PHOTO BY GEORGE FULTON

Changing Times

Cannabis Law in South Carolina and How to Avoid the Ethics Minefield

By Walter F. Harris III

History of cannabis laws in the United States

Historically, cannabis has a long and storied presence throughout our country's development. Until the 20th century, cannabis was legal to grow and consume.[1] Listed in the United States pharmacopoeia based on medicinal values in 1850, cannabis use for medicinal, recreational and spiritual purposes has been recognized for providing a multitude of medical benefits.[2] This changed, however, after the Mexican Revolution in 1910, when newly arrived Mexican immigrants introduced American culture to the recreational, non-medicinal use of "marihuana."[3] What followed was a singular mission by the Federal Bureau of Narcotics to focus the government's attention on the new "scourge" facing the nation as a result of these immigrants.[4] The results propagated by movies such as Reefer Madness (1936) and sensationally exploited by the newspapers of the day, set the stage for early marijuana prohibition and the states quickly followed the federal government's lead. By the end of 1937, 46 out of 48 states had officially classified cannabis as a narcotic similar to morphine, heroin and cocaine.[5] This led Congress to enact the Marihuana Tax Act of 1937[6] ("the Act"). The Act stipulated that users of cannabis, whether defined for industrial and medical purposes, had to register and pay a tax of $100 per ounce. Those failing to pay the appropriate tax faced criminal charges for tax evasion, not the actual use of the plant. Because the Tenth Amendment prevents the federal government from directing states to enact specific legislation or require state officials to enforce federal law,[7] Congress elected to utilize a tax as an indirect method to prohibit the production, use and distribution of cannabis within the states. It was the fastest way to begin this indirect "prohibition" nationwide. Congress knew that it was easier to layer the law with taxes and paperwork that would serve to deter all users of marijuana for any purpose. Moreover, it was easier

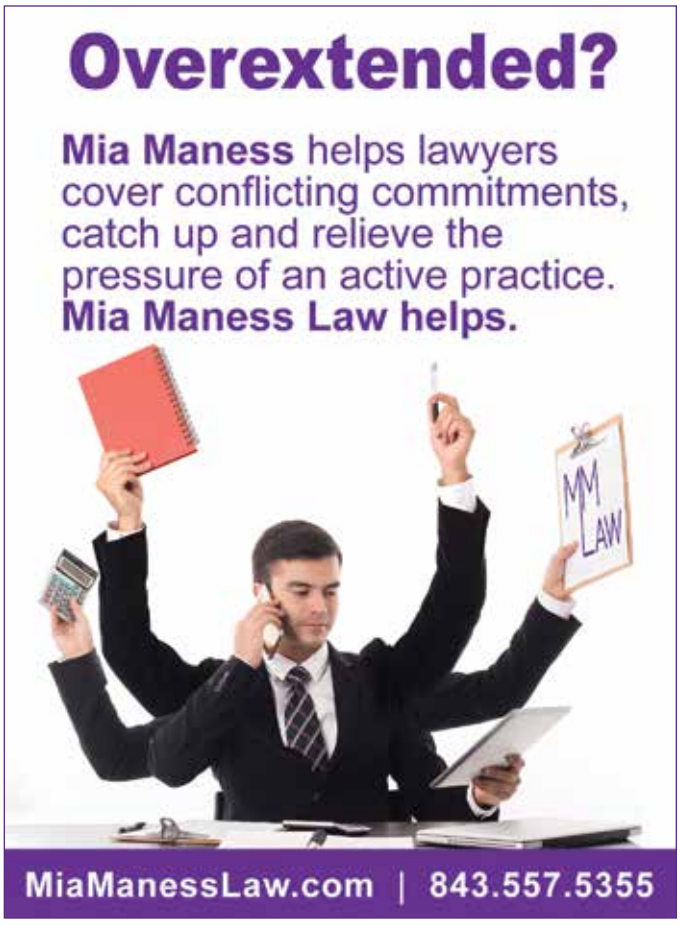
to prove tax evasion than to prove criminal use. Anyone found in violation of the Act was subject to extreme fines and up to five years imprisonment.[8]

Over time, the United States has continuously categorized cannabis as a dangerous drug. Ultimately, this culminated in the inclusion of cannabis in the federal Controlled Substance Act of 1970[9] ("CSA"), which replaced the Marihuana Tax Act. The CSA is the key federal policy under which marijuana is regulated.[10] It was borne ostensibly out of the self-indulgent excesses of the 1960s. When President Richard Nixon took office in 1969, he urged Congress to "get tough on drugs."[11] The CSA divided controlled substances into five "schedules," ranging from Schedule I, the most dangerous, to Schedule V, the least dangerous. Marijuana was listed as a Schedule I drug under the CSA, meaning (1) it has "high potential for abuse";[12] (2) it "has no currently accepted medical use in treatment in the United States";[13] and (3) there is a lack of accepted safety for its use under medical supervision.[14] It joined heroin, LSD, ecstasy, methaqualone (Quaalude) and peyote on this list.[15] Surprisingly, cocaine and methamphetamine—highly addictive drugs with a long history of recreational use—are listed alongside Adderall and Ritalin as a Schedule II drugs, meaning they have an "accepted medical use."[16]

Since cannabis is regulated at the federal level as a Schedule I drug, no doctor can prescribe it under federal law because it purportedly serves no "legitimate medical purpose."[17] States that have legalized marijuana have attempted to shield medical professionals from liability by omitting the use of the word "prescribed," which is in direct conflict with the CSA. Instead, these states convey a doctor's intent with verbiage such as, "recommendation" or "certification." But still, if the federal government was so inclined, it could repeal a doctor or pharmacist's Drug Enforcement Administration ("DEA'") registration, exclude them from participating in the Medicare program, cause them to lose their assets, and in the most extreme cases, send them to prison.[18] Indeed, under federal law, "knowingly, or intentionally… manufactur[ing], distribut[ing], or dispens[ing], a controlled substance" such as marijuana carries a penalty of up to life imprisonment.[19] Today the CSA still serves as the federal drug policy under which all controlled substances including marijuana are regulated. The federal government can impose substantial criminal *and* civil penalties for violation of the Act.[20] Because the Supremacy Clause of the Constitution mandates that federal law supersedes all state laws to the contrary, marijuana is still effectively illegal throughout the country.

Dichotomy between federal and state Law

So how does a Schedule I drug banned under federal law find itself now legal under state law in those states that allow medical or recreational use? The answer is complex.



James Madison, the father of modern federalism, posited that our government occupied a "middle ground between a consolidated or unitary form – one in which the general government possessed complete control over the component units – and the confederal form, wherein the constituent units retained their sovereignty."[21] As such, the theory of cooperative federalism is described as "a partnership between the States and the Federal Government, animated by a shared objective."[22] While the Supremacy Clause under the preemption doctrine is thought by many to be "the supreme law of the land" negating conflicting state laws,[23] the Tenth Amendment's anti-commandeering doctrine creates an external restraint on congressional power with regard to the states.[24] It is this restraint that is at issue today with respect to marijuana regulation.

In *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court held that "although states are free to cooperate in the enforcement of federal law if they wish to do so, *state apparatuses cannot be conscripted into the service of federal policy as such commands are fundamentally incapable with our constitutional system of dual sovereignty*." (Emphasis added.) Following this ruling, some states enacted legislation addressing medicinal use of marijuana, and a few other states enacted legislation allowing recreational use. The bellwether state of Colorado became the first state in the Union (followed by Washington State in 2012) to vote overwhelmingly to legalize recreational use of marijuana. This created a direct confrontation and the potential for a serious showdown between the states and the federal government while testing the historical perspective of the doctrine of federalism. In 2013, the Obama administration responded to this rapidly moving legal landscape with the Cole Memorandum. This Memorandum created a hands-off approach by the Department of Justice for prosecution of marijuana offenses for those medical and recreational enterprises that were in full compliance with their respective state laws.[25] The Memorandum specified that the department was not creating a new legal defense for people who may have violated the CSA. Instead, the Memorandum was intended to guide prosecutors on where to train their scarce investigative resources.[26] This was quite a departure from the historical zealousness with which the federal government normally addressed marijuana law enforcement efforts.

Real protection from the Justice Department for states in their efforts to legalize marijuana came about on May 30, 2014 when the Rohrbacher-Farr Amendment (now, Rohrbacher-Blumenauer) prohibited the Justice Department from spending funds to interfere with the enactment of state medical cannabis laws. However, in *U.S. v. Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039 (2015), the federal government challenged this amendment by seeking a permanent injunction against the defendant, a longtime California medical marijuana dispensary, enjoining them from distributing marijuana. But in denying injunctive relief and finding for the plaintiff, the court upheld the amendment and concluded that it expressly prohibited the DOJ from expending any funds to prevent California (and 32 other states) from "implementing its own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[27]

The Rohrbacher-Farr Amendment and current case law creates some protection for state efforts to legalize medical cannabis. This protection does not, however, change the overall legal status of cannabis under the federal law. Instead, it offers protection that is limited in scope and duration. The Rohrbacher Amendment must be renewed every fiscal year, which lends to its instability. Since 2014, Congress has renewed the amendment 14 times, the latest renewal being in the March 2018 federal spending bill. However, Attorney General Jeff Sessions rescinded the Cole Memorandum in January of 2018, once again setting the stage for potential conflict if the amendment is not renewed during the next term of Congress. This, in turn, has renewed interest in Congress to begin to tackle the federal-state divide on marijuana laws in the upcoming session of Congress.

Law of cannabis in South Carolina

Not surprisingly, South Carolina, like most of the South, has historically taken a dim view with respect to medical marijuana legalization, and thus the legislature's efforts in this field are limited and highly restrictive. However, medical science has progressed and the views of South Carolina residents looking for a safe alternative to opioids have changed over time. According to a 2016 Winthrop poll, 78% of South Carolina residents approve of marijuana for medicinal purposes. Studies have revealed that marijuana may be used to treat a host of illnesses including gout, tetanus, convulsions, uterine hemorrhage, and rheumatism.[28] Initially, a small group of motivated and concerned parents in South Carolina began looking for some type of relief for their children's rare and severe forms of refractory epilepsy, a condition that does not respond to traditional medicines. These parents found anecdotally that cannabidiol (CBD), the non-psychoactive chemical in cannabis, was able to lessen—if not outright stop—their children's frequent seizures.[29] In fact, the U.S. Food & Drug Administration recently approved the first CBD-based drug extracted from the marijuana plant for children suffering from this debilitating illness.[30] With this knowledge, these parents sought to legalize CBD in South Carolina, thereby opening the door in 2014 for the first of many legislative steps toward potential legalized medical marijuana. Named "Julian's Law" for the child whose plight brought upon these efforts, in 2014 the South Carolina legislature passed, and Governor Nikki Haley signed, S.1035 (Act. No. 221 of 2014) into law. The Act created a narrow exemption

under South Carolina law for the possession and use of CBD from the criminal definition of marijuana in our code, albeit in a very narrow application, allowing for no more than .09% THC (delta-9-Tetrahydracannibinol, the chief psychoactive component of cannabis) and at least 15% CBD for cannabis oil derived from marijuana. The only persons that were allowed to take advantage of this exemption were children and adults diagnosed with Dravet syndrome, Lennox-Gastaut syndrome, or any refractory epilepsy disorders, which is a very narrow patient base.

Since the passage of this CBD exemption from Article 3 of the South Carolina Code, CBD oils and products are now readily available on a retail basis in South Carolina in seeming contravention of the specific legal requirements of Julian's Law. The reasoning is that CBD falls under a convoluted legal grey area due partly to the passage of the 2014 Farm Bill (discussed below), a bill that recognizes hemp as falling outside the CSA, and which has been taken a step further by a recent DEA directive[31] that seemingly agrees that CBD oil is outside the reach of the CSA:

> Products and materials that are made from the cannabis plant and which fall outside the CSA definition of marijuana (such as sterilized seeds, oil or cake made from the seeds, and mature stalks) are not controlled under the CSA. Such products may accordingly be sold and otherwise distributed throughout the United States without restriction under the CSA or its implementing regulations. The mere presence of cannabinoids is not itself dispositive as to whether a substance is within the scope of the CSA.

With no threat of prosecution by the federal government now, and in line with the developing state legislative efforts on hemp, CBD products are available throughout South Carolina.

Also in 2014, the South Carolina Senate passed S.839, the South Carolina Hemp Law, which reclassified cannabis possessing less than 0.3% THC as an industrial crop rather than a controlled substance and opened the door for cultivation "for a wide variety of uses, including twine, rope, paper, construction materials, carpeting and clothing, and has the potential for use as cellulosic ethanol biofuel." In 2017, this law was further expanded in scope when the South Carolina House passed, and Governor Henry McMaster signed into law, H.3559 (Act 37 of 2017), which expanded the definition of industrial hemp products to include cannabinoids (CBD) and created the Industrial Hemp Program through which under a strict registration and vetting process, South Carolina farmers can apply for a limited number of permits to grow hemp for both industrial use and human consumption.

These efforts by the South Carolina legislature are being mirrored federally under the pending Agricultural Improvement Act of 2018 wherein the U.S. Senate, and partially sponsored by Senator Mitch McConnell (R-KY), will give states and Indian tribes the opportunity to "have primary regulatory authority" over the production of hemp with that state or on tribal land by submitting a control plan to the secretary of Agriculture for approval. This is a major step for the federal government as it seeks to legalize cannabis with a THC content under .03% under federal law for industrial use, from textiles to paper to plastic alternatives giving credence to the arguments at the federal level that there are further benefits when it comes to the cannabis plant.

Moreover, a push from both constituents and certain legislators has moved South Carolina toward the next step in this measured march of recognizing the benefits of cannabis with possible full legalization of medical marijuana in 2019. In the last session of the General Assembly, the House introduced H.3521 and the Senate introduced S.212. These companion bills were both labeled "The South Carolina Compassionate Care Act." S.212 was favorably reported out of the Senate Medical Affairs Subcommittee on March 29, 2018, and in the House, H.3521 was favorably reported out of the Medical, Military, Public and Municipal Affairs Subcommittee on May 5, 2018. These bills would have allowed medical marijuana that included both THC (psychoactive) and CBD (non-psychoactive) properties for patients suffering from a host of serious ailments. Both bills also contained strict limitations on marijuana use, including an express ban on smoking medical marijuana. While these companion pieces of legislation ultimately died when the General Assembly adjourned sine die in June, nothing prevents these bills from being refiled when the General Assembly assembles in January 2019. It is widely anticipated that 2019 will be the year of eventual passage.

Attorney ethics minefield

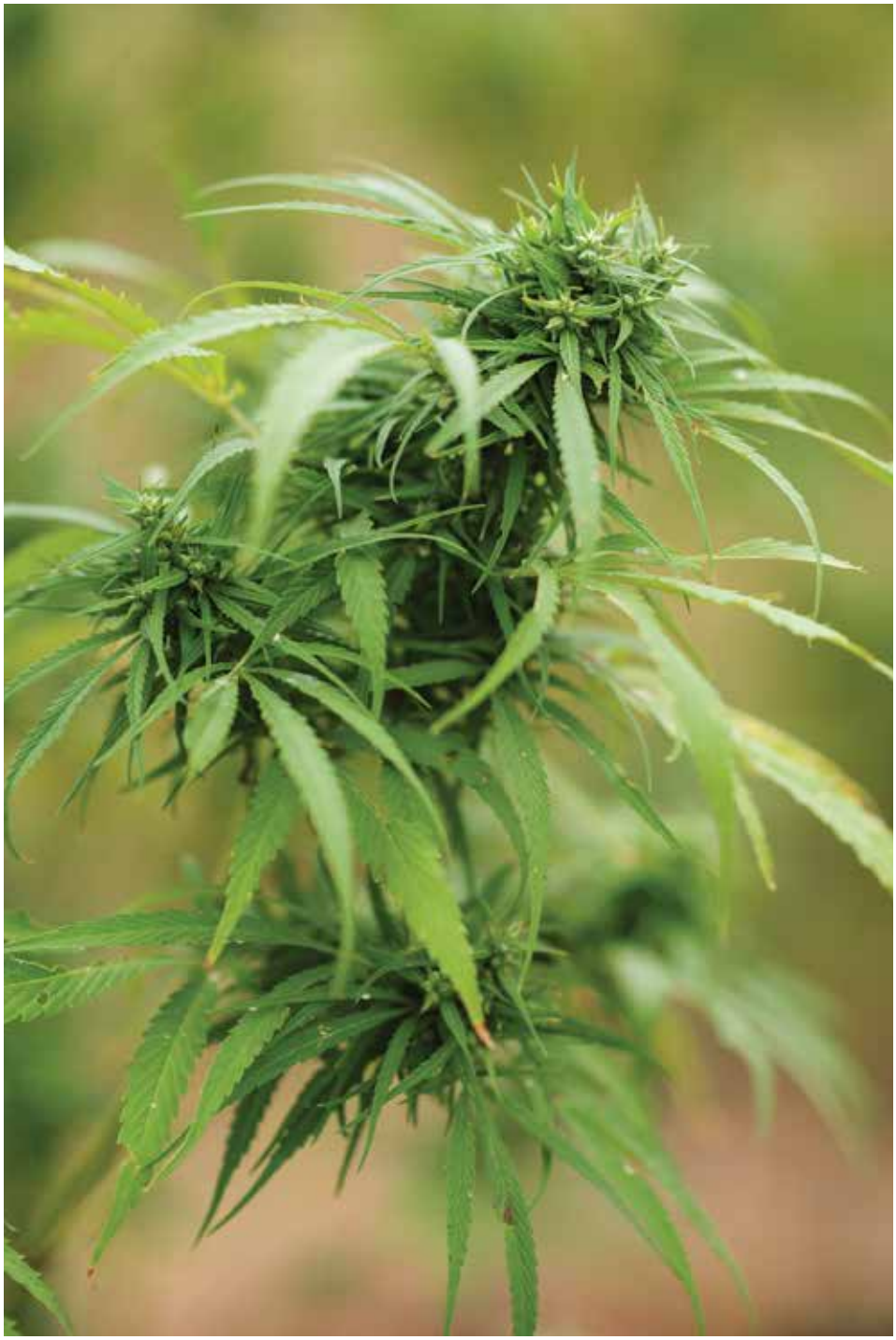
The realization that the General Assembly may pass a medical marijuana bill in the 2019 session

has led some individuals to inquire about the interest and feasibility of setting up businesses related to our state's medical marijuana initiatives. This raises some serious ethical considerations for the practicing attorney, and care should be given before dispensing advice.

States issue licenses to attorneys and set ethical standards to which attorneys practicing within the state must adhere. Most states have incorporated the ABA Model Rules of Professional Conduct into their own ethics rules, which define the standards, behaviors and conduct under which attorneys must operate. Attorneys engaging in the practice of law with respect to medical marijuana activities could potentially run afoul of these rules. ABA Model Rule of Professional Conduct 1.2 (d): Rule 1.29(d) provides:

> A Lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposes course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope or meaning or application of the law.[32]

Potential clients may include businesses that would cultivate, manufacture or sell medical marijuana; or perhaps clients that help these businesses to operate such as doctors, lawyers, real estate professionals, and third party vendors. The role of a South Carolina lawyer would be conceivably twofold: (1) providing legal advice and instruction as to the law of medical marijuana within the parameters of state laws; and (2) providing actual legal assistance in any transactional services to the support, establishment and/or operation of a medical marijuana business. Either scenario is fraught with potential legal peril for the lawyer. As discussed earlier, the term "legal marijuana" does not exist under the CSA. There are neither exceptions nor registration available with the DEA for any



purpose when it comes to marijuana. So where exactly is the legal minefield created? Take for example, an attorney helps guide a client through the state regulatory and licensing laws in assisting the client to open a state-sanctioned medical marijuana dispensary. While the attorney provides a necessary and valuable legal service to the client, he or she at the same time is violating state ethics laws by actively assisting the client in breaking federal drug laws in setting up the business. Not to mention committing potential legal malpractice under the rules. Under ABA Model Rule of Professional Conduct 8.4 (a)(b),

> [i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;[33]

Most attorney malpractice insurance policies contain clauses excluding criminal acts. Thus, if an attorney failed to provide proper legal advice to a marijuana business client about federal marijuana law and that client suffered damages and sued the lawyer for malpractice, the malpractice carrier may attempt to deny coverage under the criminal acts exclusion.

So does an attorney show a client the door when the discussion of opening a medical marijuana dispensary arises? Not necessarily. When presented with these questions from a client, attorneys are unlikely to create personal liability if the legal services are limited to solely legal advice. Lawyers acting in the role of counselor and merely providing a client with an overview of federal cannabis law has fulfilled their duty of advising the client as to the legal consequences of any proposed client action. It would be wise for the lawyer to inform the client of the severity of potential federal criminal prosecution as well as explain state law and the conflicting issues between the two competing government entities. However, the lawyer leaves their safe area and enters the minefield when the lawyer crosses the threshold from teaching and counseling the client to active participation by handling the legal transactions to set up and operate the business. Conceivably, the lawyer has now aided and abetted an illegal drug enterprise under federal law,[34] leading to possible criminal charges.

So how do attorneys in states that have legalized marijuana, whether medical or recreational, address this conflict? As we see in Rule 1.2(d), an attorney may not assist a client in pursuing acts that violate established law. However, states with marijuana laws on the books in contravention of the CSA have drawn different conclusions on whether an attorney's actions violate ethics rules. For instance, in Washington, the state supreme court encountered difficulty addressing this ethical dilemma when reviewing proposed changes to state ethic rules seeking to make clear that attorneys will not violate ethics rules or suffer sanction or disbarment solely because the attorney engaged in conduct allowed under Washington state law but barred by federal law.[35] The state's Office of Disciplinary Counsel adopted a similar position by announcing that the state "does not intend to discipline lawyers who in good faith advise or assist clients or personally engage in conduct that is in strict compliance with [the state's marijuana laws] and its implementing regulations."[36] Washington finally responded to this predicament by adding a new comment to RPC Rule 1.2:

> Under Paragraph (d), a lawyer may counsel a client regarding Washington's marijuana laws and may assist a client in conduct that the lawyer reasonably believes is permitted by those laws. If Washington law conflicts with federal or tribal law, the lawyer shall also advise the client regarding the related federal or tribal law and policy.[37]

However, as seen in Washington and other states that have permissive state marijuana laws, there is still no bright line test as to the limits that an attorney may go in advising clients and when this legal assistance crosses the line from legal to illegal conduct under federal law. As the above rule shows, it creates further confusion as it leaves up to the lawyer subjectively to determine what they "believe" is permitted by statute. Not a ringing endorsement for offering counsel in this field since the opinions and beliefs of one attorney varies so differently from another thereby creating potential significant legal peril to the unwary.

Conclusion

At the present time, offering any advice or counsel to clients regarding medical marijuana should be kept to a recitation of controlling federal and state criminal law, proposed anticipated changes in state law with regard to medical

marijuana, and a brief explanation of the concept of preemption and what that entails in this discussion. Once South Carolina passes a medical marijuana law, it would be advisable to still hold fast to offering the bare minimum of legal advice in this field. Anything of an active, transactional nature in providing legal direction crosses the line into violation of federal law and possibly aiding and abetting a client in the commission of a crime. Only until the South Carolina Supreme Court seeks to interpret and amend the applicable Rules of Professional Conduct to address this issue can an attorney then have some type of assurances that the actions being undertaken are at least blessed by the controlling state judiciary. However, the issue of the CSA and the designation of marijuana as an illegal Schedule I drug is still a serious concern, and until that important issue is addressed by legislative action, it still will raise second thoughts by all attorneys if representation in this field should be avoided altogether.

Walter F. Harris, III is the principal of Harris Law Firm, LLC on Daniel Island.

Endnotes

[1] Erwin Chemerinsky, Jolene Forman, Allen Hopper, & Sam Kamin, *Cooperative Federalism and Marijuana Regulations*, 62 UCLA L. Rev. 74, 81 (2015).
[2] *See* D. Mark Anderson, Benjamin Hanson & Daniel I. Rees, *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & ECON 333, 335 (2013).
[3] *Id.*
[4] *See* MARTIN A. LEE, SMOKE SIGNALS: A SOCIAL HISTORY OF MARIJUANA – MEDICAL, RECREATIONAL AND SCIENTIFIC 48 (Simon & Schuster 2013).
[5] Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PENN STATE LAW REV. 333, 338 (2014).
[6] Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970).
[7] *See* U.S. CONST. amend. X.
[8] Marijuana Tax Act s.12.
[9] Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012)).
[10] *Id.*
[11] Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 426 (2011) ("When President Nixon took office in 1969, he saw this prevalent marijuana use by the nation's youth as causing a moral decay in American society.").
[12] 21 U.S.C. § 812 (b)(1)(A)(1994).
[13] *Id.* § 812 (b)(1)(B).
[14] *Id.* § 812 (b)(1)(C).
[15] Drug Enforcement Administration, Drug Schedules, available at https://www.dea.gov/drug-scheduling (last visited October 16, 2018).
[16] *Id.*; 21 U.S.C. § 812(b)(2)(B) (1994).
[17] 21 C.F.R. §1306.04 (2014).
[18] *See* 21 U.S.C. § 824(a); 42 U.S.C. § 1320a-7.
[19] 21 U.S.C. § 841(a).
[20] *See generally* 21 U.S.C. § 841-65.
[21] George W. Carey, In Defense of the Constitution, revised and expanded edition (Indianapolis: Liberty Fund, 1995).
[22] *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).
[23] U.S. CONST., art VI, cl. 2.
[24] *See Printz v. United States*, 521 U.S. 898 (1997) (holding that although states are free to cooperate in the enforcement of federal law if they wish to do so, state apparatuses cannot be conscripted into the service of federal policy as such commands are fundamentally incapable with our constitutional system of dual sovereignty).
[25] Memorandum from James M. Cole, Deputy Att'y Gen. (Aug. 29, 2013), is available at https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.
[26] *Id.*
[27] *Marin Alliance*, 139 F.Supp.3d. at 1040 (quoting the 2015 Appropriations Act).
[28] Rosalie Liccardo Pacula *et al.*, *State Medical Marijuana Laws: Understanding the Laws and their Limitations*, 23 J. PUB. HEALTH & SAFETY 413, 415 (2002).
[29] Bethany Halford, CBD: Medicine from marijuana, Volume 96, Issue 30, Chemical & Engineering News (July 22, 2018).
[30] *Id.*
[31] Drug Enforcement Administration, *DEA Directive Regarding the Presence of Cannabinoids in Products and Materials Made From the Cannabis Plant* (May 22, 2018), available at https://www.deadiversion.usdoj.gov/schedules/marijuana/dea_internal_directive_cannabinoids_05222018.html.
[32] Model Rules of Prof'l Conduct R. 1.2(d); *See also* Rule 1.2(d), RPC, Rule 407, SCACR.
[33] Model Rules of Prof'l Conduct R. 8.4(a)(b); *See also* Rule 8.4, RPC, Rule 407, SCACR.
[34] *See United States v. DePace*, 120 F.3d 233 (11th Cir. 1997).
[35] Debra Cassen Weis, American Bar Journal, *Can Lawyers Ethically Smoke Pot in States Where it is Legal? One Bar Groups Seeks 'Yes' Answer* (Oct. 15, 203), http://www.abajournal.com/news/article/can_lawyers_ethically_smoke_pot_in_states_where_it_is_legal_one_bar_group/.
[36] Letter from Douglas J. Ende, Chief Disciplinary Counsel, Wash. State Bar Ass'n to Charles W. Johnson, Assoc. Chief Justice & Rules Comm. Chairman, Wash. Supreme Court (October 24, 2013).
[37] Washington Rules of Prof'l Conduct R. 1.2 cmt. 18.