REPRESENTING CANNABIS OPERATORS

By Whitney Hodges

Cannabis laws are complex and constantly evolving. While federal law, including the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Controlled Substances Act" or "CSA"), still prohibits cannabis-related activities within the State's borders, several largely progressive laws in California permit the possession, cultivation, transportation and distribution of cannabis. Some of these laws are the first of their kind.

These state laws, collectively referred to as the "Cannabis Laws," include: (i) Compassionate Use Act of 1996 ("CUA"); (ii) Medical Marijuana Program Act; (iii) Medical Cannabis Regulation and Safety Act; (iv) certain provisions of the California Uniform Controlled Substances Act; (v) Control, Regulate and Tax Adult Use of Marijuana Act ("AUMA"); (vii) Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA").

In addition to the blend of federal prohibitions and the myriad state authorizations, California has afforded local governments discretion to further regulate cannabis production and distribution for both medical and nonmedical (also known as recreational or adult) uses. California's early authorization of medical cannabis use did not preempt or limit local regulation related to cannabis activities. AUMA propelled the principle of preserving "local control," and soon thereafter MAUCRSA retained the doctrine. Interpretation of the Cannabis Laws continues to evolve as local governments experiment with various approaches, including licensing schemes and outright bans. The effects of the burgeoning cannabis industry are far-reaching, and have already impacted the legal community. To this end, it is beneficial to ensure clients are advised of the following facts.

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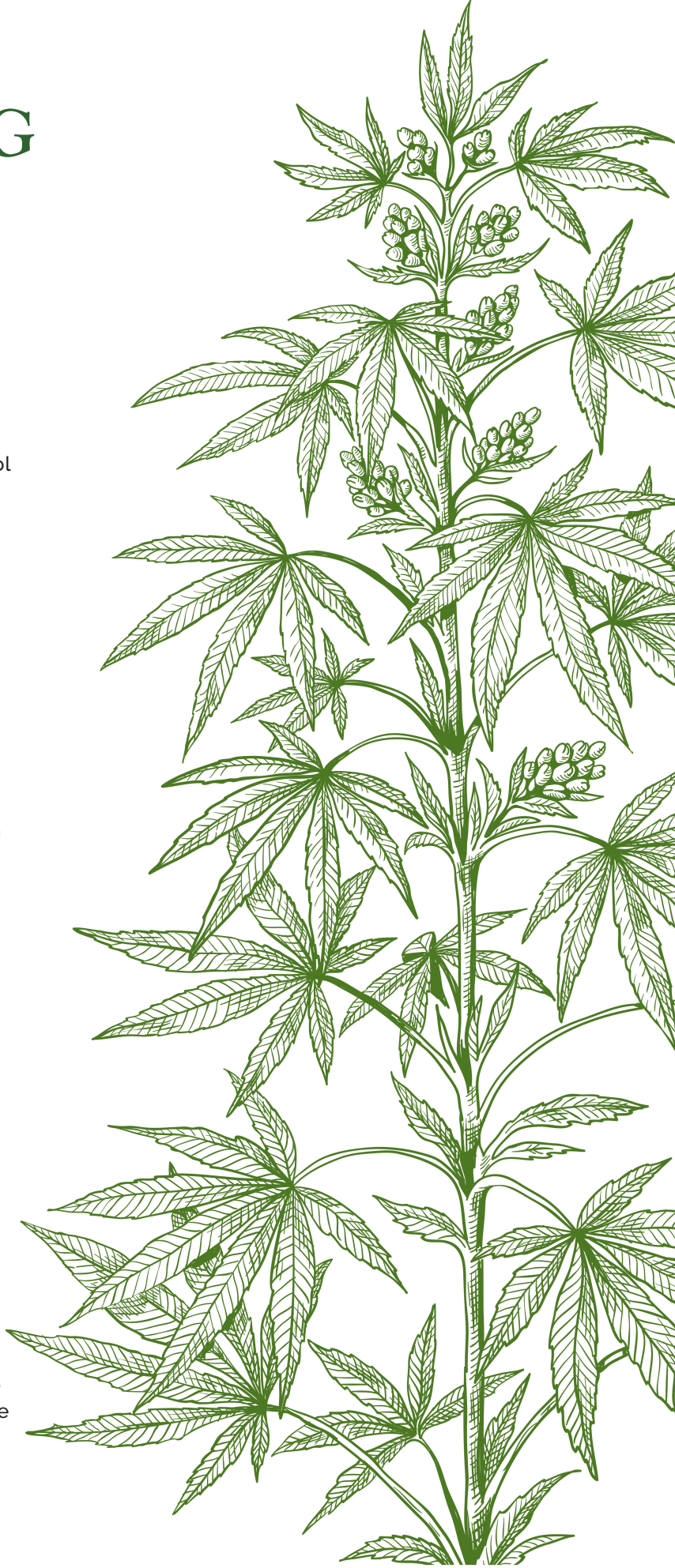

In *Gonzalez v. Raich* (2005) 545 U.S. 1, the U.S. Supreme Court held that intrastate cultivation and use of cannabis under the CUA did not place the defendants in that case beyond the CSA's reach, because Congress's plenary commerce power extends to those activities. In another case, *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, the U.S. Supreme Court held that the CSA did not authorize an implied defense to its penal provisions based on medical necessity, even where a state strictly controlled access to medical cannabis. At this point in time, the federal CSA and California's MAUCRSA exist side by side and inherently conflict. The cultivation, distribution and consumption of cannabis in accordance with California's cannabis laws necessarily violate federal law to the contrary.

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Thus, a client should be aware that the law firm is not providing any advice on any illegal activities related to the possession, growth, distribution or sale of cannabis. Rather, the engagement is limited to advising the client on the validity, scope and meaning of state and local laws, including as they apply to private placements and investment terms, and to the extent such state and local laws conflict with federal or tribal law. Moreover, with the present uncertainty of the laws and enforcement policies concerning cannabis, there is the risk that any agreements with persons or entities that are cultivating, distributing, possessing or using cannabis may be deemed unenforceable.

Additionally, there are potential issues under the two main money laundering statutes 18 U.S.C. § 1956 and § 1957. Section 1956 is the primary money laundering statute. It makes it a crime for anyone to conduct a financial transaction when they know that the money comes from specified illegal activity (including revenue from cannabis sales) and the person either intends to promote the illegal activity, helps to evade taxes or knows that the transaction is designed to conceal the source of funds. Arguably, there is a requirement that must have the "intent to promote the carrying on of specified unlawful activity." However, under Section 1957, it is a crime to engage in the same financial transactions Section 1956 criminalizes, but it removes the intent requirement and adds a requirement that the transaction be for greater than $10,000.

It's possible that the attorney-client privilege may be lost because of the "crime-fraud exception" and that our communications may then be discoverable by law enforcement or other persons not a party to the engagement.

All in all, it is crucial to keep these laws and potential issues in mind when representing cannabis operators and cannabis-related service providers.

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