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Practice Area Portrait

High Expectations: Business Keeps Heating Up in Cannabis Law Area

It's an easy legal profession trend to identify.

As the fourth quarter of 2018 unfolds, cannabis law contains all the indicators of what makes a law practice area hot: An infusion of money, growing consumer demand, an industry bursting with talent, strong technology components, heavy regulatory complexity and, most of all, legislative changes that open up commerce, or in this case, legalize commerce. As state after state pass laws making marijuana legal, business heats up quickly and demand for attorneys skilled in cannabis law—which requires expertise in employment, environmental, state regulatory, financing, and other issues—moves along at an equally brisk pace.

Just how quickly? The cannabis industry already finds itself in the midst of consolidation, with deep-pocket interests swooping in and snatching up smaller businesses. Also, the expectations for rapid industry growth keep rising.

“I see a lot of clients getting acquired,” says Erin Carlstrom, a land use attorney with legal experience in the cannabis industry as well as in local government as a city council member and the former vice mayor of Santa Rosa, CA. She leads the cannabis law group at Napa-based Dickenson, Peatman & Fogarty, which also has an office in Santa Rosa. “Huge investments are coming; there is more awareness with lots of people who have lots of money.”

Of course, usually it takes years and years—sometimes decades—for merger fever to strike an economic sector. Not with pot.

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“You’d think there would be the normal cycle of the industry growing with lots of players and then, eventually, the bigger players would roll up the weaker ones,” says Mark Heyl, the chair of San Jose-based Hopkins & Carley’s corporate practice and its M&A practice group, who also leads its cannabis industry group. “But that’s happening quickly and all at once. The legalization caused this sea change.” California legalized recreational use of marijuana at the start of this year

while medical marijuana has been legal for more than two decades.

San Jose and other cities in San Francisco’s South Bay region are shaping up to be ideal markets for a robust cannabis economy to take off. “Since legalization, you’ve got Silicon Valley money flowing in, business acumen, technology and strategic thinking; it’s an economic mecca,” Heyl says. “With consolidation of the industry, the survivors will be the ones that are able to run sophisticated businesses, raise money and follow the rules.”

Of course other areas in the Golden State are also seeing a lot of entrepreneurial activity. “We do a lot of work helping people get their permit,” Carlstrom says.

Those cannabis businesses run into a wide variety of processes that must be navigated to obtain retail and other permits. It all depends on the local regulations. “The process is layered with regulations,” Carlstrom says. “It can be very complicated and it’s also very much in flux. In some communities, it’s easy to obtain a permit. But for a permit for retail activity in Santa Rosa, the process involves a Herculean list [of regulatory steps].”

Compliance and Employment Issues

In Nevada, attorneys at McDonald Carano, which has offices in Las Vegas and Reno, have been serving clients in the marijuana business for several years (medical pot has been legal since 2000 and recreational since January 2017). But now the firm’s launching an official cannabis law practice group, with a web page live online this fall. Laura Jacobson leads the group and seems positioned well to help clients in this area, with experience as both a labor and employment attorney and a commercial litigator.

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Cannabis-Law Issues

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“We’re quite active helping businesses with employment law and compliance issues, building out their agreements with contractors, and counseling on a lot of licensing matters,” says Jacobson, who was recently named to the *National Law Journal* 2018 Cannabis Law Trail Blazer List. “It’s been a constant swirl of licensing compliance matters, with a new round of licensing opening this month [September] and again next year.”

While Jacobson hasn’t had to draw on her litigation skills yet, clients are keeping her busy on the employment front. For one thing, employees at dispensaries enjoy the product. “They tend to be young and tend to be folks who imbibe,” she says. “While it’s often difficult to find good people at a lot of workplaces, it’s even harder in the marijuana industry to hire good, responsible people who are also passionate about marijuana.”

Indeed, the dispensary jobs do require responsibility, clear thinking, and attention to detail because one minor misstep often carries major ramifications. “Nevada is so heavily regulated that a small employee mistake can result in huge fines with severe consequences regarding your license to conduct a marijuana business,” Jacobson explains. “For example, if you don’t put a particular label on a package before it leaves the store, that’s potentially a huge problem because the state could fine you or suspend or revoke your license.”

Hopkins only recently launched its cannabis team after looking at possible entry into the area when marijuana in California was only legal for medical purposes. “We looked at the practice 10 years ago and didn’t feel comfortable getting into it; it was very much the Wild, Wild West,” Heyl says.

One thing that made it so “wild” was the widespread abuse of medical marijuana use, including the permissiveness of doctors to hand out medical use cards. “The funniest quote I heard about this was from James Cole [an attorney, not at Hopkins, and a national leader in the fight for legal weed at the federal level],” Heyl says. “He said that if you were to go to a doctor and say, ‘Doctor, every time I take a breath in I feel like I have to breathe back out.’ The doctor would say, ‘Oh, you need some cannabis then. Here’s a card.’”

But as the movement for recreational-use legality moved forward, Hopkins & Carley leaders took another look at entering the cannabis law arena. “Chuck Reed, the former mayor of San Jose [and a Hopkins special counsel], was instrumental in rolling out the cannabis regs,” Heyl says. “He understood that this is truly happening, and said, ‘Let’s get in front of it.’ He was supportive of it. I thought, if Chuck wants us in cannabis law, then it does make sense.”

The firm now has about 10 attorneys practicing in the cannabis group, which is in its inaugural year.

Federal Impediments

Although states are increasingly legalizing pot, the federal ban places unfriendly business complexities on the industry. One major problem centers on the legal framework requiring banks to be federally funded by the FDIC, which means, in large measure, marijuana businesses can’t use banks so cannabis is a cash-operated business. That presents several obstacles.

“For the businesses,” McDonald’s Jacobson says, “it’s the cash problem. There’s no banking, which makes it hard to pay your employees, attorneys and taxes. Federal illegality makes it hard to set up the proper relationships between employees and independent contractors and get them paid. It makes it difficult to

withhold federal taxes and employment taxes. It's tricky to navigate.”

Naturally, working through these and other dynamics require legal counsel and law firms are jumping on the opportunities. “More and more law firms, including larger ones, are willing to get into this area,” Heyl says. “They have clients with lots of money that are investing – and more people are recognizing that the federal government isn't prosecuting so as this happens there's less and less fear.”

Companies in the wine and alcoholic beverage markets seem to recognize an alignment with the cannabis industry. “There's considerable interest in this space and so much commonality between the wine and alcoholic beverage industries and cannabis businesses,” says Carlstrom, noting that Dickenson represents many wine- and alcohol-related companies. “Many of our clients in those spaces are looking to transfer or expand into cannabis too.”

As law firms continue to dip—or even plunge—into the cannabis waters, they'll need to hire lawyers, and finding good talent in this area isn't always easy. Dickenson just hired a new associate with both corporate and cannabis law experience and wants to recruit another. “We're looking for someone with a

litigation background combined with experience in the cannabis area, and that's hard to find,” Carlstrom says.

When asked what she would advise young lawyers who might see career opportunities in the field of law, Jacobson says they'd be prudent to develop an expansive skill set. “In this state I would recommend a more holistic practice and not focusing exclusively on licensing or regulations,” she says. “The nature of this industry touches on many areas of law. I would encourage them to approach it from a legal compliance and business perspective but also look at the government affairs angle.”

One thing's for certain. Unlike many of their older peers, most, of course not all, younger attorneys don't reject the idea of legal cannabis and therefore are more open to making a career in this fast-emerging area.

“I'm a Millennial, an elderly Millennial,” Carlstrom says. “So to me legalization has always made absolute sense. And for people of my generation, it's never been a question of whether it should be regulated and taxed. It's an area of law that's very intriguing. I've been at the center of that vortex, and, as a professional, it's been amazing.” ■

– Steven T. Taylor