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Rising Smoke ...

Part One: Cannabis Law Attorneys Stay Busy to Keep Pace with Industry Growth

Before the pandemic hit the United States and started to spread, cannabis law attorneys were increasingly busy in what was then a hot practice area. After all, the marijuana industry was experiencing growth in both consumer demand as well as workforce numbers and talent; an influx of deep-pocket investment money; industry consolidation; and of course increased legalization but with diverse and complex state-by-state regulations that require significant legal help to navigate; among other factors.

Now, and since March 2020, cannabis law is even busier—smoking hot, if you will.

Attorneys’ workloads are full primarily because of the industry’s expansion and its gushing revenue stream in recent years. The term “emerging” no longer applies to the legal marijuana sector; it has, indeed, emerged.

“By some estimates, total U.S. cannabis sales were expected to surpass \$24 billion in 2021, representing 38% growth over 2020 sales,” according to a report in January

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by Reuters. “In considering the industry’s broader effects on the economy, a recent analysis published by *MJBizFactbook* projected that the cannabis industry is expected to add \$92 billion to the U.S. economy in 2021.” [The fact book contains marijuana business data collected and analyzed by the editors of the trade publication *MJBiz Daily*.]

The most recent surge in business and legal activity is a direct result of a significant escalation in consumption during the COVID era.

“The market is thriving, particularly since the beginning of the COVID pandemic, when many jurisdictions established cannabis as essential,” says Jonathan Robbins, the cannabis law chair at Miami-based Akerman, which has 30 attorneys serving the industry full-time or in some capacity. “Given the current environment in which we’re living, people are heavily burdened with stress. Thus now more than ever, the therapeutic benefits of cannabis are being embraced.”

Jonathan Storper, the leader of the cannabis law group at the national firm Hanson Bridgett in San Francisco, concurs. “The regulated cannabis market is growing by leaps and bounds,” he says.

Barriers Still Exist

That’s not to say, of course, that all impediments have been cleared for even more growth. “Financing remains a challenge, however, because of federal legal restrictions and black-market competition,” Storper adds.

Although states are increasingly legalizing pot, New York and Virginia among some of the most recent ones, the federal ban places unfriendly-business complexities on the industry. One major problem centers on the legal framework requiring banks to be federally insured by the FDIC, which means, in large measure, marijuana businesses can’t use banks so cannabis is a cash-operated business, which presents several obstacles. For example, it makes it difficult for dispensaries and other cannabis businesses to pay employees, attorneys, other professionals, and their taxes.

What’s more, without action on Capitol Hill and in the White House to legalize pot nationwide—something an overwhelming majority of Americans want, according to poll after poll—market competition will take



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Cannabis Law

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a hit and black-market distribution will continue to encroach.

“Unfortunately, the illicit market (at least in California) is significantly undercutting the ability of legitimate cannabis owners from fairly competing in the marketplace,” according to written answers submitted to *Of Counsel* by Jonathan Hyman and Jonathan Menkes, co-chairs of the CBD and legal cannabis group at Irvine, California’s Knobbe Martens. “Until regulators step in to curtail the illicit market, I don’t think very many of the legal players will be able to compete for much longer.”

Despite the industry’s strong market—and the robust business it’s generating for lawyers—many of those operating inside this sector feel a sense of uncertainty and frustration at the failure of nationwide legalization efforts, says Stan Jutkowitz, the leader of the cannabis law team at Chicago-based Seyfarth Shaw, which has 50-plus attorneys serving marijuana-industry clients. That legislative inability and other factors also breed resignation across the industry and carry an impact on investments and pricing.

“Much of the industry appears to be reconciled to the fact that cannabis will not be legalized at the federal level in the short term,” Jutkowitz says. “Congress has not been able to pass legislation legalizing cannabis nor has Congress been able to provide a safe harbor for cannabis banking, despite the fact there’s a bill that would do just that. The SAFE Banking Act has been passed by the House five times [only to stumble in the Senate]. Also, equity investment in cannabis companies has slowed and the price of product remains volatile.”

M&As, Rural Growth, and Enthusiasm

The consolidation craze that has run rampant across many economic sectors, including the legal profession, of course, has also affected the cannabis industry. Many larger companies see lucrative opportunities and swoop in to acquire smaller businesses. This is fueling legal work in many areas of law.

“Lawyers across the firm are servicing our cannabis clients, including our corporate, real estate, intellectual property, finance, tax, litigation, and M&A practice groups,” says Hanson Bridgett’s Storper. “The M&A market in particular is very hot right now.”

But those players in the M&A market encounter difficulties too. “In corporate transactions, one of the most important takeaways for cannabis businesses is to be prepared for longer-than-expected delays in regulatory approvals that can create challenges in daily operations, financing arrangements, and business planning,” says Andrew Gabriel, who chairs the business entities & transactions department as well as the real estate and land use team at Nevada’s McDonald Carano.

Attorneys at McDonald Carano, which has offices in Las Vegas and Reno, have been serving clients in the marijuana business for several years (medical pot has been legal since 2000 and recreational cannabis since January 2017). And it was one of the early firms to launch an official cannabis law practice group,

Gabriel says national legalization will also boost mergers, acquisitions, and other deals. “If federal law changes to make cannabis legal, U.S. public companies and banks will be encouraged to dive in, creating a flurry of transactional activity,” he says.

Not surprisingly, Nevada’s marijuana-industry growth has centered in urban areas. But that’s changing as rural counties are beginning to embrace cannabis businesses and the revenue they generate.

“The state has issued more than 700 medical and recreational cannabis licenses, but most are in the main population centers of Clark and Washoe counties,” Dennis Gutwald, Gabriel’s partner at McDonald Carano, who practices in the firm’s gaming and administrative law group. “Several once-hesitant rural counties that previously issued local cannabis moratoriums are now interested in diversifying their local economies by bringing cannabis-driven economic benefits to their communities.”

The same sort of acceptance and embrace in rural communities is not limited to Nevada. “I’ve got friends and associates in California, Oregon, and other states where pot’s legal, and they say a lot of residents in small towns are lighting up and digesting edibles often these days, and the business people see greenbacks in the green, leafy substance,” says an East Coast law firm consultant. “Entrepreneurs find it all very exciting – as do several of the cannabis law attorneys I counsel.”

Several of the lawyers *Of Counsel* contacted for this article expressed enthusiasm about practicing in the cannabis law arena. They called the industry “dynamic” with “potentially meteoric growth opportunities”

and legal issues they find “intellectually challenging” and “changing almost daily.”

Ackerman’s Robbins puts it this way: “I have been practicing in law almost 30 years, the last several of which have been devoted almost exclusively to cannabis. It’s extremely invigorating and rewarding to be able to help shape a new industry and the laws regulating that industry. This is something I have not experienced in the past.”

More to Come

Because this economic sector and the work it creates for attorneys is so “dynamic,” there’s more to report and this article can only cover so much in the space allotted. Consequently, for the first time ever in examining a particular legal area, *Of Counsel* has split this practice area portrait into two parts. Look for more in our May issue with additional insight on a range of cannabis law topics offered by the same sources in this article and others. ■

—Steven T. Taylor