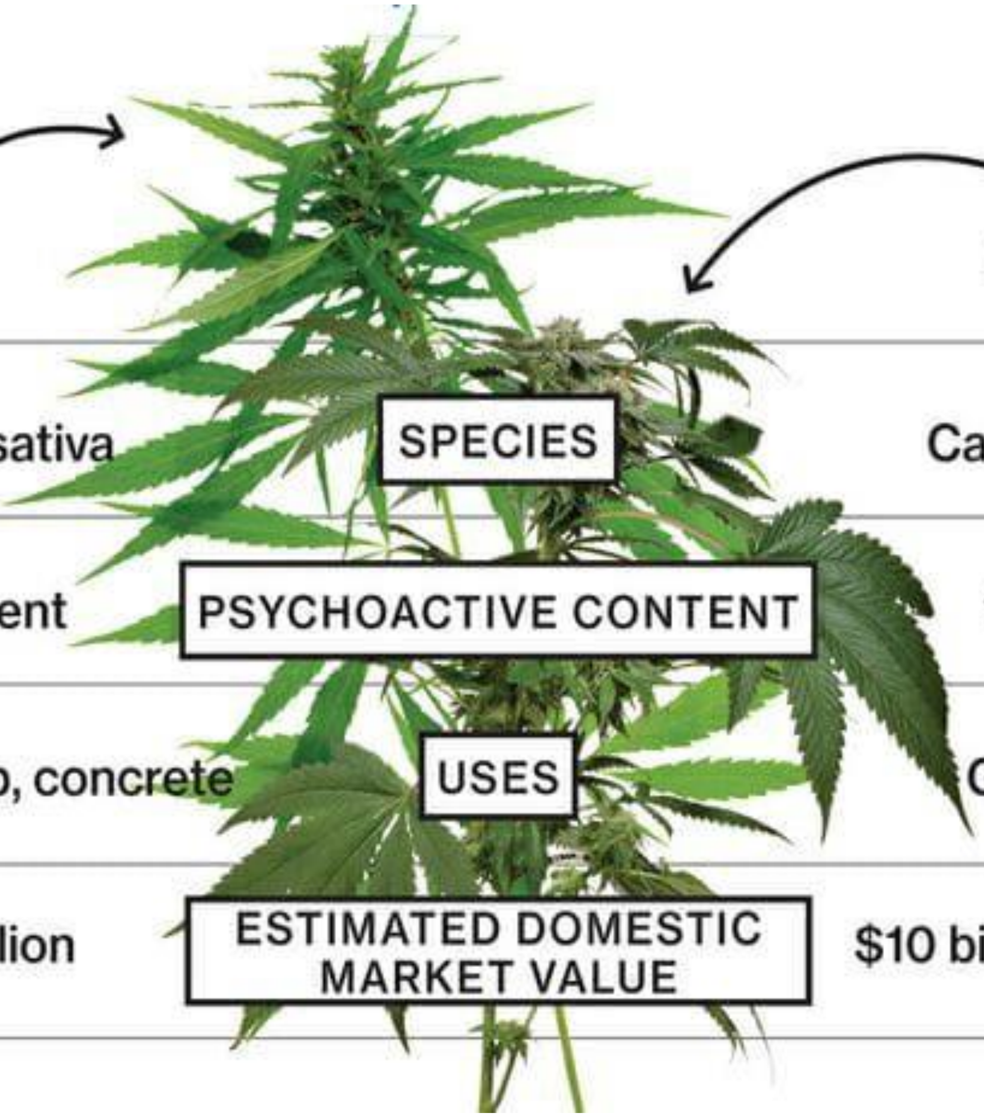
Mr. Landau holds a B.A. from the University of Michigan and a J.D. from the Boston University School of Law. Mr. Landau is a member of the New York State Bar Association, Commercial & Federal Litigation Section, CPLR Committee; co-chair of the Appellate Practice Committee and a member of the Alternative Dispute Resolution Committee of the Westchester County Bar Association. Mr. Landau is rated AV-Preeminent™ by Martindale Hubbell and has been AV-Rated since 2001. Mr. Landau has been named to the New York *Super Lawyers®* list as one of the top attorneys in New York every year since 2012. No more than 5% of lawyers in the state are selected by *Super Lawyers®.*

Licensing of Cannabis Businesses

Robert C. Hertman, Esq.



Hemp		Marijuana
Cannabis sativa	SPECIES	Cannabis sativa
0.3 percent	PSYCHOACTIVE CONTENT	10 percent
Auto parts, soap, concrete	USES	Getting high
$452 million	ESTIMATED DOMESTIC MARKET VALUE	$10 billion-$120 billion

Gonzalez v. Raich (2005)

After the DEA seized cannabis plants authorized under California's Compassionate Care Act, respondents brought an action seeking injunctive and declaratory relief prohibiting the enforcement of the Controlled Substances Act. Here, SCOTUS held the federal marijuana prohibition to be a valid exercise of Congress' commerce power.

New York State Office of Cannabis Management (“OCM”)

- In NY rulemaking under State Administrative Procedure Act (“SAPA”)
- Propose regulation through publication in the State Register.
- Receive and consider public comment.
- Adopt rules by filing with Secretary of State for incorporation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THE POUND
the Weed GIANT

Hammer v. Today's Health (2010)

Plaintiff loaned money to defendant to open a dispensary in Colorado. After defendant defaulted, plaintiff sued in State Ct to enforce the terms of the contract. The defendant moved for summary judgement on the grounds of illegality. The court ruled for defendant , holding that under the Controlled Substances Act the underlying contract was illegal.

Safe Streets Alliance v. Hickenlooper (10th Circuit)

Civil Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1946(c)

– Under RICO trebel damages are allowed

Grower was sued by neighbor under RICO. Plaintiff argued that they suffered a loss in property value b/c of licensed cultivator next door. 10th Circuit ruled for the cultivator holding that there was no loss in property value.

Question?

Thank you.

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Navigating Ethical Obstacles In Cannabis Law
By Andrew Schriever[1]

Until recently, if, in response to the question "what do you do for a living?" a lawyer responded, "I help people to cultivate, process and distribute marijuana for sale," it would be a pretty safe bet that the responding lawyer would eventually be losing his or license to practice law, and likely be facing prosecution for aiding and abetting a client's illegal activity. But, in the words of Bob Dylan (and apropos of the subject matter), "The Times, They Are A Changin'." As of the writing of this article, ten states plus Washington D.C. have fully legalized "cannabis" (now the preferred industry term) for recreational, a.k.a., adult use, consisting of Alaska, California, Colorado, the District of Columbia, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. Over twenty more states allow for some sort of legal use, such as for medical purposes, and many more states are actively considering legalizing adult use, including New York.

With Canada having fully legalized cannabis for adult use in the fall of 2018 (such that within months, public cannabis companies are now trading on the Canadian stock exchange), with the topic already staked out as a 2020 campaign issue, and with the American-based stock exchanges and the banking industry, which are subject to federal regulation, sidelined from getting into the business at present, it is likely just a matter of time before the United States legalizes adult use cannabis – such that people engaged in state cannabis commerce will no longer have to fear being in violation of federal law. For now though, cannabis remains federally illegal, listed as a Schedule I drug under the Controlled Substances Act, the most tightly restricted category reserved for drugs that have "no currently accepted medical use," alongside heroin, LSD, ecstasy, peyote and cocaine.

From these observations, an obvious paradox emerges: if cannabis is illegal under federal law, then how is it that states can legally allow not just possession, but an open market running from seed-to-sale, where people are permitted and licensed by the state to grow, ship, refine and sell the product, as part of a growing industry which, in 2018 alone, garnered $10 Billion worth of investments in the United States?[2] This question also invokes a states-rights issue, underscoring the tension between the Constitution's Tenth Amendment, which reserves to the "States respectively, or to the people" all non-federal powers, and Article VI, the Supremacy Clause, which requires state law to yield when it is inconsistent with federal law, pursuant to which it follows that if cannabis is federally barred, then it cannot be legal at the state level. The resolution of this tension has been an evolving process, to a point today where federal law has not completely yielded, but where cannabis businesses following state law and the lawyers who advise them can generally move forward without fear of federal prosecution.

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[2] Associated Press. (2018, December 27). *Legal marijuana industry had banner year in 2018 with $10B worth of investments*. Retrieved from https://www.nbcnews.com/news/us-news/legal-marijuana-industry-had-banner-year-2018-10b-worth-investments-n952256.

The origin of this federal-state conflict dates back to 1973, when Oregon became the first state to decriminalize cannabis, to 1996, when California became the first state to legalize medical cannabis use, to 2012, when Colorado and Washington became the first states to legalize adult, or recreational, use, to today where the trend is proceeding toward full legalization.

In this respect, the growing acceptance and legalization of cannabis echoes the sea-change in public opinion that eventually led to the recognition of gay marriage, which began with Massachusetts being the first to recognize the right to gay marriage by a decision from its highest Court in 2004. From that point, the legitimacy and legality of gay marriage progressed at an astonishingly rapid pace, culminating in federal legal recognition of the right to gay marriage with the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015). Like with gay marriage, there has been a significant and accelerating rise in support for cannabis legalization. As of 2000, 31% of the nation favored legalization, as of 2012, 50% was in favor, and now, polling indicates that this number has risen to 66% in favor.[3]

So, it is largely not a question of "if," but "when" will cannabis be completely legal in the United States, begging the question of what's a lawyer to do until then? How does a lawyer steer clear of well-established rules of ethics which prohibit a lawyer from aiding a client in engaging in conduct which is illegal, *i.e.*, the cultivation and sale of cannabis as barred by federal law, when state law allows legal cannabis on a medical or an adult use (recreational) basis?

The answer to this question begins with the Obama Administration, where, following Colorado and Washington's move to legalize, the federal government had to resolve whether to enforce its prohibition of cannabis as a Class I drug in the face of full legalization in these states. The solution was left to the Justice Department and was imperfect, but it has proven to be workable. It is embodied in an August 29, 2013 "Guidance Regarding Marijuana Enforcement," authored by Deputy Attorney General James M. Cole, which became known as The Cole Memorandum (the Cole Memo), and it applied to enforcement of investigations and prosecutions concerning cannabis in all states.

The Cole Memo did *not* represent a wholesale departure from enforcement of federal policy on cannabis. Rather, in recognition of the trend of states enacting their own laws allowing for medical cannabis use, and in the wake of Colorado and Washington's adult use legalization, the Cole Memo spelled out its continuing priorities of preventing: (1) distribution to minors; (2) revenue from going to criminal enterprises, gangs and cartels; (3) cannabis from being transported to states where it is illegal; (4) states from using cannabis laws as a pretext to traffic illegal drugs or activity; (5) violence and firearm use in connection with cannabis activity; (6) drugged driving and other adverse health consequences; (7) growing cannabis on public land; and (8) possession

[3] Hartig, H. and Geiger, A. (2018, October 8). *About six-in-ten Americans support marijuana legalization*. Retrieved from https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/; Shutt, J. (2019, March 6). *Congress is finally going to pot.* Retrieved from https://rollcall.com/news/congress/marijuana-gains-traction-both-parties; Hawken, Kilmer, Caulkins and Kleinman, *Marijuana Legalization: What Everyone Needs To Know*. Oxford University Press, 2012.

and use on federal property (although ironically, Washington D.C. has since become one of the legal adult use jurisdictions).

The Cole Memo confirmed that these priorities would continue to guide enforcement of the Controlled Substances Act "against marijuana-related conduct." The Memo's directive was to focus federal enforcement efforts on conduct interfering with any of the listed priorities, and to make clear that such enforcement could continue. The balance of the Cole Memo then largely reflects deference to states' rights, noting that traditionally, federal enforcement has always focused on prosecuting conduct which violates the list of federal priorities, but not prosecuting "individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," which prosecutions are normally left to the states.

The Cole Memo then made clear that states would be expected to implement rigorous regulatory regimes, with an emphasis on vital health and safety measures, such as ensuring strong protections and enforcement measures against distribution to minors. However, the bottom line conclusion was that states which legalize cannabis would be left alone so long as they ensured compliance with their regulations and laws in accordance with the list of federal priorities (which list does not pose any practical obstacle, as most of the priorities are shared by advocates for responsible legalization and reflected in regulations passed by states that allow legal cannabis). The Cole Memo did end, however, with a significant disclaimer that it was only a guidance (i.e., it does not have the force of law and could be subject to change at any time), and that federal prosecution remained an option if the listed federal priorities were implicated, or in cases where the Department of Justice determined that federal action served "an important federal interest" – a rather fluid standard.

Despite that closing caveat, the Cole Memo was clearly seen by states as a green light to move forward with allowing for a legal cannabis market. Legalization for adult use has since taken a firmer hold, such that 20% of the states have now legalized adult use cannabis.

Of course, as each of these states enacted their own adult-use legislation, businesses within those states needed legal representation for licensing, land use approvals, leasing/buying, ensuring regulatory compliance as well as for bread-and-butter legal work such as corporate formation and governance. The Cole Memo paved the way for lawyers to provide that representation, knowing that federal prosecution would not ensue from advising those engaged in cannabis-related business activity, provided such activity complied with state regulations and was in harmony with federal enforcement priorities. So, based on the Cole Memo a lawyer could represent a client knowing that the client following the rules, as well as the lawyer, would be free from prosecution.[4]

Then the ground shifted, with the release of the January 4, 2018 memorandum from then-attorney general Jeff Sessions. That document opened with a list of federal statutes, and stated that these "statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime." The document then called the previous guidance

[4] As discussed below, however, while an attorney could take a good deal of comfort knowing that he or she would be free from prosecution for working with the industry, the Cole Memo in and of itself did not allay concerns raised by applicable ethical rules.

unnecessary and declared it rescinded. According to Senator Cory Gardner (R, CO), the president rebuked Sessions for that memo, saying "That sounds like something my grandpa said in the 1950s."[5] The rebuke seemed to do the job, as the publication of Sessions' memo did not seem to trigger federal prosecution of those who were engaged in the cannabis trade in legalized states or to deter public sentiment in favor of legalization. To the contrary, there continued to be a rise in states' initiatives to pass legislation legalizing cannabis and creating licensed marketplaces.

Nevertheless, insofar as the lawyers were concerned at the time Sessions weighed in, while they previously were able to sleep well under the blanket of the Cole Memo knowing they or their clients could not be federally prosecuted, Sessions' reversal was a prescription for insomnia – essentially telegraphing that all bets were off, and the client and/or the lawyer could be subject to federal prosecution for engaging in the cannabis trade, regardless of whether such conduct was in compliance with state law.

But the impact of Sessions' proclamation turns out to have been relatively short-lived, as at present, the winds have shifted back in favor of leaving the states alone. While no new "guidance" has been issued as of this writing that rescinds Sessions' statements, the latest attorney general, William Barr, testified in January 2019 that his approach would be "not to upset settled expectations and the reliant interests that have arisen as a result of the Cole Memorandum." Barr also said he would refrain from going "after companies that have relied on" the Cole Memo. In addition, while still making clear his distaste for legalization and his personal preference for a federal ban everywhere, Barr acknowledged that if there is to be a federal approach (other than prohibition), "if we want states to have their own laws – then let's get there and get there in the right way." So, despite Barr's stated personal preference for federal prohibition "everywhere," his articulated official position is that the Cole Memo is now again a reliable guide, such that clients and counsel can engage in the cannabis trade with a reasonable expectation that they will be free from prosecution provided they comply with state law.

Of course, counseling and representing a client in a manner that allows the attorney and client to be free from federal prosecution does not necessarily equate to such conduct qualifying as ethical. So, how does an attorney navigate to ensure he or she is on the right side of the ethical rules?

The first ethical takeaway from all of this is that attorneys, as fiduciaries obligated to disclose material information to their clients, must start every intake with a client whose business involves the cultivation, handling or sale of cannabis with the warning that what the client is doing is federally illegal even though it is legal under state law. The attorney should advise the client that because a guidance such as the Cole Memo, and any other pronouncements by the United States attorney general do not have precedential or binding effect, the client could still technically be prosecuted under federal law. Such disclosure would represent the minimum required by Rule 1.4(b) of the New York Rules of Professional Conduct (and similar rules in other jurisdictions

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[5] Jaeger, K. (2019, February 25). *What Trump said in private conversations about cannabis revealed*. Retrieved at https://www.bostonglobe.com/news/marijuana/2019/02/25/what-trump-said-private-conversations-about-cannabis-revealed/pRKfBj73TfZjEnQOWznCYO/story.html.

borrowing from the American Bar Association's model rules), titled, "Communication," which provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

A lawyer complying with this rule by explaining the client's legal exposure puts him or herself on safe ethical grounds as a starting point, but the analysis gets more complicated when accounting for that part of the ABA's model rules of professional responsibility which are adopted in many states, including New York, and which provides that a lawyer cannot assist a client in illegal conduct. In New York, the applicable Rule is 1.2(d), titled "Scope of Representation and Allocation of Authority Between Client and Lawyer," and it provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client."[6]

This Rule would seemingly shut the door on a lawyer's ability to represent a cannabis business client. However, attorneys can take solace in the fact that at least one ethical opinion has been issued in New York (and similar ethical guidance has been offered in other jurisdictions) that clears a path toward representing cannabis businesses without committing an ethical violation.

As relevant to New York, on September 29, 2014 – two years after Colorado and Washington legalized adult use, and shortly after the July 2014 passage of New York's Compassionate Care Act permitting medical marijuana use – the New York State Bar Association Committee on Professional Ethics issued Opinion 1024. The Opinion's summary, as relevant to Rule 1.2(d) (among others)[7] is that "[i]n light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana."

The Opinion recognized that the Department of Justice adopted a guidance "restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana." On that basis, the Opinion found that "Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance," and even went so far as to note that it "seems fair to say that state law would not only permit but affirmatively expect lawyers to provide such assistance," in helping clients comply with state cannabis laws, particularly given the critical importance of legal services in ensuring compliance

[6] This language is identical to the ABA's Model Rules of Professional Conduct, except that ABA Rule 1.2(d) adds after the phrase "conduct with a client," the words "and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." This additional language could provide a practitioner in a jurisdiction which adopts the complete ABA rule some additional cover from any claimed ethical violation because a lawyer could fairly determine that the federal restriction on cannabis would not apply to the business of a client who complies with state laws, at least while the Department of Justice continues to adhere to the Cole Memo's guidelines.

[7] Also referenced in that Opinion was Rule 8.4(b), which forbids "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

with technical regulatory schemes such as under the Compassionate Care Act, and given that noncompliance could result in criminal prosecution.

The Opinion further analyzed how other states have addressed the issue, and discussed an opinion from Arizona's ethics committee, noting that "no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds." The Opinion noted that on that basis Arizona declined to interpret and apply its version of Rule 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, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits." The New York State Bar committee concluded that New York's ethical rules "permit lawyers to give legal assistance regarding the [Compassionate Care Act] that goes beyond a mere discussion of the legality of the client's proposed conduct. In general, state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation," recognizing that "a state medical-marijuana law establishing a complex regulatory scheme depends on lawyers for its success."

So, as an ethical matter, lawyers in New York and other jurisdictions that have approved some form of legal cannabis and which have applied similar interpretations to their ethical rules can represent clients in the industry without fear of federal prosecution and without fear of being found to have committed an ethical violation. This is provided that the attorney's assistance complies with state law and the conduct which is the subject of the representation (as well as the representation itself) does not run afoul of the list of federal priorities embodied in the Cole Memo, such as preventing sale to minors.

While the New York ethics Opinion was addressed solely to legalized medical cannabis, the reasoning articulated in that opinion would also seem to apply with equal force to an attorney assisting clients who deal with cannabis for adult (recreational) use when such use is legalized. However, for avoidance of doubt, and to eliminate any remaining risk of ethical prosecution, there is currently a proposed amendment to Rule 1.2(d) which was recently discussed at the New York State Bar Association's Annual Meeting, and which would provide (with new language in italics):

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client, *and may counsel or assist a client in conduct expressly permitted by New York law that may violate federal or other law, provided that the lawyer advises the client about that federal or other law and its potential consequences.*

As a caveat, the protection that would be afforded by this revised Rule would only extend to fear of prosecution of an alleged ethics violation in New York. The proposed new comment (10A) which accompanies this draft rule change makes clear that although there may be no ethical violation, the client and lawyer still remain at risk as long as cannabis remains illegal under federal law:

> Occasionally, conduct expressly authorized by New York law may violate federal law or the law of another jurisdiction. In such cases, a lawyer may counsel or assist a client engaging in the conduct violative of federal or other law, but to provide effective representation, the lawyer should also advise the client about that federal or other law and its potential consequences. If the lawyer assists the client in engaging in such conduct, the fact that the lawyer has complied with these Rules may not shield the lawyer from possible consequences for violation of the law or legal ethics rules of that other jurisdiction.

Thus, regardless of the fact that practitioners and clients engaged in the cannabis business may be acting ethically under state ethics rules, as long as cannabis remains federally illegal, those practicing and doing business in this space will continue to have a proverbial sword hanging over their heads by virtue of some risk of federal prosecution, even if such risk is very remote (the author is not aware of any federal prosecutions against cannabis businesses or persons legally operating on the state-level since the Cole Memo). Attorneys in this space can also take comfort in the fact that the federal legislative trend continues to move toward acceptance, and possibly eventual national legalization for adult use, with the latest evidence being the federal legalization of hemp in the 2018 Farm Bill, and pending Congressional legislation aimed at relaxing banking industry restrictions so that federal regulators would not be able to punish financial institutions (including potentially insurance companies) if they work with cannabis businesses that are legal under state law.[8]

Based on these trends and the fact that federal prosecutors appear to be honoring the tenets of the Cole Memo, it is reasonable to conclude that the practice of cannabis law is a safe endeavor, albeit not a failsafe one as long as marijuana crimes remain on the federal books. Based on current trends, however, the level of risk should continue to decrease, particularly as more and more states legalize adult use and integrate cannabis into their economies.

Until such time as the federal legalization or de-scheduling of cannabis as an illicit drug, lawyers are nevertheless advised to proceed cautiously. Best practices dictate that any time an attorney is retained to assist a client to engage in the legal cannabis business under state law the attorney should first remind the client that the conduct is prohibited under federal law and that as long as this is the case, neither the attorney nor the client are completely free from risk of federal prosecution. The attorney can then help the client assess that level of risk by discussing the applicable state law and federal policy as it stands at the time. If the state's law allows for the legal use, cultivation, refining, shipping and sale of cannabis and federal policy continues to adhere to the principles set forth in the Cole Memo, and the conduct of the lawyer and client complies

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[8] Angell, T. (2019, March 28). *Marijuana Banking Bill Approved By Congressional Committee*. Retrieved at https://www.forbes.com/sites/tomangell/2019/03/28/marijuana-banking-bill-approved-by-congressional-committee/#1ae2d32d2ce1; Associated Press. (2019, March 28). *Cannabis Banking Bill Advances In US House Committee.* Retrieved at https://www.nytimes.com/aponline/2019/03/28/us/ap-us-marijuana-banking.html.

with state law without violating the federal priorities listed in the Cole Memo, then the lawyer can safely advise the client that while the level of risk is not zero, it is low given that the Department of Justice has adhered to the principles articulated in the Cole Memo, even during the brief time when Sessions stated his policy that federal cannabis laws should be enforced without qualification.

Finally, given the substantial financial potential of cannabis as a new legal cash crop, and the sizable economic gains that both the banking industry and the American-based stock exchanges stand to realize from either full federal legalization or the de-scheduling of cannabis as a federally restricted drug so that states can pursue legal cannabis programs without risking any federal violation, it would seem likely that all of these concerns over conflicts between state and federal law and the resultant ethical implications will one day be outdated (together with this article at that point). Until then, attorneys should proceed cautiously, but with a reasonable degree of assurance that as a legal and ethical matter, they can safely pursue success in the rapidly emerging field of cannabis law.

Robert C. Hertman – BIO

Robert C. Hertman is the founder of The Law Offices of Robert C. Hertman, with offices in White Plains, Manhattan and Orange County. Mr. Hertman's practice areas include, Licensing and Regulatory Defense, Outside General Counsel, Real Estate Law, Estate Planning, and Consumer Protection.

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Mr. Hertman's publications include co-authoring "The Expected Legalization of Cannabis for Adult Use in New York Will Bring New Challenges for Attorneys," (Westchester County Bar Association Journal, February 2019). He is admitted to practice in New York and New Jersey. Mr. Hertman can be reached at 845-551-5329 and emailed at rch@hertmanlaw.com.

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Jim Landau is head of commercial litigation at McCarthy Fingar LLP, and is the co-chair of the Cannabis Law Committee of the Westchester County Bar Association. He is particularly focused on helping companies in the cannabis industry transact business where it is legal to do so and writes and speaks frequently on topics relating to cannabis law. Mr. Landau also handles all types of business disputes including corporate dissolution, enforcement and avoidance of non-competition clauses in employment contracts, construction litigation, commercial landlord tenant disputes and commercial torts involving fraud, breach of fiduciary duty and/or misappropriation of trade secrets. Mr. Landau serves as a member of the Board of Directors of the Westchester County Bar Association, is co-chair of the Westchester County Bar Association's Appellate Practice Committee and is the Secretary of the White Plains Bar Association. He is also a member of the New York State Bar Association's Committee on the Civil Practice Law and Rules. Mr. Landau has been selected as a Metro New York Super Lawyer® as one of the top attorneys in New York every year since 2012, and as a top-25 attorney in Westchester County for 2018. He is admitted to practice in New York, Pennsylvania, the Second Circuit Court of Appeals and all Federal Districts of New York. Mr. Landau can be reached at (914) 385-1030 and e-mailed at jlandau@mccarthyfingar.com.

<u>**Andrew Schriever**</u>

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