

**YOUR PLEASURE OR BUSINESS CANNABIS
CLIENT: IT'S HIGH TIME ESTATE
PLANNERS KNOW WHAT TO DO**

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ESTATE PLANNERS DAY 2020
Southern Arizona Estate Planning Council

January 24, 2020
Tucson, Arizona

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Reviewed electronic discovery documents.
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Researched and assembled an original fifty-state survey on the procedures to challenge expert witnesses.

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Lower East Side Tenement Museum, New York, New York
Manager of Evening Events 2012–2016
Launched the Evening Events Department in 2012. Built a business strategy to increase brand visibility and develop relationships with diverse organizations to become engaged with the mission of the museum as clients and vendors.
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PUBLICATIONS

Alana E. Rosen, *High Time for Marijuana Expungement*, CCRC (Mar. 27, 2019),
<https://ccresourcecenter.org/2019/03/27/high-time-for-marijuana-expungement/>.

Alana E. Rosen, *High Time for Criminal Justice Reform: Marijuana Expungement Statutes in States with Legalized or Decriminalized Marijuana Laws* (Feb. 1, 2019). Available at SSRN: <https://ssrn.com/abstract=3327533>.

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YOUR PLEASURE OR BUSINESS CANNABIS CLIENT: IT'S HIGH TIME ESTATE PLANNERS KNOW WHAT TO DO

I. INTRODUCTION¹

With the legalization of medical or recreational marijuana in over half of the states, practitioners need to be aware of the interface between the legal marijuana industry and the regulatory system that affects estate planning, banking, and licensing. This Article provides a discussion of the major issues that arise in this context including:

- Impact of marijuana use on capacity
- Interpretation of clauses conditioning benefits on the non-use of illegal drugs
- Life insurance issues
- Access to federally regulated banks for marijuana-related businesses
- Marijuana-related assets related to licensing and estates
- Tax issues related to marijuana-related businesses

Thirty-three states and the District of Columbia currently exempt qualified users of medicinal marijuana from penalties imposed under state law.² Additionally, eleven states, Alaska,

California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia legalize, regulate, and tax small amounts of marijuana for non-medicinal (“recreational”) uses by individuals over the age of twenty-one.³ Regardless, the federal Controlled Substances Act continues to prohibit the cultivation, distribution, and possession of marijuana other than to conduct federally-approved research. Thus, the current legal status of marijuana is contradictory and in a state of flux: as a matter of federal law, marijuana-related activities are prohibited and punishable by criminal penalties, but at the state level, certain marijuana use is permitted. Consequently, estate planners in the marijuana-friendly jurisdictions must be cognizant of the special issues they face.

II. IMPACT ON TESTAMENTARY CAPACITY

Game show host: “And here’s your first question, Bob: What is your name? You have sixty seconds.”

Bob: “Uhhh . . . I knew it when I came in here.”⁴

A. The Problem

Opinions on the impact of marijuana on a person’s mental state and consequently

¹ This section is adapted from Gerry W. Beyer & Brooke Dacus, *Joint Wills and Pot Trusts: Marijuana and the Estate Planner*, EST. PLAN STUD., Apr. 2016, at 1.

² Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia. See [Legal Medical Marijuana States and DC](#), PROCON

<https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/> (last updated July 24, 2019).

³ *Id.*

⁴ CHEECH & CHONG, *Let’s Make a Dope Deal*, on BIG BAMBU (Ode Records/Warner Bros. Records/WEA 1972).

testamentary capacity vary greatly. On one hand, we have dire warnings such as:

Its first effect is sudden, violent, uncontrollable laughter; then come dangerous hallucinations—space expands—time slows down, almost stands still—fixed ideas come next, conjuring up monstrous extravagances—followed by emotional disturbances, the total inability to direct thoughts, the loss of all power to resist physical emotions leading finally to acts of shocking violence ending often in incurable insanity.⁵

On the other hand, another segment of society, including former United States President Barack Obama, views the impact of marijuana on an individual's capacity to be the same as or less than the reasonable consumption of beer, wine, or liquor.⁶

Marijuana today is much different than it was forty years ago. The average amount of tetrahydrocannabinol (“THC”), marijuana's active ingredient, in seized marijuana samples is an overwhelming 15.1% compared to levels in 1983, which averaged 3.9%.⁷ This denotes more than a tripling in marijuana potency.

Recent research indicates that cannabis users who begin smoking the drug at an early age

show a significant decline in IQ.⁸ New studies show, however, that teenage marijuana use is down in states where the substance is legal because legal dispensaries, which are largely replacing illegal drug dealers, require proof of age.⁹ Even so, memory, the ability to think quickly, and other cognitive functions worsen over time with marijuana use in all ages. Not only does marijuana threaten to impair cognitive functioning, but evidence of the drug's physical harm is also accumulating rapidly.¹⁰

Whether a will can be invalidated for lacking the requisite testamentary capacity because the testator used marijuana is a question courts have yet to address. Despite nonexistent direct precedent, parallel cases address the creation of a will while the testator was under the influence of intoxicants or mind-altering substances.¹¹

⁸ Fran Lowry, *Cannabis Use in Teens Linked to Irreparable Drop in IQ*, MEDSCAPE MULTISPECIALTY (Apr. 26, 2013).

⁹ Katelyn Newman, *Study: Teen Use of Marijuana Drops in States Where it is Legal*, U.S. NEWS (July 8, 2019, 11:00 AM), <https://www.usnews.com/news/healthiest-communities/articles/2019-07-08/study-teen-use-of-marijuana-drops-in-states-where-it-is-legal>.

¹⁰ See generally [Marijuana and Public Health](#), CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 27, 2019). Over the past year, there has been an outbreak of vape related lung and respiratory diseases, and in some cases, even death believed to be caused by either pesticides or chemicals used to emulsify the THC. See Jeremy Berke, *The Mysterious Spate of Vape-Related Deaths and Illnesses Continues to Grow, Confounding Experts. Here's What Officials Knew and When*, BUS. INSIDER (Sept. 27, 2019, 12:02 PM), <https://www.businessinsider.com/timeline-of-vape-related-illnesses-and-deaths-2019-9>.

¹¹ See *In re Estate of Byrd*, 749 So. 2d 1214 (Miss. Ct. App. 1999) (concerning the use of antipsychotic drugs); see also *In re Coles' Estate*, 205 So.2d 554 (Fla. Dist. Ct. App. 1968) (concerning a pain reducing narcotic); see also *McGrail v. Schmitt*, 357 S.W.2d 111 (Mo. 1962) (concerning excessive use of alcohol); see also *Naylor v. McRuer*, 154 S.W. 772 (1913) (concerning the use of morphine and other narcotics).

⁵ REEFER MADNESS (Motion Pictures Ventures 1936); see also MARIHUANA (Roadshow Attractions 1936) (“Marihuana gives the user false courage, and destroys conscience, thereby making crime alluring . . .”).

⁶ Jen Christensen & Jacque Wilson, *Is Marijuana as Safe as-or Safer than-Alcohol?*, CNN (Jan. 20, 2014) (quoting President Obama as stating, “As has been well-documented, I smoked pot as a kid, and I view it as a bad habit and a vice, not very different from the cigarettes that I smoked as a young person up through a big chunk of my adult life . . . I don't think it is more dangerous than alcohol.”).

⁷ See generally MAHMOUD EL-SOHLI, NAT'L INSTITUTE ON DRUG ABUSE, QUARTERLY REPORT POTENCY MONITORING PROJECT REPORT 104, at 26 (2009).

When determining whether a decedent had the capacity to make a will, the court places weight on the mindset and knowledge of the testator at the time of the will's execution. Courts strongly favor the notion that habitual drug use does little to impair capacity; however, the effects of long-term past exposure to an intoxicant such as marijuana, alcohol, or other drugs and medications can be an important factor when assessing capacity.¹²

When determining the capacity of the testator, the crucial timeframe is the moment when the testator executed the will. If the testator used intoxicants on the day of the will's execution, the validity of the will may come into question. *In re Coles' Estate* illustrates a scenario where a testatrix was injected with pain-reducing narcotics two hours before signing her will.¹³ The court found that her decision to give 95% of her estate to a church she had only recently joined was made without testamentary capacity.

Another question concerns whether testamentary capacity was affected by the testator's long-term use of intoxicants days, months, or years prior to will execution. Many courts generally hold that unless the long-term effects of intoxicants so permanently damage the mind that it is not capable of producing the judgment that the law requires, then testamentary capacity will be deemed to exist. In *McGrail v. Schmitt*, the court stated: "[A] person is incompetent to make a will where due to the excessive use of intoxicating liquor his mind is so impaired and enfeebled as to produce unsoundness of mind sufficient to degree to affect testamentary capacity."¹⁴ Similarly, *In re Underhill* involved

a decedent who was addicted to morphine and cocaine.¹⁵ The decedent used these drugs up to the day he executed the will and thereafter. Although the decedent experienced hallucinations, the hallucinations failed to manifest on the date of the will's execution. The court found that the hallucinations and illusions were the product of a diseased mind created by the excessive use of cocaine, and consequently, testamentary capacity did not exist.

B. Recommendations

Estate planning professionals must be cognizant of a client's marijuana use when evaluating a client's testamentary capacity. Because courts often look to when the will was executed in relation to when the testator was impaired, it is important that the attorney ascertain the last time the client used marijuana. If used within the past few months, the attorney should document that the client understood what a will does (that is, dispose of property at death), appreciated what property the client owned, and knew the client's family members. If possible, the attorney should not have the client execute the will until at least one week has elapsed since the client last used marijuana.

III. PROVISIONS CONDITIONING BENEFITS ON NON-USE OF "ILLEGAL" DRUGS

*I was gonna go to class before I got high
I coulda cheated and I coulda passed but I got
high
I am taking it next semester and I know why
'Cause I got high¹⁶*

¹² D.E. Buckner, Annotation, *Testamentary Capacity as Affected by Use of Intoxicating Liquor or Drugs*, 9 A.L.R.3d 15 (1966).

¹³ *In re Coles's Estate*, 205 So. 2d at 555; see also *In re Estate of Byrd*, 749 So. 2d at 1217-18 (ruling that the testator lacked capacity when heavily sedated with anti-psychotic drug on the date of execution).

¹⁴ *McGrail*, 357 S.W.2d at 119 (citing *Naylor*, 154 S.W. at 784) (finding mental unsoundness such as an enfeebled mind will constitute testamentary

incapacity and may be produced by excessive use of intoxicating liquor).

¹⁵ *In re Will of Underhill*, 10 Ohio Dec. Reprint 487, 488 (1889).

¹⁶ AFROMAN, BECAUSE I GOT HIGH (Columbia T-Bones 2001).

Conditional trusts are hardly a new phenomenon. For decades, parents have sought to influence the behavior of their children through financial rewards. An incentive trust imposes conditions that encourage positive behavior. Incentive trusts can be used to promote a sober, family-oriented lifestyle and discourage substance abuse. Settlers may also require drug testing or counseling as a condition of receiving trust income.

A. The Key Issues

Assume that a testator or settlor includes a provision that in some way limits or restricts distributions to the beneficiary if the beneficiary uses “illegal drugs.” How is the clause to be interpreted or applied?

The first issue is to determine when to ascertain whether marijuana is an illegal drug. Here are some possible interpretations:

- The law when the testator or settlor wrote the will or trust.
- The law when the testator or settlor dies.
- The law when the beneficiary first accepted trust benefits.
- The law as it exists now.

The second issue to determine is whether illegality is based on state law or federal law. If state law is applied, is legality based on medical or recreational use in the states where both types of uses are authorized? If federal law is used, then marijuana use would always be illegal and thus disqualify the beneficiary from receiving benefits.

If state law is applied, a third issue arises, that is, which state’s law is applicable. For example, would the court apply the state law:

- Where the testator/settlor lived when the will/trust was written?
- Where the testator/settlor lived when he or she died?
- Where the beneficiary lived when he or she first accepted benefits?
- Where the beneficiary currently lives?

Marijuana use may become an issue even if there is no applicable will or trust provision. A representative from California, Linda Sanchez, believes that children who want to inherit from their parents should have to submit to drug testing, even if their parent’s will or trust does not contain such a condition.¹⁷ She thinks it is unfair that a single parent who wants governmental assistance to purchase food needs to be drug-tested, but a child who may inherit a million dollars or more does not need to be drug-tested.

B. Analogous Cases

Although there are no will or trust cases directly on point with the tension between state law and federal law, courts are beginning to grapple with situations where companies deny employee benefits for legal marijuana use. The following cases may be useful by analogy to understand preemption of federal over state law. *Coats v. Dish Network* is a relevant case from the Colorado Supreme Court, wherein a quadriplegic licensed to use marijuana was pitted against his employer.¹⁸ Here, the court held that the state’s “lawful activities statute,” which bars employers from firing employees for engaging in lawful activities off the job, applied only to activities lawful under both Colorado and federal law. Because marijuana is illegal under federal law, its use is unlawful, and can therefore be a lawful basis for termination.

¹⁷ See Rachel Stoltzfoos, *Dem Suggests Kids Should Be Drug-Tested Before They Can Inherit From Their Parents*, DAILY CALLER (Mar. 18, 2015).

¹⁸ *Coats v. Dish Network, L.L.C.*, 303 P.3d 147 (Colo. App. 2013). The Colorado Legislature amended the Colorado Constitution declaring the legality of personal marijuana use and included a provision that states: “Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.” COLO. CONST. art. 18, § 16(6)(a).

Courts have been consistent in finding that a company may terminate an employee for marijuana use regardless of its legality under state law. In *Beinor v. Industrial Claim Appeals Office*,¹⁹ the court found that registered medical marijuana use did not fall under the meaning of “medically prescribed controlled substances,” thereby governing disqualification from unemployment benefits. In *Steele v. Stallion Rockies Ltd.*, an employee suffering from a medical condition self-medicated with marijuana.²⁰ The employee’s violations against defendant’s drug and alcohol policies led to his termination, which the court upheld. Likewise, in California, an employee can be terminated for failing a drug test. “The state’s Compassionate Use Act doesn’t require employers to accommodate possession, use or influence of marijuana in the workplace.”²¹

By analogy, another instructive issue is the interface between marijuana use and the ability to receive an organ donation. In 2015, California enacted a statute that prohibits a person from being excluded as an organ donee merely because that person is a user of medical marijuana.²²

C. Recommendation

Applied in the context of estate planning, a testator or settlor may deny a beneficiary

benefits for reasons mirroring the standard policies of a company, or for federal law preemption of state marijuana laws. Whether a beneficiary can inherit in spite of marijuana use will largely boil down to the intent of the settlor. Thus, a person who includes a provision regarding drug use should specifically address each of the issues discussed above.

IV. LIFE INSURANCE

Life insurance is a key retirement-planning tool that may be used to protect a loved one’s savings for his or her family upon death or to reduce financial liability for inheritance and estate taxes for one’s beneficiaries. With states adopting widely divergent approaches, insurance companies are still trying to determine how to treat marijuana use for life insurance purposes.

A. Insurability

Because marijuana has yet to be scientifically proven to treat illness, many life insurance companies are hesitant in providing full coverage to a marijuana user.²³ While some life insurance carriers may treat marijuana smokers as traditional cigarette or cigar smokers and merely impose higher premiums, other carriers may refuse coverage for marijuana users altogether.

There is no simple guideline as to how life insurance companies classify marijuana users. Different companies employ different standards, with some being more lenient than others. How an insurance company rates an individual typically depends on the frequency of marijuana use.²⁴ According to underwriters, as with tobacco, the less an insured individual smokes,

¹⁹ *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011); *contra* *Braska v. Challenge Mfg. Co.*, 861 N.W.2d 289 (Mich. Ct. App. 2014) (per curiam) (holding that several employees, who were licensed and used medical marijuana under the Michigan Medical Marijuana Act, were entitled to unemployment compensation benefits after they were fired for failing a drug test).

²⁰ *Steele v. Stallion Rockies Ltd.*, 106 F. Supp.3d 1205, 1208 (D. Colo. 2015).

²¹ G.M. Filisko, *Weed-Wacked: Employers and Workers Grapple with Laws Permitting Recreational and Medical Marijuana Use*, A.B.A. J. (Dec. 1, 2015).

²² CAL. HEALTH & SAFETY CODE § 7151.36 (West, Westlaw through Ch. 860 of the 2019 Reg. Sess.).

²³ See Barbara Marquand, *When the Smoke Clears, Will Your Life Insurance Quotes Be High?*, INSURE (Feb. 23, 2012).

²⁴ Adam Cecil, *Getting high on insurance: How Marijuana Impacts Life Insurance Rates*, POLICYGENIUS (Mar. 23, 2015). Additional issues may arise if the user does not smoke the marijuana but instead bakes it into brownies, cookies, or other edibles.

the better the insured's health classification will be and the lower the premiums.

B. Rates – Recreational User

Smoking marijuana regularly is likely to disqualify insureds from receiving preferred non-smoker rates. What matters more than anything else is the degree of usage. As is the case with all health concerns associated with applying for life insurance, a company will examine the risks surrounding each applicant. Thus, if an applicant is a good overall health risk, the effect of marijuana usage will have less impact. Each insurer has distinct guidelines and underwriting rules; therefore, each company views marijuana usage differently.

C. Rates – Medical User

If an applicant's medical records and application for coverage indicate marijuana usage with a prescription, some insurance companies classify the applicant as a non-smoker, and no penalty is applied. Other insurance companies treat medical marijuana users as smokers, thereby increasing rates two to four times than that of non-smokers.

While medicinal users could obtain life insurance penalty-free, insurers may deny coverage for any pre-existing conditions. Consequently, medical marijuana is a double-edged sword: the substance treats debilitating conditions, yet, if a condition is not serious to necessitate a prescription, an individual will likely pay smoker's insurance rates. But if the condition is serious and a prescription is warranted, the medical condition itself may be the cause of rate increases or un-insurability.

D. Failure to Disclose

It is imperative that clients forego the urge to lie to their insurance companies regarding their marijuana use. Failure to disclose marijuana use on a life insurance application is fraud and a small lie may lead to outright rejection by all insurance carriers. If a life insurance company discovers that an insured has misrepresented his or her marijuana use, that person will be reported to the Medical Information Bureau

("MIB"). Moreover, if the insured dies within the contestability period (typically two years) and the company discovers marijuana use, the company may deny payment to the insured's beneficiaries. Note that health privacy laws protect users who disclose so that the company cannot report marijuana use to the authorities.

E. Fraudulent Statements

With marijuana laws changing the legal landscape, lines become blurred in determining whether marijuana is an "illicit" drug. In *Horvath v. Global Life & Accident Insurance*, a Western District of Pennsylvania court examined whether an insurance company acted in bad faith when it rescinded a life insurance policy for an applicant who failed to include chronic illnesses and marijuana-dependency in the policy application.²⁵ In this case, a mother applied and was accepted for two life insurance policies for her son in 2016. He later died of a gunshot wound in 2017.²⁶ In the applications, Harvath, the plaintiff, did not list that her son suffered from chronic gastroenteritis or that he had been treated and unsuccessfully discharged from treatment for marijuana-dependency two years before his death.²⁷ The defendant-insurance company rescinded the policies because the plaintiff did not provide this information in the application.²⁸ The insured-defendant's Vice President for Underwriting and New Business applied the Swiss Re Cannabis Adult Ratings Guidelines to determine how to classify the applicant's marijuana use.²⁹ He stated that an applicant eighteen and younger that uses marijuana would be issued a "Postpone," and would be denied a policy, but once the applicant turned nineteen and used marijuana in a stable environment, the company

²⁵ *Horvath v. Global Life & Accident Ins.*, No. 3:18-cv-84, 2019 WL 4058999 (W.D. Pa. Aug. 27, 2019)

²⁶ *Id.* at *1-2.

²⁷ *Id.* at *4.

²⁸ *Id.* at *5.

²⁹ *Id.*

could issue a policy.³⁰ He mentioned that substance abuse, like chronic marijuana use, is considered a medical condition that requires periodic medical care.³¹ After the policies were rescinded, the plaintiff filed suit for breach of contract and a bad faith claim.³²

Under Pennsylvania law, the insurer-defendant may deny an insurance policy if “(1) the insurance application contained a misrepresentation; (2) the misrepresentation was material to the risk of being insured; and (3) the insured knew that the representation was false when made or the insured made the representation in bad faith.”³³ In order for the plaintiff to succeed and prove that the insurer unreasonably rescinded the policy, the court applied a two-prong test that the plaintiff-insured must prove: (1) “the insurer did not have a reasonable basis for denying benefits under the policy”³⁴ and (2) “the insurer knowingly or recklessly disregarded its lack of a reasonable basis for denying a claim.”³⁵

The *Harvath* court held that a reasonable jury could find that the insured-defendant did not have a reasonable belief for rescinding the policies and that it knew or recklessly disregarded its lack of reasonable basis because the deceased’s gastroenteritis did not reach the level of chronic illness, and that the plaintiff believed the marijuana treatment was a one-time occurrence and not considered periodic medical care.³⁶ Additionally, the plaintiff believed she accurately answered questions regarding the drug treatment.³⁷ The defendant could not

provide evidence to show that her statements were false.³⁸

When determining whether an applicant answers reasonably when disclosing marijuana use, a reasonableness standard could guide both courts and insurance companies.³⁹ This would require a determination as to what a reasonable person should expect when reading questions pertaining to drug use and then applying that standard to the facts of a particular case. While decisions would vary between states, the federal illegality of marijuana would likely lead courts to hold that a reasonable person would disclose his or her marijuana use.

F. Material Misrepresentation and Insurer Reliance

The second step to a court’s analysis is a subjective one. The insurance company must show that knowledge of the misrepresented facts would have caused the insurer to forego issuing the same policy at a similar premium. This means that for a misrepresentation to matter depends heavily on the underwriting procedures of the insurance company. A court would need to ask what effect, if any, the answer to the illegal-drug question would have on the applicant. The materiality is not limited to the disclosure of any specific fact; it covers any information that might have flowed from the disclosure of the fact. This requirement would depend heavily on the facts of the case, but as long as the insurer can establish material reliance then there is a possibility to avoid paying the insurance policy.

If the company entered into an insurance contract with the individual and later learned of the insured’s use of marijuana in a state where such use is legal, then the insurance company

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at *6.

³³ *Id.* at *8.

³⁴ *Id.* at *9.

³⁵ *Id.* at *10.

³⁶ *Id.* at *9–10

³⁷ *Id.*

³⁸ *Id.* at *10.

³⁹ See also *Marijuana Usage Guidelines*, BBA LIFE, <https://bbalife.com/wp-content/uploads/Marijuana-Usage-Guidelines-2018.pdf> (last visited Nov. 24, 2019) (breaking down marijuana use by insurance company coverage).

may have the option to rescind the policy or deny coverage.

G. Policy Considerations

Aside from insurance law, existing cases might inform a court when deliberating on whether coverage should be provided to an applicant who failed to disclose marijuana use. In several cases involving deaths caused by the use of Schedule I substances, courts have opined that paying insurance proceeds to the beneficiaries of individuals who died as a result of using Schedule I drugs would be against public policy.⁴⁰

V. MARIJUANA-BASED ASSETS

As the marijuana industry expands, marijuana-related businesses (“MRBs”) are beginning to consider business entity structures that will protect the business and its operators.⁴¹ Some attorneys advise their clients to first consider funding and tax liabilities when they begin to structure a new company.⁴² If there are multiple

operations, attorneys advise the creation of separate business entities for each operation as a way to limit tax liabilities⁴³ and to protect the other business structure from general liabilities.⁴⁴ Based on these considerations, attorneys recommend C Corporations or LLCs because of the tax implications and protections from general liabilities.⁴⁵ Companies can also consider S Corporations, Partnerships, and Sole Proprietorships, but these business entities are not recommended because of greater tax and personal liability risks for the principal.⁴⁶

MRBs can incorporate in the state of operation, so there may be a different analysis depending on the state. Even so, many of the considerations for structuring a business entity are similar based on choice of jurisdiction.⁴⁷

A. Licensing Regulations and Marijuana-Based Assets

State that have legalized marijuana have enacted state-run regulatory systems to manage licensing procedures for commercial MRBs. Because marijuana regulations are state-specific, states with newly legalized policies can survey trends in other states, but there is little consistency when estate-planning issues arise like the transfer of ownership in the event of the licensor’s death.

In Colorado, for instance, the licensing for retail and medical marijuana is managed by the Department of Revenue.⁴⁸ Colorado does not allow the transfer of a license, unless it is transferred to a controlling or passive beneficial owner.⁴⁹ Thus, a deceased license-holder cannot

⁴⁰ See *State Farm Fire and Cas. Co. v. Baer*, 745 F. Supp. 595 (N.D. California 1990) (holding that California statute and public policy were against contracts having a violation of law as their object and precluded coverage); *State Farm Fire and Cas. Co. v. Schwich*, 749 N.W.2d 108 (Minn. Ct. App. 2008) (holding that the insurer had no duty to pay insured because of Schedule I drug use).

⁴¹ See Canna Law Blog, *Cannabis Entity Selection: Corporation, LLC or Something Else?*, HARRIS & BRICKEN (Mar. 19, 2018), <https://www.cannalawblog.com/cannabis-entity-selection-llc-corporation-or-something-else/>; see generally ACAMS, *Defining Marijuana-Related Businesses*, 15 ACAMS TODAY 1–3 (2016). MRBs are divided into three tiers based on the degree the business interacts with marijuana: Tier I MRBS focus on cultivation and distribution; Tier II MRBS provide supplies and products to Tier I companies; Tier III MRBS are considered ancillary businesses that “aid and abet” Tier I MRBs. *Id.*

⁴² Lisa Bernard-Kuhn, *Choosing a Business Structure*, MARIJUANA BUS. MAG. (Nov. 2018), <https://mjbizmagazine.com/choosing-a-business-structure/>.

⁴³ See IRS, *infra* note 89.

⁴⁴ Kuhn, *supra* note 43.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Canna Law Blog, *supra* note 42.

⁴⁸ COLO. REV. STAT. ANN. §§ 44-11-202, 44-12-201 (West, Westlaw through 2019 Reg. Sess.).

⁴⁹ *Id.* § 44-12-308.

transfer ownership of the license to just any beneficiary.

In Washington state, the Liquor and Cannabis Board regulates marijuana licensing.⁵⁰ If a licensee dies, upon application to the state liquor board, “a license to produce, process, or sell marijuana may be transferred, without charge, to the surviving spouse or domestic partner . . . if the license was issued in the names of one or both of the parties.”⁵¹ The surviving party may be required to conduct a criminal background check.⁵²

The most recent state to legalize medical marijuana is Missouri.⁵³ Missouri is currently accepting applications for medical marijuana licenses to establish cultivation facilities, dispensaries, and testing facilities.⁵⁴ In Missouri, the regulation of medical marijuana falls under the Department of Health & Senior Services.⁵⁵ Missouri medical marijuana regulations are currently guided by Emergency Rules, and it is unclear whether Missouri will allow the transfer of license ownership in the event of death once permanent regulations are enacted.⁵⁶ To make the regulations more clear,

⁵⁰ WASH. REV. CODE ANN. § 69-50-325 (West, Westlaw through 2019 Reg. Sess.).

⁵¹ *Id.* § 69-50-339.

⁵² *Id.*

⁵³ *Medical Marijuana Regulation*, MO. DEPT. OF HEALTH & SENIOR SERVS., <https://health.mo.gov/safety/medical-marijuana/index.php> (last visited Nov. 25, 2019).

⁵⁴ Jaclyn Driscoll, *Slow Start for Missouri's Medical Marijuana Program*, ST. LOUIS PUBLIC RADIO (Aug. 9, 2019), <https://news.stpublicradio.org/post/slow-start-missouris-medical-marijuana-program#stream/0>.

⁵⁵ *Medical Marijuana Regulation*, *supra* note 47.

⁵⁶ 19 C.S.R. §§ 30-95.010–.110, <https://www.sos.mo.gov/CMSImages/AdRules/csr/current/19csr/19c30-95.pdf>. Missouri's Emergency Rules currently supplement Article XIV of the Missouri Constitution, the medical marijuana legalization provision. *Id.* The Rules became effective on June 3, 2019 and will expire on February

the Missouri legislature—and states with future plans to legalize marijuana—should implement a provision that outlines what kind of transfers are available, including upon the death of a licensee. Statutory provisions with clear guidelines will guide licensees and estate planners as this area of the law continues to grow.

B. Marijuana Stocks

As the marijuana industry continues to expand in the United States and Canada, marijuana businesses attempt to generate capital from different sources, including the stock market. Attorneys should advise their clients of the potential risks of investing in marijuana stocks.

Some marijuana-related businesses (MRBs) have gone public on the Canadian stock exchange, while others have gone public through the over-the-counter U.S. exchange.⁵⁷ Over-the-counter stocks in the U.S. do not face the same strict scrutiny and regulations as do the major stock exchanges, like the Canadian exchange, the Nasdaq, and the New York Stock Exchange.⁵⁸ It is important to first research the companies, including the SEC filings, before investing.

At the end of 2019, marijuana stocks were down with multiple factors contributing to the losses. In Canada, the government limited the types of products sold, some shops were delayed in opening, and less expensive products on the black market diverted funds from licensed retailers.⁵⁹ In October 2019, however, the

27, 2020. *Id.* According to the Emergency Rules, licensed cultivation, dispensary, manufacturing, testing, and transportation facilities can assign, sell, give, lease, sublicense, or transfer its license to another entity with the approval of the department, as long as the new entity provides the same application information as the original entity. § 30-95.040(4)(C).

⁵⁷ Javier Hasse, *How to Invest in Marijuana Stocks*, BENZINGA (Dec. 12, 2019), <https://www.benzinga.com/money/marijuana-stocks/>.

⁵⁸ *Id.*

⁵⁹ Alex Veiga, *Cannabis Stocks' 2019 Skid Showing Few Signs of Easing*, ASSOCIATED PRESS (Dec. 6, 2019),

Canadian government lifted the ban on marijuana-infused food products.⁶⁰ In the U.S., government regulations continue to act as a barrier for the growth of MRBs.⁶¹ Scares of vape-related illnesses and deaths throughout the U.S. in the fall of 2019 also hurt marijuana stocks.⁶² Even so, financial analysts predict that marijuana stocks will increase as new businesses open and new products are developed.

C. Estates and Marijuana-Based Assets

How should an attorney handle a client who owns marijuana-based assets—ranging from a full-fledged growing or dispensary business to a small stash—who wants to control where this property goes upon death?⁶³ The conflicting policies regarding marijuana exemplify the confusion associated with the states' ability to pursue policies that deviate from those advanced by the federal government. Broad legalization efforts stand in stark contrast to federal law, which make the cultivation, distribution, or possession of any amount of marijuana, a criminal offense.⁶⁴ Given the federal government's ability to enforce its own prohibition, it cannot be said that states legalizing marijuana create a true right to grow, sell, or use the substance. The extent to which federal authorities will seek to prosecute individuals owning marijuana-based assets remains uncertain. Yet, either in addition to, or in lieu of bringing criminal prosecutions, the Department of Justice may choose to rely on the civil forfeiture provisions of the Controlled Substance Act to disrupt the operation of marijuana dispensaries and production facilities.

<https://apnews.com/7c2c747dba086851704a59db621c7443>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id; supra* note 10 and accompanying text.

⁶³ *See generally* Dunstan H. Barnes, *So Your Client Wants to Open an Illinois Cannabis Dispensary?*, ILL. B.J., Oct. 2017, at 26.

⁶⁴ 21 U.S.C.A. §§ 841(a), 844(a) (2010).

Thus, it becomes pertinent that estate-planning professionals understand the consequences their clients face before preparing estate-planning documents dealing with marijuana-based assets.

D. Bequeathing Marijuana-Based Assets

Whether a lawyer may ethically assist a client in drafting a will or trust concerning illegal assets is an issue of great concern for estate planners in states that have legalized medical or recreational marijuana. Although no state has yet directly addressed the marijuana-estate planning interface, several states have dealt with the general attorney-marijuana situation by taking widely varying approaches. For example, an Arizona ethics opinion states that it is permissible for a lawyer to assist clients wishing to start businesses or engage in other actions permitted under the Arizona Medical Marijuana Act.⁶⁵ However, a Connecticut ethics opinion explains that, although a lawyer may advise and represent a client as to state requirements for licensing and regulation of marijuana businesses, the attorney must inform the client that such businesses violate federal criminal statutes and that the lawyer may not assist the client in criminal conduct.⁶⁶ Illinois recently amended its professional responsibility rules to state that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may . . . counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.”⁶⁷

Accordingly, attorneys actually have little direction when confronted with estate planning issues relating to marijuana-related assets. By

⁶⁵ Ariz. Comm. On Prof'l Ethics, Formal Op. 11-01 (2011).

⁶⁶ Conn. Comm. on Prof'l Ethics, Informal Op. 2013-02 (2013).

⁶⁷ ILL. SUP. CT. R. PROF'L CONDUCT, R. 1.2(d)(3) (2016).

analogy, cases that concern the bequeathing of items legal in the decedent's estate and illegal in the hands of the beneficiary may be instructive, such as the inheritance of a gun by a registered felon. For example, in *United States v. Davis*, Davis was convicted of possession of a non-registered firearm and possession of a firearm by a felon.⁶⁸ Davis received the firearm from his father's estate and kept it in his closet where officers subsequently discovered the weapon. The Seventh Circuit held that possession of the weapon in his residence and under his control violated the law. His admittance that the gun was an inheritance only bolstered evidence that the weapon was in his possession.

E. Administering Marijuana-Based Assets

Another potential problem is the exposure to civil and criminal liability of the client's fiduciaries, such as the executor or administrator of an estate, property management agent, or trustee if the person's property includes marijuana-based assets. The client may find it difficult to saddle a family member, friend, or professional fiduciary with this property. A cautious fiduciary may decline to serve because there is no clear answer as to fiduciary liability.

An analogous bankruptcy case is instructive. In *In re Arenas*, a Colorado marijuana farmer and his wife filed for bankruptcy.⁶⁹ They petitioned to convert the case from one under Chapter 7 to Chapter 13. The court denied the motion explaining:

In this case, the debtors are unfortunately caught between pursuing a business that the people of Colorado have declared to be legal and beneficial, but which the laws of the United States—laws that every United States Judge swears to uphold—proscribe and subject to criminal sanction. For this reason, neither a Chapter 7 nor Chapter 13 trustee can

administer the most valuable assets in this estate. Without those assets or the marijuana-based income stream, the debtors cannot fund a plan without breaking the law, and are therefore ineligible for relief under Chapter 13. . . . Administering the debtors' Chapter 7 estate would require the Trustee to either violate federal law by possessing and selling the marijuana assets or abandon them. If he or she did the former, the Trustee would be at risk of prosecution; if he or she did the latter, the creditors would receive nothing while the debtors would retain all of their assets and receive a discharge as well.⁷⁰

Liability extends even to the assets of Tier III MRBs or ancillary businesses—businesses that do not work directly with marijuana products but provide services to Tier I MRBs.⁷¹ In the 2018 case, *In re Way to Grow*, Debtors were in the business of indoor hydroponic and gardening-related supplies, operating as an ancillary business to businesses that worked directly with the marijuana plant.⁷² Debtors filed for chapter 11 bankruptcy, and the Bankruptcy Court held that while this case would be a typical “run-of-the-mill Chapter 11 proceeding,” it was dismissed because the debtors were violating federal law and the Controlled Substances Act by supplying MRBs with gardening supplies.⁷³

⁶⁸ *United States v. Davis*, 15 F.3d 1393, 1397 (7th Cir. 1994).

⁶⁹ *In re Arenas*, 535 B.R. 845 (2015).

⁷⁰ *Id.* at 854; see also Vivian Cheng, Comment, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY BANKR. DEV. J. 105 (2013).

⁷¹ See *supra* note 41 and accompanying text.

⁷² *In re Way to Grow, Inc.*, 597 B.R. 111, 115–16 (Bankr. D. Colo. 2018).

⁷³ *Id.* at 133.

VI. MARIJUANA AND BANKING REGULATIONS

A. Problem

Legally run-and-operated MRBs do not have access to banks and financial institutions because of the federal prohibition of marijuana as a controlled substance. Without access to banks, MRBs are dealing in all cash. Cash businesses pose a public safety threat because there is an increased risk for burglaries and robberies.⁷⁴ For instance, in the summer of 2019, Denver police issued a letter to marijuana businesses warning of a string of burglaries.⁷⁵ Additionally, MRBs pay state taxes—millions of dollars—in cash, which in turn requires more security in the state buildings that process the money.⁷⁶ Because cash is fungible, there is also a greater risk of money-laundering, fraud, and political graft.⁷⁷ There are also concerns that cash is trafficked across state lines affecting interstate commerce.⁷⁸

⁷⁴ See Rob Nichols & Jim Nussle, *Congress Can Solve the Cannabis Banking Conundrum Now*, FOX BUS. (July 18, 2019), <https://www.foxbusiness.com/business-leaders/congress-cannabis-marijuana-banking-conundrum>.

⁷⁵ Notice from the Denver Police Department, City and County of Denver (June 7, 2019), <https://mailchi.mp/denvergov.org/dpdnotice?e=c1f6d44ab0> (stating that there were thirty-four marijuana business burglaries reported to the Denver Police Department in 2019).

⁷⁶ *Challenges for Cannabis and Banking: Outside Perspectives: Hearing on S.D. 538 Before the H. Comm. On Banking, Housing, and Urban Affairs*, 116th Cong. (2019) (statements of Sen. Gardner, Chairman, & Sen. Gardner, Chairman, H. Comm. on Banking, Housing, & Urban Affairs).

⁷⁷ *Id.*

⁷⁸ *Challenges for Cannabis and Banking: Outside Perspectives: Hearing on S.D. 538 Before the H. Comm. On Banking, Housing, and Urban Affairs*, 116th Cong. (2019) (statement of Sen. Merkley, Chairman, H. Comm. on Banking, Housing, & Urban Affairs).

Tier III MRBs or ancillary businesses—businesses that do not work directly with marijuana products but provide services to Tier I MRBs—are also financially affected by conducting business with marijuana-related businesses. Ancillary businesses include electricians, plumbers, lawyers, accountants, marketers, and advocacy organizations.⁷⁹ In 2017, for instance, PNC Bank shut down the bank account of the Marijuana Policy Project—a non-profit that advocates for criminal justice reform—because the organization received donations from MRBs.⁸⁰ Because the reach of the marijuana industry is rapidly expanding, more businesses will be considered ancillary and the financial services of these financial services may be affected.

There are a small number of banks and credit unions that do provide services to MRBs, which are regulated in part by the Financial Crimes Enforcement Network Guide (FinCEN).⁸¹ The

⁷⁹ See Karen A. Parker et al., *Risk Management Within the Cannabis Industry: Building a Framework for the Cannabis Industry*, 28 FIN. MKT, INSTITUTIONS & INSTRUMENTS 3, 8–9 (2018); Claire Hansen, *Historic House Vote Expected on Marijuana Banking Bill*, U.S. NEWS (Sept. 25, 2019, 12:01 AM), <https://www.usnews.com/news/national-news/articles/2019-09-25/historic-house-vote-expected-on-marijuana-banking-bill>.

⁸⁰ Nicole Lewis, *“It Is Too Risky”: Marijuana Group Says PNC Bank to Close Its Accounts Amid Fears of A DOJ Crackdown*, WASH. POST (June 20, 2017) https://www.washingtonpost.com/national/it-is-too-risky-marijuana-group-says-pnc-bank-to-close-its-accounts-amid-fears-of-a-doj-crackdown/2017/06/20/130ee7b2-550b-11e7-b38e-35fd8e0c288f_story.html.

⁸¹ FIN. CRIMS. ENFORCEMENT NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014) <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf> (stating how financial institutions can service marijuana-related businesses without breaking the law). James Cole, former Deputy Attorney General, issued a memorandum guiding U.S. attorneys to focus efforts on drug cartels and border trafficking, and not on marijuana-related businesses complying with state regulations. Brad Auerbach, *How Cannabis Entrepreneurs Feel About*

regulation requirements are time- and cost-intensive to implement, and many financial institutions find it too risky to do business with MRBs.⁸² The cost of regulation is a financial strain on both financial institutions and small businesses.⁸³

Some financial institutions have even filed suit against branches of the Federal Reserve to allow banks to provide services to MRBs.⁸⁴ The Fourth Corner Credit Union was formed in Colorado to provide banking services to legal MRBs under Colorado law.⁸⁵ However, the Federal Reserve Bank of Kansas City refused to issue a master account, and the Credit Union sought an injunction against the Reserve Bank.⁸⁶ The Tenth Circuit dismissed the case with prejudice and held that the Credit Union would use the injunction to provide banking services to businesses that violate the CSA and federal law.⁸⁷ The Court stated that by granting the Credit Union a master account, it “would thus serve as the linchpin for the Credit Union’s facilitation of illegal conduct.”⁸⁸

Sessions’ Reversal of the Cole Memo, FORBES (Mar. 3, 2018, 7:32 PM), <https://www.forbes.com/sites/bradauerbach/2018/03/03/how-cannabis-entrepreneurs-feel-about-sessions-reversal-of-the-cole-memo/#1f44a5b5c4ae>. In 2018, former Attorney General Jeff Sessions rescinded the Cole Memo. *Id.*

⁸² Ellen Sheng, *Underbanked Cannabis Industry Struggles to Finance Double-Digit Growth, Leaving Business Owners Empty-Handed*, CNBC (Oct. 1, 2019, 10:28 AM), <https://www.cnbc.com/2019/10/01/underbanked-cannabis-industry-struggles-to-finance-double-digit-growth.html>.

⁸³ *Id.*

⁸⁴ See *Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 861 F.3d 1052, 1053 (10th Cir. 2017).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1055.

⁸⁸ *Id.*

States that have legalized recreational and medical marijuana are often serviced by small state-run banks or local credit unions.⁸⁹ In Washington state, a small number of local banks offer services to MRBs, such as Salal Credit Union, which openly advertises its willingness to do business with MRBs.⁹⁰ The Colorado Bankers Association stated that roughly thirty-five financial institutions are offering services to MRBs, but are doing so quietly because of the strict federal regulations.⁹¹ In Missouri, where medical marijuana is now legal, bankers are educating themselves and urging Congress to pass a bill that would protect banks and financial institutions.⁹² At least one local bank, Triad Bank in St. Louis, Missouri, is offering deposit services to MRBs.⁹³

B. Recommendations

On September 26, 2019, the House of Representatives passed the Secure and Fair

⁸⁹ See also Julie Weed, *Washington State Marijuana Companies Getting Some, But Not All Banking Services*, FORBES (May 7, 2018, 1:11 PM) <https://www.forbes.com/sites/julieweed/2018/05/07/washington-state-marijuana-companies-getting-some-but-not-all-banking-services/#7bc19c1665a6>.

⁹⁰ *Id.*; *Cannabis Industry*, SALAL CREDIT UNION <https://www.salalcreditunion.org/business/cannabis-industry/> (last visited Oct. 4, 2018) (promoting the extensive, yet highly regulated services it offers to marijuana-related businesses).

⁹¹ Jesse Paul, *Congress is Weighing Whether to Give Marijuana Businesses Access to Banks. In Colorado, That’s Already Happening*, Colo. Sun (Oct. 1, 2019, 5:05 AM), <https://coloradosun.com/2019/10/01/marijuana-banking-colorado-safe/>.

⁹² MO. CONST. art. XIV, § 1 (West, Westlaw through Nov. 6, 2018); Max Cook, *Is Medical Marijuana Banking Coming Soon?* MBA https://www.mobankers.com/MBA/News/Medical_Marijuana_Banking.aspx (last visited Oct. 7, 2019).

⁹³ Nick Thomas, *Missouri’s Triad Bank Now Offering Services to Cannabis Businesses*, MARIJUANA BUS. DAILY (May 13, 2019), <https://mjbizdaily.com/missouris-triad-bank-now-offering-services-to-cannabis-businesses/>.

Enforcement (SAFE) Banking Act of 2019 with a vote of 321–103.⁹⁴ The bill would protect banks and financial institutions that provide financial services to MRBs and service providers for MRBs.⁹⁵ If passed, the SAFE Harbor Banking Act would provide regulatory guidance to banks and financial institutions and improve oversight for potential fraud or suspicious activities.⁹⁶ This bill would also prohibit banking regulators from canceling the accounts of legitimate MRBs and service providers, and from taking adverse action on loans made to these businesses.⁹⁷

Financial services include not only banks, but also credit card companies. The definition of “financial services” includes the use of credit cards, debit cards, and other types of payment cards.⁹⁸ MRBs, like dispensaries, would be able to implement credit card machines, eliminating reliance on cash payments and increasing the safety of communities.

Some MRBs are investing money in cryptocurrencies because blockchain technology allows MRBs to store and transfer money digitally, without using the services of financial institutions.⁹⁹ While blockchains are designed

for transparency, and storing money digitally is safer than cash, there are still many unknowns in the world of cryptocurrencies.¹⁰⁰ For instance, it is unclear whether cryptocurrencies qualify as securities and there are unique tax implications for virtual currency owners.¹⁰¹

VII. TAX ISSUES AND MARIJUANA

A. Marijuana Industry and Taxes

Typical businesses can deduct ordinary and necessary expenses that are common and that are accepted within the ordinary course of business.¹⁰² MRBs are unable to deduct business expenses because the Internal Revenue Service continues to enforce section 280e, which expressly forbids any deductions or credits for a business that “consists of trafficking in controlled substances.”¹⁰³

In *Patients Mutual Assistance Collective Corp. v. Comm’r of Internal Revenue*, the U.S. Tax Court held that Internal Revenue Service section 280e precludes businesses that engage in activities that involve trafficking controlled substances from deducting expenses, regardless

⁹⁴ Robert J. Cordy & Marc E. Sorini, *SAFE Banking Act Passes House, Extends Cannabis Safe Harbor Protections*, NAT’L L. REV. (Sept. 26, 2019), <https://www.natlawreview.com/article/safe-banking-act-passes-house-extends-cannabis-safe-harbor-protections>.

⁹⁵ Secure and Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Legis., 1st Sess. (2019).

⁹⁶ *Challenges for Cannabis and Banking: Outside Perspectives: Hearing on S.D. 538 Before the H. Comm. On Banking, Housing, and Urban Affairs*, 116th Cong. (2019) (statement of Joanne Sherwood, President & CEO of Citywide Banks, H. Comm. on Banking, Housing, & Urban Affairs)

⁹⁷ *Id.*

⁹⁸ H.R. 1595 § 14(7)(C).

⁹⁹ Oliver Dale, *Cryptocurrency & The Cannabis Industry: Two Hot Markets Working Together*, BLOCKONOMI (Mar. 23, 2019), <https://blockonomi.com/cannabis-cryptocurrency/>. A blockchain is a decentralized database that is shared

across computer networks. Maryanne Murray, *Blockchain Explained*, REUTERS GRAPHICS (June 15, 2018), <http://graphics.reuters.com/TECHNOLOGY-BLOCKCHAIN/010070P11GN/index.html>.

¹⁰⁰ Dale, *supra* note 93.

¹⁰¹ *Id.*; Thomson Reuters Tax & Accounting, *IRS Has Begun Sending Letters to Virtual Currency Owners Advising Them to Pay Back Taxes*, Thomson Reuters (July 29, 2019), <https://tax.thomsonreuters.com/news/irs-has-begun-sending-letters-to-virtual-currency-owners-advising-them-to-pay-back-taxes/>.

¹⁰² *Publication 535 (2018) Business Expenses*, IRS https://www.irs.gov/publications/p535#en_US_2018_publink1000208626 (last updated Aug. 5, 2019).

¹⁰³ I.R.C. § 280e (2019).

of whether the actions are legal within a state.¹⁰⁴ The court stated that while section 280e applies to MRBs, if the company has a separate, nontrafficking trade, then it could deduct its expenses.¹⁰⁵ In *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner*, the U.S. Tax Court held that a single taxpayer can have multiple businesses, and to determine whether the businesses are separate for tax purposes depends on the “degree of economic interrelationship between the two undertakings.”¹⁰⁶

The Tax Court in *Patients Mutual Assistance Collective Corporation* stated that while an MRB cannot deduct business expenses, it only needs to pay tax on gross income, which is the subtraction of the cost of goods sold [COGS] from the gross receipts.¹⁰⁷ Regardless of the industry, taxpayers can use COGS to calculate gross income according to IRS § 471.¹⁰⁸ Unless an MRB can create two separate entities, it can only rely upon the COGS as a money-saver for its operation.

B. Estate Tax Issues

Although an item may be illegal to own, a “market” may nevertheless exist in which to measure the value of that property. For example, in *Estate of Sonnabend*, estate appraisers valued an iconic Rauschenberg with an attached rare stuffed bald eagle at zero because it would be

illegal to sell.¹⁰⁹ The IRS and the Art Advisory Council took a different view of the painting, valuing the piece at \$65 million, thereby demanding a \$29.2 million estate tax payment. Although no legal market for this artwork existed, there may be an “extralegal avenue,” taking into consideration the true intrinsic value of the art compared to its stunning quality. While Rauschenbergs are a rarity, estate tax issues surround items that seemingly have no legal market, including marijuana-based assets. Despite marijuana’s illegality on the federal level, the IRS may seek to establish ownership and value for purposes of taxation. Thus, the IRS might require the asset to be valued even though that asset is illegal.

Because marijuana-based assets must be included in the gross estate, a value must also be assigned to them. The Internal Revenue Code section 2031(a) provides that the value of the gross estate is determined by including the value at the time of death of all property wherever situated. Section 2031(b) provides that the value of every item of property includible in the decedent’s gross estate is the fair market value at the time of the decedent’s death.

In determining the value of illicit drugs held by a taxpayer, the IRS is entitled to use any reasonable means to establish the grade of the drugs held by the decedent at his death and the market in which the drugs would have been sold. In *Caffery v. Commissioner*, the taxpayer was engaged in the importation and distribution of marijuana. In reconstructing the taxpayer’s income earned from his drug activities, the IRS computed the unreported income based on the “street value” of the marijuana.¹¹⁰ Similarly, in *Jones v. Commissioner*, the IRS reconstructed the taxpayer’s income based on the “street market” and the “retail street value” of “uncut”

¹⁰⁴ *Patients Mut. Assistance Collective Corp. v. Comm’r of Internal Revenue*, 151 T.C. No. 11, *11–12 (T.C. 2018).

¹⁰⁵ *Id.* at *12.

¹⁰⁶ *Californians Helping to Alleviate Med. Problems, Inc. v. C.I.R.*, 128 T.C. 173, 183 (T.C. 2007).

¹⁰⁷ *Patients Mutual Assistance Collective Corp.*, 151 T.C. No. 11 at * 16.

¹⁰⁸ *Id.* at *17 (“A business that could immediately deduct indirect costs under section 471 now has to treat those costs as capital expenditures and wait until it realizes related income to adjust for them.”).

¹⁰⁹ Patricia Cohen, *Art’s Sale Value? Zero. The Tax Bill? \$29 Million.*, N.Y. TIMES (July 22, 2012).

¹¹⁰ *Caffery v. Comm’r*, 60 T.C.M. (CCH) 807 (1990).

cocaine upon discovering that the taxpayer sold 42 kilos of cocaine to drug dealers.¹¹¹

VIII. OTHER ISSUES

A. CBD Regulations

In 2018, Congress passed the Agricultural Improvement Act of 2018 (The 2018 Farm Bill), which legalized industrialized hemp—a cannabis derivative with low concentrations of THC—as well as its derivatives, which includes CBD.¹¹² CBD is regulated by Congress, the Drug Enforcement Administration (DEA), the Food and Drug Administration (FDA), and the Federal Trade Commission (FTC).¹¹³ Oversight by these four separate government agencies causes a complex web of rules and regulations for companies producing CBD products.

The DEA continues to assert that CBD is a Schedule I drug “with no currently accepted medical use and a high potential for abuse” and remains banned by the agency.¹¹⁴ With the passage of the Farm Bill, the FDA issued a statement stating that the agency will regulate CBD and hemp products as it continues to research the effects of the substance.¹¹⁵

The FDA’s chief concern is with companies making unproven claims about the effectiveness of CBD products.¹¹⁶ The FDA will enforce its regulations against companies claiming that the CBD product is a drug, that it is a dietary supplement, and that it is a food.¹¹⁷ The FDA will issue a warning letter to the company and if

the company does not comply, the FDA has the authority to recall the product, to seize the product, or to criminally prosecute the company.¹¹⁸

Attorneys should advise clients that market and sell CBD products to avoid using the marketing terms “CBD” or “CBD infused.” Instead, the terms “Hemp Infused” or “Hemp Extract” should be used instead.¹¹⁹ Packaging should avoid any statements about potential health benefits.¹²⁰ And finally, there should be no reference to dietary supplements on the products or on websites.¹²¹

B. Marijuana and Criminal Record Expungement

As states continue to legalize marijuana, criminal justice activists argue that those whose actions are now considered legal under the new laws should have a fresh start.¹²² Most states do not allow individuals with criminal records, including marijuana-related offenses that are now considered legal, to participate in the legal marijuana industry.¹²³ If these individuals can enter this industry with a clean record, the issues discussed above will be applicable. Some states have drafted expungement provisions within the state’s legalization statutes.¹²⁴ In other states, District Attorneys are instituting programs to vacate and dismiss mass amounts of marijuana-related offenses.¹²⁵ Counties in Illinois and California are collaborating with software companies to create algorithms to sort the

¹¹¹ Jones v. Comm’r, 61 T.C.M. (CCH) 1721 (1991).

¹¹² Amanda Milgrom, *Navigating the Web of CBD Regulations*, 48 COLO. LAW. 24, 26 (2019).

¹¹³ *Id.* at 25.

¹¹⁴ *Id.* at 26.

¹¹⁵ *Id.* Congress reinforced that the FDA has the authority to regulate CBD products under the federal Food, Drug, and Cosmetics Act in the Farm Bill. *Id.*

¹¹⁶ *See id.* at 27.

¹¹⁷ *Id.* at 28–29.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 28.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Alana E. Rosen, *High Time for Marijuana Expungement*, CCRC (Mar. 27, 2019), <https://ccresourcecenter.org/2019/03/27/high-time-for-marijuana-expungement/>.

¹²³ *Id.*

¹²⁴ *See* H.B 1438, 101st Leg., (Ill. 2019).

¹²⁵ Rosen, *supra* note 122.

records of individuals eligible for expungement.¹²⁶ Illinois Governor J.B. Pritzker recently granted 11,000 pardons for low-level marijuana convictions.¹²⁷ Upon the opening of the first Chicago dispensary, Lieutenant Governor Juliana Stratton was among the first in line to purchase edibles. She stated: “For too long, [Illinois] residents, particularly those that are black [and] brown, have been targeted and criminalized for cannabis possession.”¹²⁸ Even on the federal level, Senator Cory Booker has proposed the Marijuana Justice Act of 2019, which would automatically expunge records on a revolutionary scale.¹²⁹

IX. CONCLUSION

Legalized medical and recreational marijuana is having a widespread impact on society, and the areas of banking regulations and estate planning are no exception. Evidence exists that clients are even considering marijuana laws in selecting the state in which to retire.¹³⁰ Prudent attorneys, especially those living in states where marijuana is legal, must start inquiring about the client’s marijuana use and marijuana-based assets.¹³¹ If

the client is a user, be it as a patient or a stoner, such use must be evaluated when determining the client’s capacity to execute a will and other estate planning documents. In addition, the use may impact the client’s ability to obtain life insurance and the premiums paid for coverage. If the client has a marijuana business, the ability of the client to transfer that business to the desired beneficiaries may be hindered. Even if the client is neither a marijuana user nor a business owner, the client may wish to limit the marijuana use of beneficiaries. Only by careful inquiry and planning, may the client’s intent be carried out to the maximum amount allowed under current law.

¹²⁶ Rhys Saunders, *Expungement by Algorithm*, ILL. B. J. (2019), at 12.

¹²⁷ Ronn Blitzer, *Illinois Lieutenant Governor Among First to Buy Legal Pot as New Law Takes Effect*, FOXNEWS (Jan. 2, 2020), <https://www.foxnews.com/politics/illinois-lieutenant-governor-among-first-to-buy-legal-pot-as-new-law-takes-effect>.

¹²⁸ *Id.*

¹²⁹ Saunders, *supra* note 126.

¹³⁰ Chris Taylor, *Seniors Are Seeking Out States Where Marijuana is Legal*, MONEY (July 22, 2015).

¹³¹ Some law schools are already teaching courses on marijuana law including Harvard Law School, Vanderbilt Law, and the University of Denver Sturm College of Law. See Lorelei Laird, *Law School Offers a Marijuana Law Class*, A.B.A. J. (May 1, 2015) (reporting that a course entitled *Representing the Marijuana Client* is being offered at the University of Denver Sturm College of Law); *Course Catalog: Cannabis Law*, HARVARD SCH. OF L.,

<https://hls.harvard.edu/academics/curriculum/catalog/default.aspx?o=73642> (last visited Nov. 24, 2019); Course Information: Marijuana Law and Policy, VANDERBILT L. SCH., <https://law.vanderbilt.edu/courses/341> (last visited Nov. 24, 2019).