



Malpractice and Ethical Pitfalls in the Marijuana Practice of Law

Presented by Heather Kelly, Greg Heering, and Christine Kruppa

CO-SPEAKERS
EAD 10-11-14

January 24, 2018



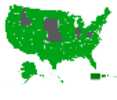
Evilwing Issues Under State and Federal Law

- Civil Marijuana (Revised) January 4, 2018
- Status And Permitting Medicinal Use of Marijuana
- Several States New Permit Recreational Use of Marijuana

Federal Law 4 The Controlled Substances Act

Controlled Substances and Drug Trafficking Statutes
 Marijuana is listed as a Schedule I controlled substance under the Controlled Substances Act (CSA), 21 U.S.C. § 812. The CSA is a federal law that regulates the manufacture, distribution, and use of certain drugs. Marijuana is classified as a Schedule I controlled substance, which means it is considered to have a high potential for abuse and no currently accepted medical use in the United States.

Medical Marijuana States



'Legal' Means Different Things in Different States



Medical Marijuana in Texas

- Medical Marijuana is legal in Texas
- 2015 "Compassionate Use Act" regulates medical marijuana use for patients with "incurable" epilepsy
- The act initially was drafted as a bill, but it failed to pass. It was later introduced as a bill, but it failed to pass.

Medical Marijuana in Florida

- Amendment 10 passed in 2010, establishing medical marijuana. The amendment allows for "qualified patients" to use medical marijuana.
- Legislature passed Senate Bill 1008, which established the Medical Marijuana Use Registry.
- Florida's medical marijuana law is one of the most restrictive in the country. It only allows for the use of medical marijuana for patients with certain conditions, and it requires patients to obtain a medical marijuana use registry identification card.

California's Dual Approach to Marijuana

- California has a dual approach to marijuana. It is legal for medical use and for recreational use.
- The medical marijuana program is regulated by the State Board of Medical Marijuana Regulation and Control.
- The recreational marijuana program is regulated by the State Board of Cannabis Regulation and Enforcement.

Ethical Issues for Professionals

- Marijuana is a Schedule I controlled substance under the Controlled Substances Act (CSA), 21 U.S.C. § 812.
- Professionals should be aware of the ethical implications of marijuana use. For example, marijuana use can impair judgment and decision-making, which can lead to ethical violations.
- Professionals should also be aware of the legal implications of marijuana use. For example, marijuana use is illegal in many states, and it can lead to criminal or civil penalties.

Rule 1216 (ABA Model Rules)

- Comment (c) to Rule 1.7(a) states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.
- Comment (c) to Rule 1.7(b) states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.

Colorado Supreme Court Issues Comment to Rule 1.7

- The Colorado Supreme Court issued a comment to Rule 1.7(a) of the Colorado Rules of Professional Conduct. The comment states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.
- The comment also states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.

Washington Comment to its Rule 1.7(a)

- Comment (c) to Rule 1.7(a) states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.
- Comment (c) to Rule 1.7(b) states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.

Nevada Rule 1.7 comment

- Comment (c) to Rule 1.7(a) states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.
- Comment (c) to Rule 1.7(b) states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.

State Bar of Arizona, Ethics Opinion 1-10

- The State Bar of Arizona issued Ethics Opinion 1-10, which states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.
- The opinion also states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.

Ohio Board of Professional Conduct

- The Ohio Board of Professional Conduct issued a comment to Rule 1.7(a) of the Ohio Rules of Professional Conduct. The comment states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.
- The comment also states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.

Ohio Supreme Court

- The Ohio Supreme Court issued a comment to Rule 1.7(a) of the Ohio Rules of Professional Conduct. The comment states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.
- The comment also states that a conflict of interest exists if the lawyer's representation of one client will be materially limited by the lawyer's representation of another client.

Impact of New Marijuana Legislation on Employers

- State Legislation
- Federal Legislation
- Approaches for Employers
- Labor Employment Processes

Costs v. Dish Network

- In the case of *Costs v. Dish Network*, the court held that the employer's policy of testing for marijuana use was not a violation of the Americans with Disabilities Act (ADA).
- The court stated that the employer's policy was a neutral, nondiscriminatory policy that applied to all employees.
- The court also stated that the employer's policy was a reasonable accommodation for the employee's disability.

Colorado's Lawful Activities Statute

- Colorado's Lawful Activities Statute, C.R.S. § 18-6.5-101, provides that an employer may not discriminate against an employee based on the employee's use of marijuana in a lawful activity.
- The statute also provides that an employer may not discriminate against an employee based on the employee's use of marijuana in a lawful activity.

Costs v. Dish Network

- In the case of *Costs v. Dish Network*, the court held that the employer's policy of testing for marijuana use was not a violation of the Americans with Disabilities Act (ADA).
- The court stated that the employer's policy was a neutral, nondiscriminatory policy that applied to all employees.
- The court also stated that the employer's policy was a reasonable accommodation for the employee's disability.

Potential Practice Pitfalls

- Unintentionally violating federal enforcement
- Compromising regarding retention future laws and regulations
- Increased future law claims exposure in certain states

Financial Crimes

- Financial Crimes Enforcement Network (FinCEN) issued a notice regarding the use of virtual currencies. The notice states that virtual currencies are not legal tender and are not recognized as a form of payment.
- The notice also states that virtual currencies are not regulated by the Federal Reserve.
- The notice also states that virtual currencies are not insured by the FDIC.

Financial Institutions

- Financial institutions should be aware of the risks associated with marijuana use. For example, marijuana use can impair judgment and decision-making, which can lead to financial crimes.
- Financial institutions should also be aware of the legal implications of marijuana use. For example, marijuana use is illegal in many states, and it can lead to criminal or civil penalties.

Practice Pitfalls

- Employment Agreements
- Marijuana Use Policies
- Arbitration Agreements
- Non-Compete Agreements
- Confidentiality Agreements
- Non-Solicitation Agreements
- Non-Disclosure Agreements
- Assignment Agreements
- Severance Agreements
- Release Agreements
- Waiver Agreements
- Consent Agreements
- Acknowledgment Agreements
- Authorization Agreements
- Consent to Publish Agreements
- Consent to Represent Agreements
- Consent to Speak Agreements
- Consent to Testify Agreements
- Consent to Sue Agreements
- Consent to Arbitrate Agreements
- Consent to Mediate Agreements
- Consent to Reconcile Agreements
- Consent to Negotiate Agreements
- Consent to Settle Agreements
- Consent to Compromise Agreements
- Consent to Surrender Agreements
- Consent to Forfeit Agreements
- Consent to Relinquish Agreements
- Consent to Abandon Agreements
- Consent to Desert Agreements
- Consent to Desertion Agreements
- Consent to Abandonment Agreements
- Consent to Relinquishment Agreements
- Consent to Abandonment Agreements
- Consent to Relinquishment Agreements

Avoiding Conflicts - Rules 1.7, 1.8, 1.9, and 1.10



Practice Pitfalls

- Employment of Non-Management Labor
- State Bar of Arizona, Ethics Opinion 1-10
- Associate Counsel (if necessary)
- Retainer and Fee
- There is a risk of a conflict of interest in the event of a change of control
- Bar and conflict inquiry

Decision Comment?



Gordon & Rees National Professional Liability Webinar Series

Our insightful leaders share the latest trends and laws that impact professional liability defense.



**Thank You For Attending.
The Webinar Will Begin Shortly.**

**If you have any questions,
please use the **Q&A** box on the
right side of your screen.**



Malpractice and Ethical Pitfalls in the Marijuana Practice of Law

Presented by: Heather Kelly, Greg Hearing, and Christine Kroupa

**A webinar brought to you as part of
the Gordon & Rees
National Professional
Liability Webinar Series**

**Our insightful leaders share the latest trends and
laws that impact professional liability defense.**



- Complimentary, one-hour webinars by Gordon & Rees professional liability attorneys
- Discussion of malpractice and ethical topics relevant to all practice areas

Questions?

Use the **Q&A** box found
on the upper right side
of your screen.

Presenter



Heather Kelly



Christine Kroupa



Greg Hearing

Evolving Issues Under State and Federal Law

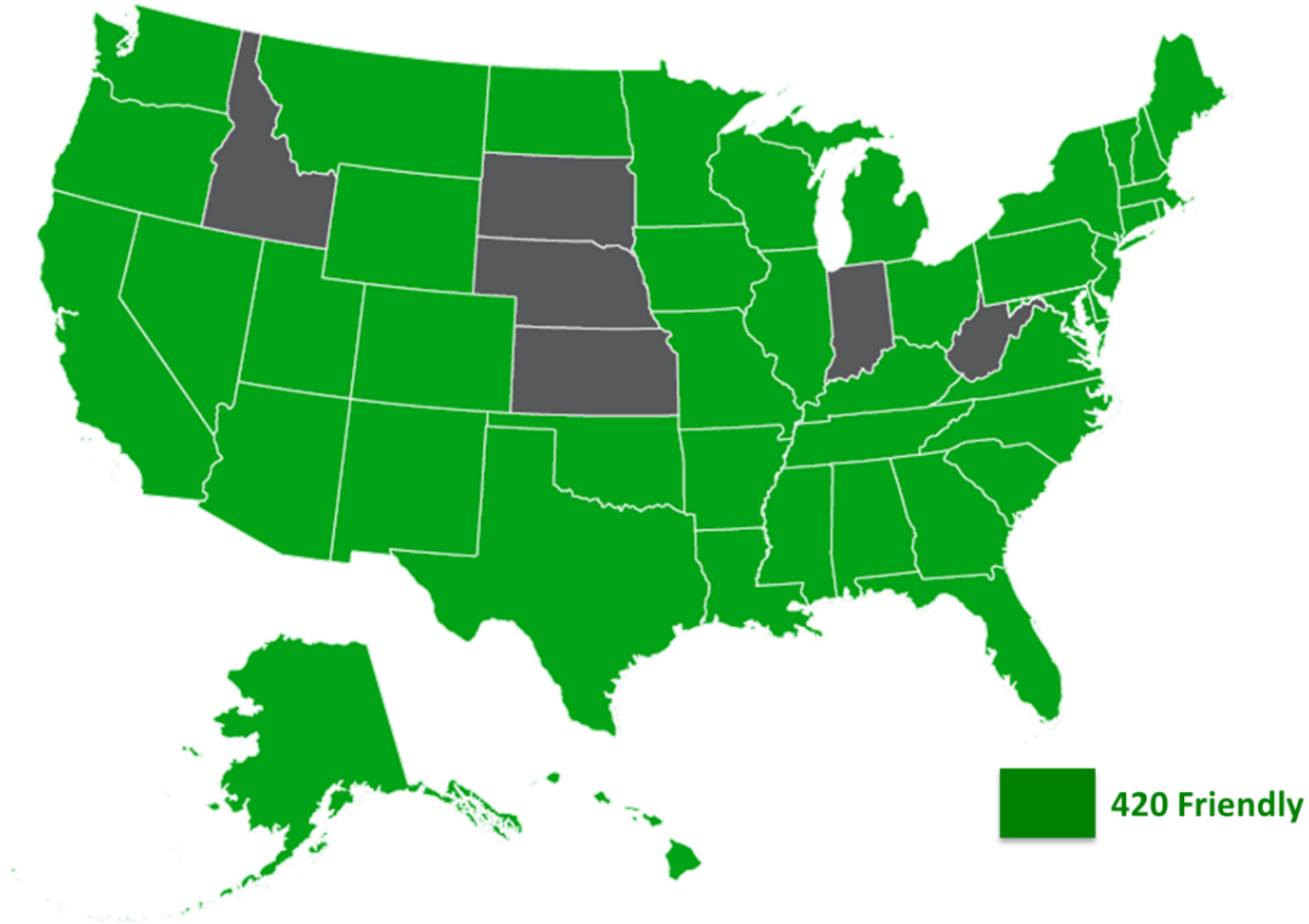
- Cole Memorandum (Revoked on January 4, 2018).
- States Are Permitting Medicinal Use of Marijuana
- Several States Now Permit Recreational Use of Marijuana

Federal Law & The Controlled Substances Act

- Possession, Cultivation, and Sale of Marijuana remain federal crimes.
- Marijuana is still a Schedule 1 drug, defined as “drugs with no accepted medical use and a high potential for abuse.”
- Continual conversations amongst members of Congress regarding a reclassification but no action to date.
- Federal law remains enforceable regardless of state statutes legalizing or decriminalizing marijuana. *Gonzalez v. Raich*, 545 U.S. 1 (2005).
- Chris Bartkowicz – Operating a medical marijuana grow operation allegedly pursuant to state law. Raided by DEA and prohibited from raising Colorado’s laws as a defense to federal charges.

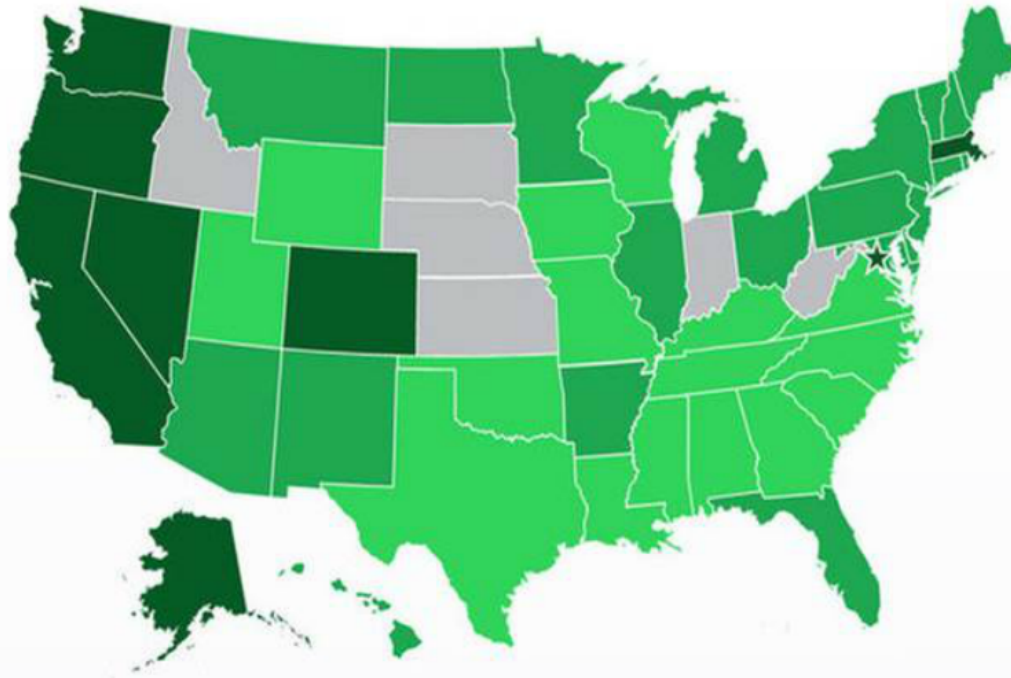


Medical Marijuana States



“Legal” Means Different Things in Different States

Marijuana Legalization by State



Recreational Marijuana

Alaska
California
Colorado
Massachusetts
Nevada
Oregon
Washington
Washington, D.C.

Medical Marijuana

Arizona
Arkansas
Connecticut
Delaware
Florida
Hawaii
Illinois
Maine
Maryland
Michigan
Minnesota
Montana
New Hampshire
New Jersey
New Mexico
New York
North Dakota
Ohio
Pennsylvania
Rhode Island
Vermont

Limited Medical Marijuana*

Alabama
Georgia
Iowa
Kentucky
Louisiana
Mississippi
Missouri
North Carolina
South Carolina
Tennessee
Texas
Utah
Virginia
Wisconsin
Wyoming

* Limited medical marijuana includes cannabis extracts that are high in cannabidiol and low in tetrahydrocannabinol.

Medical Marijuana in Texas

- Medical Marijuana in Texas is limited.
 - 2015 “Compassionate Use Act” legalizes medical marijuana solely for patients with “intractable epilepsy.”
 - The law remains non-functional, as regulations for its implementation have yet to be effectuated.
- The issue remains hotly debated in Texas and is likely to continue to evolve over the next several years.

Medical Marijuana in Florida

- Amendment 2, passed in 2016, extends medical marijuana legalization from terminally ill patients to larger group of patients with “debilitating diseases.”
 - “Debilitating diseases” include AIDS, PTSD, and Multiple Sclerosis.
- Proposed regulations governing implementation have been criticized as unduly harsh.
 - Limit the entire state industry to a maximum of seven dispensing organizations, which would theoretically serve 500,000 patients.



California's Dual Approach to Marijuana

- Following the 2016 election, California has parallel statutes legalizing both medical and recreational marijuana use.
- The legislative package regulating medical marijuana is the Medical Marijuana Regulatory and Safety Act (MMRSA).
- The California Marijuana Legalization Initiative legalized recreational marijuana in 2016.



Ethical Issues for Professionals

- Issues reach lawyers, accountants, realtors, and multiple other licensed professionals
- Personal use
- Advising and counseling clients
- Facilitating transactions for clients in the marijuana industry
- Aiding and abetting federal crimes
- Owning a Dispensary or Grow Operation
- Assisting in the build out or operation of a grow operation or dispensary

Rule 1.2(d) (ABA Model Rules)

- Cannot counsel or assist a client in conduct that is known to be criminal or fraudulent.
- Can discuss the legal consequences of any proposed course of conduct.
- Federal Rules on Lawyer Conduct

Colorado Supreme Court Issues Comment to Rule 1.2

- [14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by this constitutional provision and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.
- Adopted March 24, 2014 with two dissenting justices.

Washington Comment 18 to Rule 1.2(d)

- Special Circumstances Presented by Washington Initiative 502 (Laws of 2013, ch.3)
- [18] At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.
- [Comment [18] adopted effective December 9, 2014.]

Nevada Rule 1.2 comment

- COMMENT [1] A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution article 4, section 38, and NRS chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

State Bar of Arizona, Ethics Opinion II-01

- A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act (“Act”), despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client’s proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client’s activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

Ohio Board of Professional Conduct

- Board of Professional Conduct Opinion 16-006:
- “A lawyer may not advise a client to engage in conduct that violates federal law, or assist in such conduct, even if the conduct is authorized by state law. A lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise. A lawyer may provide advice as to the legality and consequences of a client’s proposed conduct under state and federal law and explain the validity, scope, meaning, and application of the law.”

Ohio Supreme Court

- Following the advisory opinion, the Ohio Supreme Court added a new subparagraph to Rule 1.2 which states: “A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.”

Impact of New Marijuana Legislation on Employers

- State Legalization
- Federal Illegality
- Approaches for Employers
- Limited Employee Protections



Coats v. Dish Network

- Brandon Coats is a paraplegic formerly employed by Dish Network. He was terminated after failing a random drug test which revealed marijuana in his system.
- Coats claimed Dish violated C.R.S. 24-34-402.5 by terminating his employment based on his state-licensed use of medical marijuana at home, during non-working hours.
- He argued that the Medical Marijuana Amendment (Colo. Const. art XVIII sec. 14) made such use "lawful" for purposes of the statute, notwithstanding any federal laws prohibiting medical marijuana use.

Colorado's Lawful Activities Statute

- Colo. Rev. Stat. 24-34-402.5 provides:
- “It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours”

Coats v. Dish Network

- The trial court dismissed petitioner's complaint for failure to state a claim after finding that medical marijuana use was not "lawful" under Colorado state law.
- The Court of Appeals affirmed.
- The Supreme Court, after review, affirmed: “term 'lawful' as used in section 24-34-402.5, was not restricted in any way, and we decline to engraft a state law limitation onto the term. Therefore, an activity such as medical marijuana use that is unlawful under the federal law is not a 'lawful' activity under section 24-34-402.5.”

Potential Practice Pitfalls

- Uncertainty regarding federal enforcement.
- Contingencies regarding uncertain future laws and regulations.
- Receipt of funds from clients engaged in canna-business.

Financial Crimes

United States v. Boedigheimer:

- A Minnesota attorney was federally convicted for using his law firm to help launder money from a brother-in-law's marijuana sales operation;
- Brother-in-law got a sham job at the law firm, his wages paid by the proceeds from his marijuana sales, according to the charges;
- Boedigheimer was sentenced to 5 years in prison.

United States v. Furtado

- Colorado Attorney indicted for money laundering;
- Furtado used his attorney trust account, held in the name of his law firm, to facilitate his client's purchase of property to cultivate marijuana
- Criminal charges dismissed;
- Received a public censure.

Financial Institutions

- Banks have squarely rejected attempts by the marijuana industry to open deposit accounts or credit card accounts.
- Industry remains heavily cash dependent.
- Be wary of financial institution requirements for clients (i.e. mortgages or lines of credit which prohibit renting to or engaging in action deemed illegal under federal law)

Practice Pointers

- Engagement Agreements
 - Expressly Limit Scope (if providing unbundled or limited representation)
 - Identify the client
 - Run conflicts
- Associate Counsel (if necessary)
- Advise the Client
 - On risks of particular course of action in writing if possible

Avoiding Conflicts - Rules 1.7, 1.8, 1.9, and 1.10



Malpractice Exposure

- Dabbling
- General Practice
 - Transactional and Litigation
- Conflicts
 - *Representing all parties*
 - *Who is your client – the entity vs. the owner*
 - *Corporate Entity Rule*
- Trust Account Issues

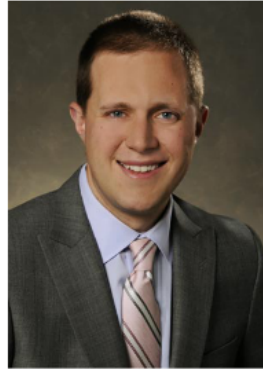
Practice Pointers

- Disengagement of Nonengagement Letter
 - Identify when representation is finished
 - Stamp the Bill Final
- Associate Counsel (if necessary)
- Retainer and Bill
 - Think about a retainer sufficient to cover entire representation
 - Bill and collect regularly

Questions? Comments?



Heather Kelly
hkelly@grsm.com



Greg Hearing
ghearing@grsm.com



Christine Kroupa
ckroupa@grsm.com

-
- MCLE Credit available in California, Colorado, Illinois, New York, and Texas and may be available for reciprocity in other jurisdictions.
 - Email profliabilitywebinars@gordonrees.com to inquire.

March 21, 2018

Topic: TBA

Presented by: Susan Wall & Hal Frampton

Register online: profliabilitywebinars.gordonrees.com

NY CLE Code: GR0118

GORDON&REES
SCULLY MANSUKHANI