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Social Equity in Cannabis

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With cannabis making its way through the road to legalization, concern in the disparity of the lack of minority license holders continues to grow. To address this issue, social equity licensing has arisen as a government mechanism intended to even the playing field for those from communities disproportionately impacted by the war on drugs. Different approaches have been explored by various cities and states (i.e., California, Connecticut, Massachusetts, New York, and Oregon), with some programs faring better than others.

To explore the necessary ingredients to a successful social equity licensing program, San Francisco social equity licensee Mirage Medicinal provides some insight via Jon Heredia, the Mirage Medicinal CLO and Director of Business Development.

What Are the Benefits of Social Equity Licensing?

It provides verified social equity applicants with priority processing, technical assistance, waiver of fees, and access to local and state grants. Through the program, my partner (the social equity applicant) and I have been able to secure funding for three dispensaries in San Francisco, roughly $100,000 in city and state grants, and a white labeling partnership with a Sacramento microbusiness.

What Are the Problems Social Equity Licensees Face?

Saturation of Retail Licenses

The overwhelming majority of social equity applicants in a tourist destination like San Francisco are seeking retail dispensary or delivery licenses. Retail has higher business margins compared to other supply chain models, so many applicants choose retail businesses to account for the higher cost of living and working in San Francisco.

Although a set retail license cap has been explored, there is no clear cap on retail licenses in San Francisco. Rather, there is only a market cap, where retail businesses cannot be less than 600 feet apart from each other.

These factors, coupled with the idea that storefronts are "sexier" as a model (vs. distribution), means that if all social equity applicants acquire retail licenses, then they will find themselves competing in an already saturated market, thereby decreasing their likelihood of success.

Delays in Local Permitting Process

Social equity applicants must undergo a complex, multi-agency land-use and building application process (like all new San Francisco business owners). This process involves a social equity applicant paying for architectural plans, which must go through an approved process of multiple reviews by several agencies like the Department of Planning, Building, Police, Fire, Health, Public Works, etc.—none of which are required or incentivized to help speed through social equity applications. The San Francisco Office of

Cannabis, however, is mandated by the San Francisco Social Equity Program to prioritize and expedite social equity applications. As a result, it is common for social equity applicants to languish in the permitting process for years, leaving them struggling financially while they wait in limbo.

Our company waited three years before finally getting our permit to build. Over those three years, we still had to pay rent while waiting to be granted our building permit. Although we were able to negotiate some rent forgiveness and deferrals with the landlord, the majority of equity applicants were not. As a result, many social equity applicants were forced to give up their verified social equity status and property because they simply ran out of money. These same applicants went back to the black market, in deep debt and distrust of the government.

Lack of Resources

Most social equity applicants do not have "neighborhood associates turned legal and business advocates." Despite there being city and state resources and services available to social equity applicants, it's still a complicated and tedious process to learn and apply for grants and investment. The land-use and permitting process is extremely complicated, even for professionals. The allocation of funds to maintain the health of a business (for application fees, rent, tax withholding, etc.) is a matrix that experts are still trying to figure out as to what works best.

If this is difficult for even the savvy business person, it is extremely difficult for a social equity applicant.

Focus on Ownership

The San Francisco social equity program strictly focuses on providing social equity applicants a path to ownership via straight ownership of a business or being incubated by an incubator. However, not everyone who qualifies as a social equity applicant is capable, qualified, or even has the desire to be an owner upon initial verification as a social equity applicant.

The social equity program should not just be a program that gives equity applicants a path to ownership of a cannabis business. It should also be a program that requires or incentivizes currently operating cannabis operations to hire verified social equity applicants as employees and help them develop and thrive in the cannabis space.

How Do We Improve the Social Equity Process?

Saturation of Retail Licenses

Jurisdictions should implement a public awareness campaign informing communities of the diverse business models of the cannabis industry. Once more people are aware of the different operators along the supply chain, these folks will be more informed and better understand how they can fit in these non-retail models.

Concurrently, jurisdictions should incentivize social equity applicants interested in non-retail licenses by carving out license allocations and conducting public outreach campaigns informing them of the availability of these licenses.

Lastly, a city cap on retail licenses should be considered.

Delays in Local Permitting Process

All local agencies, not just the city's designated cannabis agency, must have a mandate to prioritize processing social equity applications. Furthermore, an official within each respective agency should

be assigned as the agency's "cannabis liaison" and be held accountable to abide by the mandate and minimize any procedural delays.

Lack of Resources

The city should increase its partnerships with service providers like CPAs, cannabis law firms, financial advisors, law schools, business schools, and social workers and make these service providers available to social equity applicants as soon as these folks become verified as social equity applicants. The services should not just be limited to legal advice but also include business advice, tax advice, life planning, and therapy.

The goal is for the city to give social equity applicants a pathway to ownership and guidance to succeed in the industry by helping them thrive in a corporate setting. Social equity applicants should also be taught how to best allocate their personal funds so that they are primed to achieve generational wealth.

Focus on Ownership

The city should create a rule (not just a recommendation) requiring a certain percentage of a business's workforce to be comprised of verified social equity applicants. To increase the pool of social equity applicants, the city should implement an outreach campaign, in partnership with job placement and recruiting centers, informing community members of the requirement that cannabis businesses must meet their quota of verified social equity employees.

Concurrently, with the financial support of the city, these job placement centers can hire consultants whose job is to train employees across all aspects of the cannabis supply chain (cultivation, manufacturing, distribution, testing, and retail). Over a set amount of sessions, these consultants will describe every aspect of each job across the supply chain and can provide light training to equity applicants who are interested in applying for the position.

No Roof for Your Reefer! Medical Cannabis Tenants Need Patient Protections in Federally Assisted Housing

By Andrea Steel and Lila Greiner

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One of the most fascinating aspects of cannabis law in America is that, despite marijuana being illegal at the federal level, almost every state allows for its legal use in some form or fashion. As of this writing, 36 states, Washington, DC, and four US territories have laws authorizing the medical use of cannabis. Additional states allow for low-THC medical cannabis, but these state programs are so restrictive that they are typically not considered legal medical states. Despite this overwhelming majority, families and individuals living in affordable housing across the nation risk losing their homes because the substance remains federally illegal, with no patient protections in place. Until this federal/state conflict is addressed, property owners—including public housing authorities (PHAs)—are left having to carefully navigate satisfying resident medical needs while remaining federally compliant.

Affordable housing comes in many forms, but the focus in this article is on federally assisted public housing and housing choice vouchers. Public housing and Section 8 housing are often used interchangeably, though they have different practical implications. Public housing refers to housing built and operated by PHAs using federal money and solely serving low-income residents with incomes not exceeding 80 percent of the area median income (AMI). Housing choice vouchers, often referred to as "Section 8," allow holders to choose any housing that meets the program requirements, as opposed to being limited only to subsidized public housing developments. Like public housing, eligibility is determined by a PHA based on income, but private landlords own and manage the voucher properties. Vouchers are given, to the extent available, to applicants whose incomes do not exceed 50 percent AMI, though most are reserved to those whose incomes do not exceed 30 percent AMI.

The Quality Housing and Work Responsibility Act of 1998 (QHWRA), which generally governs various aspects of HUD's public housing and tenant-based Section 8 housing assistance programs, including the housing choice voucher program, contains provisions applicable to the use of marijuana in federally subsidized affordable housing. For *applicants*, if the PHA or private landlord determines any member

of the household is an illegal user of a controlled substance, it will bar admission to the housing. For *current tenants*, there must be policies or lease provisions that allow for termination upon discovery a resident is illegally using a controlled substance or whose illegal use interferes with other residents' health, safety, or peaceful enjoyment. The provision barring *applicants* from accessing federally assisted housing is a strict ban, but for *residents already living there*, some level of discretion is allowed. These federal provisions govern, even in states where medical cannabis use is expressly permitted. This conflict can have a significant adverse effect on families in need of affordable housing where a member is legally using cannabis as medicine in accordance with a state medical program.

In one glaring case, Mary Cease, a Navy Veteran earning less than 30 percent of the AMI in Indiana County, Pennsylvania, was denied housing when she moved there in 2018 after escaping an abusive spouse. Ms. Cease had no prior criminal record and was transparent in her application with the local PHA about her doctor-authorized medical use of cannabis in the treatment of her post-traumatic stress disorder and chronic back pain. After years of litigation stemming from the PHA's refusal to approve her housing application, she was victorious in February 2021 when the Pennsylvania Commonwealth Court found the term "illegally using a controlled substance" to be ambiguous where the resident's use was prohibited by federal law but permitted under state law. *Cease v. Hous. Auth. of Indiana Cty.*, 247 A.3d 57, 61 (Pa. Commw. Ct.), *appeal denied*, 263 A.3d 243 (Pa. 2021). The court went on to reason, "the pertinent provisions of QHWRA are based on the obsolete and scientifically flawed premise [of the federal Controlled Substances Act] that marijuana 'has no currently accepted medical use in treatment in the United States' and that 'there is a lack of accepted safety for use of marijuana under medical supervision.'" *Id.* The Pennsylvania Supreme Court denied further appeal, though the housing authority could still appeal to the federal courts.

Although a state court in Pennsylvania may have ruled in favor of the tenant in the case of Ms. Cease, federal courts in California ruled against evicted resident Emma Nation in 2020 when they held she was required to exhaust all administrative remedies prior to pursuing court action, specifically that she should have petitioned the Drug Enforcement Administration to reclassify the federal control status of marijuana. *Nation v. Trump*, 818 F. App'x 678 (9th Cir. 2020).

One of the greatest injustices in this state/federal conflict is the creation of a second class of citizens when it comes to the legal use of cannabis. The wealthy do not need to access federal assistance for housing or other basic needs such as healthcare, freeing them to follow the state laws without fear of losing their homes. Meanwhile, the poor face severe penalties for using the same medicine, creating a new world of illegality that only applies to certain sects of our population. Under current laws, cannabis is functionally illegal for low-income individuals in federally assisted housing, even in states where it is legal for others. Citizens most in need cannot benefit from certain healthcare treatment options available to those with deeper pockets, despite such activities being sanctioned by medical professionals and state law.

Recognizing the great harm the state/federal cannabis law conflicts cause to the nation's most needy citizens, Rep. Eleanor Holmes-Norton (D-DC) has three times filed legislation that would amend the QHWRA to expressly prohibit landlords and PHAs from establishing policies barring admission to federal housing programs where a household member is using medical cannabis in compliance with state law. The proposed legislation would clear the ambiguity found in the Cease case by explicitly stating the term "illegal use of a controlled substance" does not include "the use, distribution, possession, sale, or manufacture of marihuana (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) that is in compliance with the law of the State in which such use, distribution, possession, sale, or manufacture takes place." H.R. 3212 — 117th Congress: Marijuana in Federally Assisted Housing Parity Act of 2021. This bill was introduced in May 2021 but has not yet been heard in committee. Prior

versions of the bill introduced in 2018 and 2019 similarly did not gain traction.

Perhaps 2022 will be the year we see some forward progress with cannabis laws at the federal level in some aspect, though I highly doubt comprehensive reform is likely any time soon. In the meantime, various actions can be taken to provide some semblance of protection for medical cannabis tenants in federally assisted housing:

- Individuals and companies or organizations can advocate for the passage of the Marijuana in Federally Assisted Housing Parity Act (and cannabis reform generally) by reaching out to their legislators in Congress
- PHAs can develop carefully crafted policies that aim to protect tenants and applicants using medical cannabis following state law, including the following:
  - o prohibit drug testing of applicants for cannabis or altogether
  - o exclude medical marijuana from applicant inquiries on drug use
  - o provide for reasonable restrictions on smokables to reduce potential complaints from other tenants, or even implement smoke-free housing policies
  - o allow for discretion with respect to discovery of cannabis use by existing tenants
  - o prohibit lease terminations based on the use of medication authorized in accordance with state law

States and local municipalities can put in place certain laws or ordinances that support tenant and applicant protections, including the following:

- prohibit landlords from making certain inquiries of housing applicants about participation in the state's medical cannabis program
- prohibit landlords from terminating tenancy based on the use of state-legal medication taken in accordance with state law

Any laws, ordinances, and policies would need to be meticulously drafted due to the inherent conflict between state and federal law. Pile on top of all of this, that most multifamily mortgage documents require the landlord to comply—and cause tenants to comply—with all federal, state, and local laws. Despite painstaking efforts to craft good policy, there are no guarantees such language would not be challenged in a court of law, and if so, what the outcome would be. However, the needle doesn't move on its own—some amount of risk must be taken to challenge the status quo and move the ball forward. When preparing these sorts of policies, seeking counsel from those experienced in both affordable housing and cannabis law is suggested to help navigate the various requirements and mitigate risk.

Navigating Hemp's Legal Headwinds in 2022

By Christopher Strunk

Christopher Strunk is a partner in Gordon Rees Scully Mansukhani LLP's Oakland office, where he is co-chair of its Cannabis, Hemp & CBD National Practice Group. He serves on ABA's TIPS Cannabis Committee and has served as its past Vice Chair of Programming.

Hemp has been cultivated and used for thousands of years. It was in widespread use in ancient China and Mesopotamia. Taking advantage of its sturdy fibers, ancient peoples made clothing, shoes, rope, and sailcloth. It was a key economic engine for pre and post-revolutionary America, and has even served key roles for the US military: on the deck of the *USS Constitution,* the oldest still-commissioned warship in the Navy, and during the "Hemp for Victory" campaign in World War II.

However, as part of the *cannabis sativa* family, hemp fell under the definition of "Marihuana" under the Marihuana Tax Act of 1937, 50 Stat. 551, making its cultivation and sale an economically problematic affair. When the Controlled Substances Act (CSA) made hemp a Schedule I controlled substance in 1970, there appeared to be no hope for the industry.

But after a sea change in public opinion on cannabis, and for the first time in many decades, hemp was removed from the Controlled Substances Act, 21 USC 802(16)(B)(ii), by the 2018 Farm Bill. A new statute, 7 USC 1639o, provided a detailed definition:

> *The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.*

The excitement of a "new" American cash crop, however, very quickly met harsh reality. Rulemaking at the federal level proceeded at a glacial pace, and the regulations that *were* promulgated (such as the testing regulations) were loudly criticized in public comments. And just when the industry felt it was starting to make some sense of the new regulations, the COVID-19 pandemic demolished fledgling businesses, disrupted business conditions, and de-prioritized hemp regulation as governments focused squarely on the public health emergency.

Hemp industry participants still face many unanswered questions in 2022: navigating changing state and international tetrahydrocannabinol (THC) standards, use of cannabidiol (CBD) in food products and supplements, and the means of getting one's products to market are just some of them. Further, states like California have moved forward with their own laws on hemp, in response to Federal paralysis on CBD, setting up conflicts with the Federal government even as Federal legislation moves forward. 2022 could see some pivotal developments for the industry.

THC Standards & Testing

Perhaps the most daunting task faced by the hemp business owner is ensuring that their hemp products meet the federal standards for THC content. Although it is often said that the 2018 Farm Bill "legalized" hemp, such a conclusion is a misconception. Any "hemp" with a greater than .3% delta-9 THC concentration by dry weight is "Marihuana," and federally *illegal* under the CSA—as are any products

derived from those plants.

While the .3% THC standard is "old news," the *testing* requirements to make that determination still generate confusion. For example, the United States Department of Agriculture's (USDA's) regulations technically require the use of Drug Enforcement Administration (DEA) approved laboratories to complete such testing, but due to the small number of labs currently in the program, delayed implementation of this requirement until January 1, 2023. Additionally, in promulgating their final rule, the time at which a grower must test was increased from 15 to 30 days before harvest, but many growers note that such timing still creates an undue hardship. Lastly, 7 CFR § 990.6 requires sampling of the flowering tops of the plants when those flowing tops are present. Growers, however, have expressed concern that USDA targets the most THC-rich part of the plant, and mandating testing of flowers thus artificially inflates "whole-plant" THC. To address this concern, the final regulations allow growers to request alternative testing methods—but growers must obtain *pre-approval* of such methods.

THC Standards and International Trade

Moreover, legal THC standards themselves differ internationally, even as they continue to change and evolve. While the United States has embraced a .3% delta-9 THC standard in the Farm Bill, the European Union had previously authorized only a .2%. A recent vote by the European Parliament increased the authorized THC level from .2 to .3% total THC in the Common Agricultural Policy (CAP), bringing it largely in line with the United States. But as some hemp business owners noted in 2018 Farm Bill regulatory comments published on January 19, 2021, in the *Federal Register,* the EU's use of *total* THC standards differs from computations using American delta-9 THC standards. Moreover, other hemp-producing countries (such as Uruguay in South America) have defined hemp more liberally, legalizing dry weight THC percentages as high as 1%. American hemp producers have argued that their hemp and hemp products—limited to the .3% standard—are less attractive on the international market. Lastly, the patchwork of international standards makes the import or export of hemp and hemp-derived products confusing at best and at worst could subject even the most diligent hemp business owner to a drug trafficking charge.

CBD, Food, and Supplements

Much to the chagrin of the hemp industry, the FDA has moved at a snail's pace to approve *any* meaningful use of CBD in food products or supplements in interstate commerce. More than two years after the passage of the 2018 Farm Bill, only hulled hemp seed, hemp seed protein powder, and hemp seed oil have been generally recognized as safe (GRAS) by FDA, which issued GRAS notices GRN 765m 771 and 778 as to each of these products. Critically, only trace amounts of naturally occurring CBD and THC are contained in these products.

The industry, along with several US states, has been getting impatient, setting up potential conflicts between the states and the federal government as states step in to fill the void. For example, on October 6, 2021, California Governor Gavin Newsom signed Assembly Bill 45 into law, which expressly recognized and regulated the use of CBD in beverages, supplements, and food products in the state. It did so by modifying California's Health & Safety Code (§§ 111920 et seq.) and Business and Professions Code (§ 26013.2). California's new laws do not consider products "adulterated" if they incorporate CBD and instead impose requirements on CBD-containing products such as registration with the state, rules on advertising and labeling, and taxation. California Health & Safety Code § 111921.5 also prohibits the use of industrial hemp in medical devices, prescription drugs, "processed smokable products," and alcoholic beverages. Notably, California's law appears to be in direct conflict with FDA's prohibition on CBD in food products and supplements.

A Federal Fix?

At the federal level, multiple bills have been introduced that could potentially remedy the issues facing the industry. Among the most significant is a bill from Senator Rand Paul (R-KY), S.1005, the HEMP act of 2021, which would change the legal definition of hemp from .3% THC by dry weight and increase it to 1% THC by dry weight. Others are aimed directly at the FDA's inaction on CBD. HR 6134, the CBD Product Safety & Standardization Act of 2021 was introduced by a bipartisan group of representatives including Kathleen Rice (D-NY), Angie Craig (D-MN), Morgan Griffith (R-VA), and Dan Crenshaw (R-TX). That bill would require the FDA to regulate CBD as a food additive. A similar Senate bill, the Hemp Access and Consumer Safety Act, seeks to do the same thing. But as in past years, whether there is sufficient momentum to carry these bills over the finish line in 2022 is an open question.

Conclusion

Hemp is a multi-*billion* dollar industry after just three years, notwithstanding regulatory and legal uncertainty and a devastating global pandemic. The only certainty about the industry is that the regulations will continue to change and develop. Having a grasp of these evolving issues will enable the industrial hemp business owner to remain flexible and quickly adapt to the changing legal landscape.

Ryan's Law—Legislation that Permits Access to Medical Cannabis for Terminally-Ill Patients

By Maureen West

Maureen West, JD is a previous Colorado Assistant Attorney General who represented over a dozen healthcare regulatory boards and now specializes in legal issues regarding plant-based therapeutics.

Although medical cannabis is legal in 36 states, the District of Columbia, and four US territories, it continues to remain illegal as a Schedule I drug under federal law. This federal illegality not only limits research and development of medical cannabis within the United States but also contributes to the lack of awareness among healthcare providers and patients about medical cannabis as a frontline treatment option or therapeutic recourse, creates a chilling effect on healthcare practitioners who might otherwise recommend it to their patients, and impedes access in healthcare facilities that might otherwise permit patient use.

Medical cannabis can benefit the terminally ill patient in several ways. One benefit of medical cannabis recognized by many healthcare providers is its ability to offer pain relief. In the case of terminally ill patients, morphine and fentanyl are frequently prescribed to help manage pain. However, a common side effect of these drugs is they typically cause patients to exist in a semi-comatose state. Medical cannabis can be used as an alternate or complementary treatment option to these medications, providing gentler side effects that allow terminally ill patients to stay awake and spend more of their remaining precious moments with family and friends.

Additional benefits of medical cannabis include its ability to increase appetite and reduce anxiety. Particularly for terminally ill patients, even a small meal or a bit of soup can help the patient be more comfortable. Anxiety experienced by terminally ill patients can be relieved at least for a short while by medical cannabis. Other important benefits of medical cannabis include its effectiveness in reducing nausea and vomiting.

Yet, despite these benefits, health care providers who want to recommend medical cannabis as a therapeutic for their terminally ill patients don't dare to because of the risk that their professional license will be sanctioned by a regulatory board. Unfortunately, many state medical and nursing board members who are the decisionmakers over professional licensing issues rely upon their subjective perception about medical cannabis rather than fact-based data derived from scientific research. Although lifting federal prohibitions on cannabis research would enable more research, plenty of international, credible, peer-reviewed research exists about the benefits of medical cannabis.

Healthcare facilities also have their hands tied because of current federal rules and regulations that prohibit the use of medical cannabis within a healthcare facility. This is particularly unfortunate for terminally ill patients who previously used medical cannabis in their homes with good results before being transferred to a healthcare facility.

One state has taken a stand on facilitating access to medical cannabis for terminally ill patients. It is hoped that other states will follow suit. As of January 1, 2022, the state of California created access to medical cannabis for terminally ill patients by enacting the Compassionate Access to Medical Cannabis

Act or "Ryan's Law." *See* Cal. Health & Safety Code § 1649¬1649.6. Truly good and meaningful legislation such as Ryan's Law is often triggered by human experiences and the desire to effectuate change. The story behind the law is that of Ryan Bartel, a former athlete and member of the US Coast Guard who was diagnosed with terminal pancreatic cancer. Having only weeks to live, Ryan expressed to his father that he wanted to discontinue the fentanyl prescribed for palliative relief because it was causing him to sleep. In response, Ryan's father, Jim Bartel, embarked on a mission to find a healthcare facility where Ryan would have access to medical cannabis. Naturally, Jim wanted his son to be as comfortable as possible. At the same time, he wanted to afford Ryan the opportunity to stay awake as much as possible during his final weeks. After several disappointing rejections from healthcare facilities, Jim succeeded in finding a facility that permitted Ryan's use of medical cannabis. This option made all of the difference for Ryan and his family and friends. During his final days, Ryan was able to be awake and communicative to the point where he was able to send text messages to his friends.

Ryan's Law is a straightforward piece of legislation. Its legislative intent is to support the ability of terminally-ill patients to safely use medical cannabis within specified "healthcare facilities," including acute care hospitals, special hospitals, skilled nursing facilities, congregate living health facilities, and hospice providers. State hospitals and chemical dependency recovery hospitals fall outside of the legislative definition of a "healthcare facility" and do not permit access to medical cannabis. Regarding how a patient qualifies under Ryan's Law, the term "terminally ill" is defined as a medical condition resulting in a prognosis of life of one year or less, if the disease follows its natural course.

Another important aspect of Ryan's Law is that it prohibits specified criminal penalties from being imposed on a patient or a patient's primary caregiver who possesses or cultivates cannabis for the personal medicinal purposes of the terminally-ill patient upon the written or oral recommendation or approval of a physician. Other criteria under Ryan's Law include the following:

- terminally-ill patients who want access to medical cannabis must provide to the healthcare facility either a copy of their medical marijuana card or written documentation that the use of medicinal cannabis is recommended by a physician;
- healthcare facilities can reasonably restrict the manner in which a patient stores and uses medical cannabis to ensure the safety of other patients, guests, and employees of the facility;
- healthcare facilities must prohibit smoking or vaping as methods of using medical cannabis;
- use of medical cannabis must be entered into a patient's medical records; and
- each healthcare facility must develop and disseminate written guidelines for the use of medical cannabis within the facility.

Given today's current political climate, it's heartwarming to find sensible legislation where legislators from both sides of the aisle demonstrated their ability to come together for the greater good. The first version of the bill, SB 405, passed unanimously until it was vetoed by Governor Newsom. The second version, passed 36-1 in the Senate and 71-1 in the Assembly. Ryan's father Jim Bartel, Cannabis Nurses Network's Heather Manus, RN, and Ken Sobel, Esq. were all directly involved and influential in the authorship, lobbying, and passage of Ryan's Law in California.

The time for medical cannabis to be recognized as a legitimate therapeutic for patient use has arrived. The need for sensible laws that don't place healthcare providers in jeopardy for recommending medical cannabis is long overdue. Ryan's Law is an important step in this direction by improving access to medical cannabis for terminally-ill patients. Lawyers, physicians, nurses, or anyone with a sincere desire to help enact legislation similar to Ryan's Law in their own state are invited to visit the Cannabis Nurses Network website at https://www.cannabisnursesnetwork.com.

Cannabis Coverage Issues

By Lisa L. Pittman

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Believe it or not, cannabis companies have been embroiled in insurance coverage cases for 20 years now. Sometimes the federal illegality of the business is the issue, despite the insurance company taking premiums for the activities, and other times it is the run-of-the-mill application of exclusions and endorsements that negate coverage. This article summarizes the issues with a survey of notable cases to date.

Both hemp and policy nerds can rejoice in this case. In *Bogard v. Cty. Mut. Ins. Co.*, No. 1:19-CV-00705-AA, 2021 WL 4269991, at *5 (D. Or. Sept. 20, 2021), a fire occurred in the home of the insured while he was manufacturing a hemp salve in Oregon in 2017. The insurer denied the claim based on the controlled substances exclusion because the total THC of one of the harvests was .381% and therefore marijuana. The court was faced with squaring Oregon hemp law before the 2018 Farm Bill with federal law, which had not yet distinguished between hemp and marijuana, with two different standards for measuring total THC in a substance involving two harvests. At issue was whether THCA should be included in the calculation. Testing from the 2017 harvest showed compliant levels of delta-9 THC, but .435% THCA using the Oregon regulation, and when multiplied by .877 and added to the calculation, the total THC became .381%. The 2018 Harvest delta-9 THC was .0365%, the THCA was .254%, resulting in a total THC of .259%. No lawyer likes to do math, so the court held that because the insurance policy did not reference Oregon's standards for total THC calculation, the simple, later-adopted U.S. Farm Bill definition of hemp as containing less than .3% THC by dry weight applied, and therefore the substance was hemp and not a controlled substance:

> The federal regulatory standards did not yet exist at the time of the loss or when Defendant denied Plaintiffs' claim and are not referenced or incorporated into the Policy. Rather, the Policy references only 21 U.S.C. §§ 811 and 812, and those statutes, by further reference to 7 U.S.C. § 1639o(1), define hemp as cannabis containing 0.3% or less "delta-9 tetrahydrocannabinol" by dry weight. By the strictest reading of the statutes' plain terms, this might exclude THCA from consideration entirely. At best, it is ambiguous about whether THCA should be considered. And if THCA is to be considered, the statutes themselves provide no standard for converting THCA to delta-9 THC by decarboxylation.

Id. at *5.

In *Am. Fam. Mut. Ins. Co., S.I. v. Big Bush Farms LLC*, the court evaluated whether there was a duty to defend an insured in a lawsuit alleging breach of contract, conversion, and unjust enrichment resulting from a failed business deal involving faulty seeds which caused a lower yield of industrial hemp. *See* No. 6:19-CV-1725-MK, 2020 WL 6038048, at *1 (D. Or. Apr. 7, 2020). The insurer refused to defend, citing the exclusion to the definition of "property damage" for "physical injury to marijuana or cannabis plants … even if legal in your state." The insurer argued that hemp is cannabis and therefore excluded. The insured cleverly pointed out that no physical damage to cannabis plants was alleged, rather, due to the low yield from the bad seeds, the plaintiff was deprived of the possession of the hemp and the resultant

harm from the "loss of use of tangible property," which is included in the definition of "property damage." Unfortunately, the court held that because the policy excludes coverage for physical injury to cannabis plants, the loss of use coverage for those plants was also excluded.

Are butane fires covered causes of loss? It depends on the policy, but in *Laber v. Nationwide Prop. & Cas. Ins. Co.*, the insurer successfully relied on a residential exclusion for "increased hazard," which was defined as any loss occurring "while a hazard is increased by a means within the control and knowledge of the insured." *See* No. 118CV00420MSMPAS, 2020 WL 555247, at *1 (D.R.I. Feb. 4, 2020). The court explained that the actions of the insured in manufacturing hash with butane in his home was an increase in hazard, thus the significant claim for destruction of three apartment buildings was denied.
In *Kinsale Ins. Co. v. JDBC Holdings, Inc.*, the insurer sought rescission of the insurance policy after a chemical fire resulting from hemp manufacturing occurred, due to several exclusions, one being the "procedural safeguard" endorsement concerning theft. *See* No. 3:20-CV-8, 2021 WL 2773002, at *1 (N.D.W. Va. Mar. 31, 2021). This endorsement provides that if certain protective equipment were not installed by the insured, the policy is terminated. The court disregarded this endorsement as inapplicable because it only pertained to theft. The insurer argued that coverage will not issue when there is a misrepresentation on the insurance application, which the insurer argued fell under the "concealment, misrepresentation, or fraud" exclusion. When the insured applied for coverage, they wrote the sprinklers were "being installed," when installation had not begun yet and still was not completed at the time of the fire. The court held that because the insured admitted the sprinklers were only being installed and the insurer accepted the coverage and took the premium, the insurer had a duty to pay the claim.

JDBC Holdings, Inc. also dealt with the pollution exclusion, which the insurer argued also barred coverage of the claim because the chemicals exuded from the fire constituted seepage of smoke from a hazardous substance. The court disagreed, holding smoke damage is a covered loss under the policy, and, to the extent this is ambiguous, it had to be resolved in favor of the insured. The court also admonished that, "an exclusion in a general business liability policy should not be so construed as to 'strip the insured of protection against risks incurred in the normal operation of his business,' especially when the insurer was aware of the nature of the insured's normal operations when the policy was sold." Throwing out multiple possible bases to deny coverage, even if not the one originally relied upon by the insurer, is extremely common.

Very similar facts and holding can also be found in the *Nationwide Mut. Fire Ins. Co. v. McDermott* case. *See* 603 F. App'x 374 (6th Cir. 2015). In that case, the court held that the failure to notify the insurance company of butane marijuana extraction in a house's basement, which later burned down due to that activity, voided the coverage because the insured knowingly omitted a material fact about a change in use of the policy as required by an endorsement. The court also referenced the increased hazard and intentional acts exclusions to deny coverage and held that the conversion of the basement into a marijuana extraction business created liability for the insurance carrier that it did not assume.

In *Barnett v. State Farm Gen. Ins. Co.*, 200 Cal. App. 4th 536, 539, 132 Cal. Rptr. 3d 742, 744 (2011), the insured sought coverage for marijuana plants seized and destroyed by police. The policy did not define "theft" or "stolen." But, the court held these terms have well-understood meanings. Coverage depended on the interpretation of the nature of the theft, and the court noted that theft must include an intent to steal the property. Because the insured could not show that the police intended to steal the marijuana, the court held no theft occurred. Moreover, the court held the insured was not entitled to get the marijuana back, especially once the insured was charged criminally in the matter for having too many plants.
In *Tracy v. USAA Cas. Ins. Co.*, a Hawaii caregiver sought coverage for stolen marijuana plants owner her homeowners' policy. *See Tracy v. USAA Cas. Ins. Co.*, No. CIV. 11-00487 LEK, 2012 WL 928186,

at *13 (D. Haw. Mar. 16, 2012). Though the court noted that her having too many plants might void coverage under state law and that the insured had an insurable interest in the plants, it concluded there was no coverage because marijuana is still a Schedule One, federally illegal plant, rendering the policy void against federal law and policy. The policy's exclusion stated there was no coverage for claims relating to the use, sale, manufacture, or delivery of marijuana.

In Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co., 163 F. Supp. 3d 821, 823 (D. Colo. 2016), the insured sought coverage following a nearby wildfire, contending the smoke had damaged mother plants, flower plants, veg plants, clones, and finished product. The insured believed the plants would be covered under "stock," meaning: "merchandise held in storage or for sale, raw materials, and in-process or finished goods." Because the defined term "raw material" was ambiguous under the policy, it was construed in favor of the insured here. However, the court ruled that the "growing crops" exclusion negated coverage. At issue were whether the various life cycles of plants were considered growing crops because the plants were potted rather than free-standing attached to the earth. The court held that growing crops include mother plants and clones.

In *Bowers v. Farmers Ins. Exch*., the insured sued its insurer for refusing to pay a claim under the landlord's insurance policy for mold damage caused by the destruction caused by a basement marijuana grower, of which the landlord was not aware. See *Bowers v. Farmers Ins. Exch*., 99 Wash. App. 41, 991 P.2d 734 (2000), as amended on reconsideration (Mar. 7, 2000). The court denied coverage on the basis that the tenant's actions in the basement constituted vandalism, which is an excluded loss in the policy, and that tenant's actions were the proximate cause of the loss.

This survey is but a smattering of the coverage issues presented by cannabis businesses. Other common exclusions are a violation of ordinance or law, contraband, outdoor plants, criminal acts, employee dishonesty, health hazard, vaping, fungus, RICO, intoxication. The exclusions discussed by the cases in this paper include controlled substances, cannabis/hemp/marijuana plants, procedural safeguards, increased hazard, intentional acts, concealment/misrepresentation/fraud, pollution, void against federal law/policy; sale/manufacture/delivery of marijuana, growing plants, vandalism, and mold. Some policies will contain endorsements or exclusions for certain products, like tea or coffee, for example, when those are common substances infused with hemp CBD. It is therefore necessary to comb every page of the policy to assess whether it is the right one for you – the insured will be held to have known what they agreed to in accepting the policy language in the insurance contract.

LEGISLATIVE UPDATE

Federal Regulation of Cannabis for Health and Safety: A Look Back and Forward

By Jessica Wasserman

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As a Washington, DC-based Food and Drug Administration (FDA) regulatory attorney, I have been interested in the developments that took place in 2021 regulating cannabis for health and safety. The Marijuana Opportunity Reinvestment and Expungement Act (MORE Act), first introduced in the House in 2019, did not address the regulation of cannabis products for health and safety, focusing instead on the important matters of decriminalization, social justice, and taxation. *See* https://bit.ly/3itEfqX. It has been exciting, therefore, to see two new bills in Congress in 2021 that tackled the complex problem of how to regulate cannabis products for health and safety.

The Cannabis Administration and Opportunity Act, put forward (not yet introduced) by three Senate Democrats, and the Mace Act, introduced in the House by Congresswoman Mace, received many comments and much media reaction, particularly on the new health and safety regulatory provisions. *See* https://bit.ly/3up0PXi and https://bit.ly/353Lwe0.

The first basic question for resolution in this area is which regulatory agency will have the lead in regulating cannabis products, with the candidates being either the FDA or the Treasury Alcohol and Tobacco Tax and Trade Bureau (TTB). *See* https://www.ttb.gov/. The Senate CAOA legislation gives the FDA the primary role in regulating cannabis products, and the Mace bill gives the primary role to TTB and the states. The Mace bill explicitly preserves state primacy for maintaining the existing state medical marijuana programs.

The FDA has jurisdiction over pharmaceuticals, medical devices (vapes and patches), food, dietary supplements, and cosmetics (topicals). The TTB has jurisdiction over alcohol products. A TTB regulatory approach is perceived as lighter because alcohol products are not subject to the strict regime of human health and safety validation generally required for FDA-regulated products.

The complexity of the regulatory issues for cannabis stems from the broad range of different cannabis products and the different laws and regulations applicable to a cannabis product depending on the product delivery form. There is agreement among stakeholders that pharmaceutical products such as Epidiolex (active ingredient is cannabis-derived CBD isolate) should go through the drug approval process at FDA. When it comes to edibles, including gummies, chocolates, tinctures, supplements, etc., it is not clear that TTB has the expertise to regulate these products, though the concern with FDA is that the agency would overburden the cannabis industry and stifle its development. The concern about FDA regulation stems in part from the inability of the FDA to provide a regulatory pathway for Cannabidiol (CBD) products, something the agency committed to three years ago. *See* https://bit.ly/3D4RbNr. Some stakeholders fear that FDA may be most comfortable with the full pharmaceutical drug approval process and not allocate resources to providing a pathway for other products.

Another overlay to the regulatory discussion is the role of product claims (statements on products such as

"promotes a good night's sleep" or "cures your hangover"). The FDA regulates products according to the use of the product and allows claims according to the category of the product and the substantiation of the claim. Different types of claims are allowed depending on whether the product is a pharmaceutical, a dietary supplement, or a food. Some stakeholders have asked whether FDA would allow products without claims to be legally on the market. For example, raw cannabis flower without claims should not be required to have FDA approval before being marketed. What claims will be legally allowed by the FDA is another complexity to be addressed.

In addition, the FDA regulates products according to dosage for drugs and serving size for foods and supplements. There has been considerable discussion about whether FDA might allow cannabis products to be legally marketed across several swim lanes—meaning pharmaceuticals, supplements, and foods could contain cannabis (perhaps at different levels). It is possible in theory, although extremely rare, for a single active "article" (molecule) to be approved as a pharmaceutical at a high dose and allowed in a food or supplement at a lower serving size. This has led to consideration of whether for cannabis a cannabinoid might be allowed in different products at differing safety limit levels.

There was hope once hemp-derived CBD was de-scheduled in the 2018 Farm Bill, that hemp-derived products could be a test case for how to regulate a cannabis product. *See* https://bit.ly/3ir4oqy. In 2021, however, the FDA closed the door on this possibility. At the end of 2021, the FDA refused to authorize two petitions filed by CBD companies, alleging that the products were not reviewable because CBD had already been approved as a pharmaceutical (Epidiolex) and that, in addition, the safety data was not adequate. *See* https://bit.ly/37JwNpy at (a)(1)(ff). This decision increased distrust of the FDA among stakeholders, who fear that as long as the FDA shuts the door on safety data, there will be no pathway or incentive for stakeholders to develop safety data for legal cannabinoid products. This will leave CBD in regulatory limbo and reduce confidence in the FDA as the appropriate regulator for cannabis products.

In 2021, there were also state-level regulatory developments that may impact the eventual federal regulation of cannabis products. At the state level, Oregon is issuing regulations that limit the level of THC allowed in CBD products, introducing the concept of "intoxication" as a factor in determining regulation. This concept could creep into federal regulations, creating another layer for regulatory consideration.

With the federal legislation unlikely to move forward in 2022, an election year, there is additional time to develop these regulatory approaches. Although admittedly complicated, the bottom line is that the cannabis plant is an established recreational product (like alcohol) and a promising pharmaceutical and wellness product. We will eventually figure out a way for all of these uses and sectors to thrive.

BOOK REVIEW

Contempt of Court (First Anchor Books Edition 2001)

Mark Curriden & Leroy Phillips, Jr., Reviewed by Jordan Howlette

Jordan Howlette is the managing attorney of JD Howlette Law, a civil litigation firm based in Washington, DC that focuses primarily on representing individuals and businesses involved in a variety of federal civil litigation matters, tax controversies, and general business disputes. Prior to establishing JD Howlette Law, Jordan worked as trial attorney in the Tax Division of the U.S. Department of Justice, where he successfully litigated dozens of civil tax cases and controversies on behalf of the United States in federal courts around the country. Jordan graduated cum laude from New England Law | Boston in 2016 and is licensed to practice law in Maryland, the District of Columbia, Florida, and Massachusetts. He is a veteran of the United States Army, and the immediate past co-chair of the ABA Tort Trial and Insurance Practice Section's Standing Committee on Diversity and Inclusion.

> W*hat can a [Black] lawyer know that a [W]hite lawyer does not? Do you think a [Black] lawyer could possibly be smarter or know the law better than a [W]hite lawyer?*
> —Hamilton County Criminal Court Judge Samuel D. McReynolds

In *Contempt of Court*, Mark Curriden and Leroy Phillips, Jr. introduce readers to a landmark 1909 Supreme Court case that completely changed the nation's criminal justice system. The case of *United States v. Shipp*, 214 U.S. 386 (1909), centers on the heartbreaking tale of Ed Johnson, an uneducated Black man living in the South who was wrongfully accused in 1906 of raping a young White woman in Chattanooga, Tennessee. In just 16 days following his politically motivated arrest, Johnson was convicted by an all-White jury in a trial that lacked all sense of fairness and justice.

After being sentenced by the Judge McReynolds to "hang by the neck until dead," two remarkable Black attorneys fought tirelessly to protect Johnson's rights to a fair trial by successfully petitioning the Supreme Court to intervene in the matter under the Fourteenth Amendment. Unfortunately, though, Johnson would never get his day before the High Court. His fate was sealed by a group of White vigilantes who felt that the federal government had no business or authority to interfere in the affairs of state court criminal matters. Aided and abetted by the local sheriff and the presiding trial court judge, Johnson's life came to a heartbreaking end after being brutally lynched by a bloodthirsty mob—a crime that resulted in no arrests.

> *It is apparent that a dangerous portion of the community seized with the awful thirst blood which only killing can quench, and that considerations of law and order were swept away in the overwhelming flood.... The persons who hung and shot this man were so impatient for his blood that they utterly disregarding the act of Congress as well as the order of [the Supreme Court].*
> —Chief Justice Melville Fuller, *United States v. Shipp*, 214 U.S. 386, 414-15 (1909).

Prior to *Contempt of Court*, Ed Johnson's story had never fully been told and the significance of his landmark Supreme Court case remained largely unexamined. This is somewhat surprising because *United States v. Shipp* was also the first and only criminal trial presided over by the Supreme Court, and it was the first time the justices were asked to sit as a jury in determining the fate of an individual. Moreover, *Shipp* established the Supreme Court's authority to prosecute individuals—including state officials—for willful violations of its orders, commonly referred to as contempt proceedings.

> *[Shipp's] significance has never been fully explained. Shipp was perhaps the first instance in which the Court demonstrated that the Fourteenth Amendment and the equal-protection clause have any substantive meaning to people of the African American race.*
> —Supreme Court Justice Thurgood Marshall.

This profoundly important book is a must read for all legal scholars and anyone interested in understanding how the Constitution serves to protect all of us. The book also provides a timely reminder of the unimaginable violence that African Americans endured throughout our history in the pursuit for freedom, equality, and justice.

DID YOU KNOW?

Marijuana, Cannabis—Don't Quit Reading Now! Why This Area of Law Will Likely Affect Your Practice

By Lisa J. Dickinson

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States are still in disarray as to what is legal, what is not legal, and what might become legal. This creates great difficulty for attorneys, especially those who practice across state lines or have multi-state clients. So, whether you are for or against the legalization of marijuana, cannabis, and related products – it may still affect you, your firm, and your practice. Of course, many ethical issues arise as well when dealing with this subject matter, so you need to be up to date on what your state bar has decided is allowed. For instance, in Washington state, an attorney may purchase, consume, or have an ownership interest in a cannabis business. This is not true in all states, especially neighboring Idaho, where marijuana is completely illegal, and people can still be stopped and arrested for even CBD products going through the state. You don't want to be an attorney who is caught in possession of marijuana in Idaho. Indian tribes are the same way! Although they are on federal land, some tribes have compacts with states as they are "sovereign nations" presumably allowing them to grow or sell retail marijuana to consumers. Other tribes still follow the strict federal laws to the letter of the law and have determined that marijuana is completely illegal on their reservation and that you may be terminated if you work for a tribe and test positive for marijuana, even if the state where you live says it's legal.

For firms who are considering making practice groups in this area, how do you proceed? For instance, if laws have passed to allow medical or retail sales, but the state bar has not explicitly updated its ethical rules to allow practice in this area, can you assist a client in applying for a marijuana license? How do you advise an ancillary business, such as an insurer, landlord, materials supplier, bank, or credit union on how to deal with these businesses? Can you help them form an LLC or corporation? The answer is "it depends." It depends on your state ethical rules and, frankly, your own firm's comfort level in dealing with what remains the potential stigma of practicing marijuana law. Some of your firm's other clients may find this distasteful. These are all considerations that must be made before determining whether to form a practice group or allow your firm attorneys to practice in this area. Many excellent attorneys who do practice in this area do not necessarily advertise that they do so. For instance, I have practiced business law and litigation pertaining to this subject matter since it became legal in Washington to do so but until recently have not even listed this practice area on my firm's website, LinkedIn, or other marketing channels. Some of your other clients may find it repugnant or offensive that you practice marijuana law.

Even while there is a trend in the legalization of marijuana products and derivatives, there is still a general stigma against attorneys practicing in this area – that they are not as competent, not ethical, or just downright dazed and confused. That said, there are certainly some newer, untrained attorneys who claim to practice in this area but can do little more than assist in applying for licensing and advise on the new marijuana laws in the state but are not well trained on other subjects such as contracts, insurance, entity formation, lease review, employee issues, partnership disputes, and financing, just to name a few. The experience I have had working in this arena is that there are excellent attorneys who choose to practice "marijuana law" whether they advertise as such or not. You may need an excellent mergers and acquisitions attorney, a securities attorney for accredited investor offerings, a general business attorney

to give entity and employment law advice, and a business litigator for partner disputes or other business disputes. Even though marijuana companies cannot apply for US trademarks at this time, there may come a time when it does become legal, so some attorneys have strategies as to how to best position a company if the law changes in this area. And some companies have had to defend litigation alleging that a marijuana company is violating someone else's trademark. These issues take more than a newbie, self-trained, dazed-and-confused attorney.

General employment lawyers also may encounter these issues. Does your employment manual still authorize pre-employment drug testing? What if an employee has a legal medical marijuana card? Can you fire someone for using medical marijuana? What about drug testing after an accident at work? What if they are fired for using marijuana or have a "positive test," but there is no evidence the employee was under the influence during working hours (a person can test positive after not having used it for a long time, unlike alcohol). Can the employee get unemployment compensation?

Others who practice in this area do work in the area of lobbying, regulatory matters, or perhaps even practice criminal law. There are still RICO cases, possession on federal lands, advocating for legislation and legalization, and many other aspects of the law that would be considered dealing with "marijuana law." Tax attorneys or government attorneys working for the IRS also touch on these issues under 280 E and other federal and state regulations. A general business practitioner needs to at least be aware of the taxation issues faced by marijuana businesses. These are just a few examples of how broad this practice area is and how it is not a small sliver of the law or a trend that will disappear. It is more probable than not that you will encounter a case touching on marijuana, cannabis, CBD, Delta-8, hemp, or paraphernalia, even if you practice another area of law.

Even if you are strictly a litigator or represent an insurer, you may need to know certain things about cannabis businesses. What if you want to sue one – can they file bankruptcy on your client? (No, but they can potentially file a receivership.) How can you collect on a judgment – is the company banked? Can you lien their assets if you are a lender? Is it better to file in state or federal court if you do not have an arbitration clause? What laws apply if you are an ancillary business doing business with a cannabis company, but cannabis is illegal in your state – does that make the contract unenforceable for illegality? Federal courts cannot enforce "illegal" contracts. For instance, does your circuit hold that a cannabis business contracting with a payment processing company in another state is unenforceable for illegality? There are examples of insurance cases where the court held it could not require an insurer to pay for the future use of medical marijuana expenses because doing so would violate the Controlled Substances Act. Another case held that an insurance company could not be required to pay for the replacement of marijuana plants.

What do you do if you are a landlord and drafting a lease for a marijuana company to do business out of your building? Are there things you should know? (Yes.) Is CBD legal or not? What is Delta-8 or 9? Is either one legal?

For a general practitioner who does not practice in this area, but it has now become legal (or will soon become legal in some manner) in your state, you should rely on those who have experience and knowledge in this business. I can say that there are some very fine TIPS lawyers and litigators in our newest general committee, the Cannabis Law and Policy Committee (CLPC) who you may contact and they would be happy to discuss these issues with you. Some new members of CLPC are also new to TIPS, so I encourage you to reach out and learn from them and share ideas on how your firm can also benefit from knowledge concerning this topic. Please also plan to attend the Business Litigation Committee's

Standalone CLE in Atlanta in March where the CLPC will have a session. We will be there, and at the Spring Conference in Baltimore, to answer any questions that you may have!

DID YOU KNOW?

Time for This Dad to "Leave"—The Power of Parental Leave

By Poorad Razavi

Poorad Razavi is a plaintiff attorney at Cohen Milstein, and a member of the firm's Complex Tort Litigation group, where he focuses his nationwide practice on catastrophic injury and wrongful death. cases.

The News

On August 10, 2020, I received what would become the greatest news of my life: my wife and I found out we were expecting our first child. As we began daydreaming about the new addition to our family, the realities of life also began setting in. Not only would we be contending with the unique challenges posed by the pandemic, but we also began to evaluate how two type-A professionals would deal with childcare.

My wife is a dentist, and the dental industry has historically struggled to provide meaningful "parental leave," as the practice inherently requires the doctors to physically be present to treat patients. Leave in the dental field is typically unpaid, with a strong encouragement (whether driven by patient care, finances, or other motivators) to return as promptly as possible.

Historically, the legal field also does not lay claim as a pioneer in promoting parental leave. Fortunately, there is a slow but steady shift towards recognizing the value of paid childcare leave in general. However, those gains tend to focus primarily, if not exclusively, on maternity leave.

In 2019, my firm introduced a new leave policy offering 10 weeks leave for all parents, in addition to medical recovery time for birth parents. As a first-time parent, I had no idea what this truly entailed. Moreover, as a first-time father, I only had a conceptual idea of what my role would even be during our child's early days. What was to ensue would change me not only as a lawyer but as a person altogether.

The Leave

Following the birth of our beautiful daughter, I quickly realized just how grueling those early days are. My wife and I both questioned how others, including our own parents, made it through without the benefit of having both parents on leave full time as we felt we were barely surviving each hour. As a first-time father, there are many new emotions that I encountered. However, it seems utterly unfair to compare them to what a mother or birth parent goes through. I did not have a body that had morphed and experienced the creation of new life within it. I did not have the natural, physiological, post-partum changes to tango with as I also juggled having to immediately use my own depleted body to feed a new child and cope with the emotions of wondering if I had done and continued to do everything possible to ensure the baby is well taken care of. Although I would, and will forever continue to, grasp with my own sense of "am I doing everything I can," it paled in comparison to what the birth parent must go through in continuing to give body and mind to the new baby without so much as a moment of reprieve.

As a result, the first remarkable benefit I recognized from my parental leave was my capacity to support my wife as she began her instant transition into motherhood. My ability to be there both physically and emotionally was enhanced by being able to unplug from work. There were times when I was quite

literally unable to feed myself, let alone allocate any bandwidth to handling work obligations. By having the ability to be on parental leave, I was able to commit myself wholly and completely to supporting my partner—a role that I am sure all partners would welcome if their industry permitted.

The greater profound byproduct of parental leave was my enhanced ability to bond with my daughter during that early phase. I had never changed a diaper or meaningfully supervised any babies in the past. But being free from work (and countless months of preparatory 'how to' researching involving a baby) allowed me to fully participate in the joy of taking care of my child. I happily changed every diaper I could; I (bottle) fed the baby whenever I could; I walked the halls of our home in the middle of the night to help our daughter sleep whenever I could; I did everything I could. In sum, by being unencumbered by the logistical and emotional toll that a lawyer's work takes, I was able to thankfully harness all my energy 24/7 into my wife and child.

This is not to say that I would have neglected them, or have been any 'less' of a parent, had I not been on leave. However, the demands of a newborn are relentless; there simply are not enough hours in a day to commit myself wholly to my child and wholly to my work during those early days. What outdated corporate practices refer to as "balancing" home- and work-life following the birth of a baby is really a rebranded label for "sacrificing."

Although I had always been able to intellectually understand the struggle of motherhood during the newborn phase, I was able to gain a new appreciation for it by being a direct participant in the 24/7 care and raising of our child. My wife and I have always had a strong relationship, and I remain confident that even absent any parental leave, I would have been there for her and our new daughter. And a lack of parental leave does not mean that someone would be unable to be a loving parent and partner. However, the leave provided a radically expanded opportunity to further explore those areas in a way that I simply would not have physically been able to if I had been forced to juggle the naturally taxing demands of work in the mix.

The Transition

My thoughts on this issue did not remain in the hypothetical. Despite my firm's generous leave policy, I was in the midst of a very contentious series of products liability and roadway defect cases in federal court, for which I was the lead attorney. Despite having effectuated a plan to seamlessly transition all my upcoming expert and corporate representative depositions around our due date, my daughter, quite selfishly, decided to be born weeks ahead of schedule. As I sat hunched over in the delivery room churning out last-minute briefings on my laptop, I knew that I would eventually have to get involved in some of the upcoming depositions as the burden would simply be too great to shift onto other lawyers who would have to catch up on over four years of litigation.

Therefore, several weeks after her birth, despite multiple genuine offers from other gracious partners at my firm to take over, I began preparing to take my first post-partum deposition. Fortunately, like many others, my firm had already adopted a work-from-home environment. As a result, the infrastructure was already in place to take a deposition quite literally feet away from my daughter's crib. However, as a new parent, I was truly saddened to realize how much effort we put in as a society to act as if our family life runs no interference with the 80 percent of our day we spend working. I chose to embrace my daughter's existence in my work life, rather than hiding it away. Over the next few weeks, I would virtually attend a variety of depositions, meetings with my experts, and other work matters, often with my daughter strapped sleeping to my chest. If my daughter cried during a meeting or deposition, I would acknowledge the disruption and move locations, but I made sure not to apologize for the natural overlap between

personal and professional worlds.

The preparation for the few hour blocks of time I spent handling depositions was exhausting. In addition to shifting a huge load onto my wife, it also made it very challenging for me. I was now juggling parental duties with work duties. In other words, I was able to experience a non-paternity leave existence during my leave. As we all know, taking a deposition from noon until 4:00 p.m. does mean simply carving out a four-hour block of time. In addition to the traditional preparation time, the day of the deposition (and oftentimes, days leading up to it) also involves the natural mental warmup and endless strategizing that naturally drains bandwidth away from being otherwise present in the moment with my family. It was during those times that I truly began to appreciate the immeasurable value of parental leave. Needless to say, this situation would likely have been even more taxing for the birth parent.

What was most revealing about the experience was the glimpse I got into how difficult those early days would be without parental leave. I also recognized the significance of how a company defines that leave. In other words, the leave is not meaningful if a company expects the parent to "make up" the work that is being missed. There must be a holistic team approach to this process where it is recognized and acknowledged that the leave time will result in work during that time not being performed. I can proudly proclaim that my firm wholly and explicitly acknowledged this mantra, which was a necessary stress reliever for me. As challenging as that period was, knowing that I truly could have asked my firm to cover even those few depositions is what relieved the stress. In other words, I was genuinely free to choose whether to handle any work during the leave from home.

Moreover, my firm's progressive view towards work from home allowed and continues to allow a remarkable relationship to develop between me and my daughter. Churning away crashworthiness briefs and strategizing about new airbag defect theories has taken on a new level of joy when coupled with the sound of my daughter's joyful squeals filling the house around me. Knowing that I am only steps away from her in the event of an emergency, or when she is ready to take her first step, has allowed me to remain focused on my work in a way that certainly feels different than if I am in the office. I made sure to take all efforts to ensure that my work product never suffered and, in fact, became more enhanced and efficient.

The freedom to work from home is particularly vital given my firm's international practice. Before the pandemic, I was traveling for extended periods for trial depositions to places like Ecuador in a mass chemical spraying case and Cambodia for a human trafficking case. Domestically, I was often traveling for my products liability cases to track down corporate representatives and other vital witnesses. However, the industry's adoption of Zoom depositions, coupled with the mutual trust between the firm and me to allow me the flexibility to work near my daughter during her formative years, was a crucial epilogue to this paternity leave policy.

All in all, the now two-year experiment of my firm entrusting its lawyers to have parental leave and to work from home, to challenge and change our entire industry, and ultimately our nation's culture, toward parenting, is one that I remain utterly proud of.

WHAT'S NEW AT TIPS

Developing a Remote Working Policy that Works for You

By Candace Chuck, Christine Forsythe, Loren Podwill, and Richard Williamson

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Though remote working has been around for a long time, its prevalence and acceptability certainly increased because of the pandemic. Going forward, however, each firm will need to decide whether remote working is going to be a permanent feature for its lawyers and staff. Here are some important factors lawyers and firms may want to consider in developing a remote working policy that fits their practices.

1. What do the lawyers want? Law firms need lawyers. Therefore, a critical factor for any firm to consider is whether its remote working policy is a good fit for the lawyers it has and the lawyers it wants to recruit. The pandemic has forced everyone to reevaluate where and how they want to work. For some, the comfort and flexibility of remote working has been liberating. Those lawyers may be reluctant to give up that freedom and go back to the office on a regular basis. For others, however, working from home is stifling and distracting. They may crave the personal interaction and energy that comes with working in a busy office. A set policy may attract one type of person while alienating another. Thus, before establishing any policy, it may be wise to communicate with existing lawyers and even prospective employees to determine whether they have a strong preference for working remotely versus working in-person. In addition, soliciting and implementing input from other members of your team may help them to feel invested in the ultimate decision.
2. What do the clients need and expect? Working from a lanai on the beach or a cabin in the woods may be an idyllic setting, but if it does not work for your clients, it will be a short-lived experience. If your clients have always been in different places, then remote working may save you and them time and money on travel. By contrast, if your clients are accustomed to regular, in-person meetings, they may be unhappy with being forced to communicate by phone or through a virtual platform. What you do for that client matters too. Exchanging drafts of documents electronically can be quick and efficient. But it may be better to huddle over a set of detailed construction plans with your client rather than trying to zoom and scroll on a computer screen. Likewise, examining physical evidence or participating in a site inspection will probably require you to leave the house. So, both what the client prefers and what the case demands may dictate the extent to which remote working is a feasible option for you and your practice.
3. What about the staff? Unless the entire firm is completely remote, someone will need to attend and maintain the firm's physical space. In addition, tasks like receiving mail, handling oversized or voluminous documents, preparing any hard copies of motions and appellate briefs, storing paper files and physical evidence, and maintaining infrastructure generally require someone to be in-person. Obviously, not everyone in a firm has the same role and responsibilities. Yet, requiring some members of your team to be physically present while allowing others to pick-and-choose when to appear can cause resentment and undermine firm morale. That may be unavoidable to some extent, but any remote working policy should evaluate the needs of your entire team and try to treat everyone fairly (even if not identically).

4. What is the best arrangement for the firm as a whole? Any work environment should not be an end in itself, but a means for lawyers to effectively serve their clients. Remote working may either foster or frustrate a productive work environment. For instance, sparing lawyers from long commutes may allow them more time to perform their work, while also affording additional personal time. At the same time, it is often easier to delegate work assignments and mentor new lawyers when partners and associates are in the office together. Moreover, in developing a remote working policy, you should consider how it may impact both short-term hiring and long-term retention. Flexibility with work preferences may be a great way to attract plenty of talent. If there is no cohesion within the firm, however, those new hires may leave just as easily as they came. Accordingly, before finalizing any policy, you should carefully assess whether it is really sustainable for your practice.

Lastly, it is important to remember that there is no one-size-fits-all solution. Client expectations, individual staff needs, the character of each firm's work, local norms, and office availability all weigh on whether remote working is a viable option. Nonetheless, these factors should help any firm assess and develop a long-term policy that hopefully lets you and your firm maximize the benefits of both remote and in-person work.

WHEN I WAS A NEW LAWYER

Daina Bray

Daina Bray is a Senior Research Scholar in the Law, Ethics & Animals Program, Yale Law School.

What inspired you to become a lawyer? And what did you do prior to becoming a lawyer?
From when I was a child, I have been concerned about the "underdog," whether that was a kid in my class being bullied, an animal being abused, or ecosystems being damaged. After graduating from college, where I studied international environmental issues, I worked for a year as an environmental reviewer of projects for the Federal Emergency Management Agency (FEMA). When a FEMA engineer would propose a disaster response project such as rebuilding a bridge, the project plan would come to our team to be checked for compliance with environmental laws, for example, to determine if endangered species were present or if the project was in a wetland. I was so impressed that the words of the drafters of the environmental protection laws determined whether and how the bridge would be built. Through this work, I saw first-hand the power of the law to create positive change in the world, and decided to go to law school.

How did you become involved with the ABA?
I joined as a law student and in my early years of practice relied on the ABA for continuing legal education content. The ABA really changed my life, though, seven years after I had graduated from law school. At that time, I was reconnecting with my passion for animal protection through volunteer work at my local shelter in Baton Rouge, but it had not occurred to me that I could focus my legal career on animals. I received an ABA email about a meeting of the TIPS Animal Law Committee at the 2012 Midyear Meeting in New Orleans. "Animal law," I thought in amazement, "people do that?" I made the drive to New Orleans and never looked back, eventually serving as chair of the Animal Law Committee and—as a direct result of the animal law learning and networking opportunities available in TIPS—got my first job in the field in 2014.

What is the benefit of a new lawyer becoming active with the ABA?
The continuing legal education, writing, speaking, and networking opportunities offered by the ABA for new lawyers are unparalleled. I came to the ABA to develop my legal skills, and have stayed for that reason, but also for the friendships. Getting to know talented lawyers from all over the country and world who are committed to public service and to bettering the profession is a deeply rewarding experience.

What early career mistakes did you make and what did you learn from them?
Like many lawyers, I have perfectionist tendencies. Early in my career I did not reflect on or understand how perfectionism was damaging my quality of life and work. I felt every mistake very deeply and lived in fear of not living up to my own or others' standards. As I have progressed in my career, I have become more aware of when I am holding myself to unreasonable standards and have worked on accepting mistakes and seeing them as a natural part of life and as the learning opportunities that they are. I also now spend time on mindfulness and on extending compassion to myself, which helps me bring my best to others and to my work.

What challenges you the most?
Choosing which projects to spend time on! I am fortunate to work in animal law, which aligns with my

spirit and my longstanding desire to protect animals from what humans visit on them, but it means that I am constantly aware of many more useful animal law projects than I have time to work on. Keeping a reasonable balance of projects is a constant challenge for me.

What gives you the most satisfaction?
Being a part of professional communities is deeply meaningful for me, whether that is the community of animal lawyers or the family of TIPS. The physical separation caused by the COVID-19 pandemic has made me appreciate the importance of relationships with colleagues even more, and I am looking forward to being together again soon.

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