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Estate Planning for Cannabis Business Owners: An Introduction

Bridget J. Crawford & Jonathan G. Blattmachr***

As more states legalize cannabis sales, estate planners may increasingly be called upon to advise clients with interests in cannabis-related businesses. This essay seeks to assist estate planners in two ways. First, it aims to raise general awareness of cannabis business owners' unique concerns. Second, the essay provides an overview of some of the fundamental issues about which cannabis business owners are likely to seek estate planning advice: business formation matters, wealth transfers, the ability of trusts to own cannabis-related businesses, and gift, estate, and income tax considerations.

In most states that permit legal cannabis sales, there is limited (or no) guidance to provide answers to many basic questions about wealth transfers involving cannabis businesses. At the federal level, while there is a clear prohibition on income tax deductions by cannabis businesses, the gift and estate tax rules are entirely silent on most basic matters. With the introductory information contained in this essay, forward-thinking estate planners may be better equipped to advise clients about how much is still unknown about the legal landscape for cannabis business owners and to follow future developments in this burgeoning area of law.

I. INTRODUCTION

Legal cannabis is big business. In the United States in 2020, sales of legal cannabis exceeded \$17.5 billion; experts project that the market will grow to over \$41 billion by 2026.¹ In over forty states as well as the District of Columbia, some form of cannabis may be sold and used le-

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¹ See Will Yakowicz, *U.S. Cannabis Sales Hit Record \$17.5 Billion as Americans Consume More Marijuana Than Ever Before*, FORBES (Mar. 3, 2021, 3:43 PM), <https://www.forbes.com/sites/willyakowicz/2021/03/03/us-cannabis-sales-hit-record-175-billion-as-americans-consume-more-marijuana-than-ever-before/?sh=ED620162bcf7> [<https://perma.cc/UVJ2-FAEJ>]; see also *Global Cannabis Sales Exceeded \$21 Billion in 2020; BDSA Teams Up with Canaccord Genuity to Discuss the Latest Outlook*, BDSA (Mar. 5,

gally.² Generally speaking, permissive states tend to fall into one of three categories, typically based on the product's intended purpose: (1) jurisdictions that permit medicinal use only; (2) jurisdictions that permit adult use; or (3) jurisdictions that disallow either medicinal or adult use of cannabis itself, but permit the use of cannabis-derived products containing either cannabidiol (also known as CBD, a hemp derivative) or low levels of tetrahydrocannabinol (also known as THC, the psychoactive compound found in the dried flowers and leaves of the cannabis plant most commonly associated with "getting high").³

The trend toward cannabis legalization in the United States began in 1996 with California's enactment of medicinal cannabis legislation.⁴ In 2012, voters in Colorado and Washington approved adult-use laws by ballot initiatives.⁵ The state law landscape for legal cannabis continues to evolve in the present day.⁶ To be sure, many of the state law changes track transformation in public opinion. According to a study by the Pew Research Center, more than two-thirds of adults surveyed in 2019 in the United States said that cannabis should be legal, up from twelve percent in 1969.⁷ For state lawmakers, it is difficult to ignore the millions of dollars in revenue that legal cannabis transactions can generate in the form of sales or *ad valorem* excise taxes on cannabis products, licensing fees and taxes paid by legal businesses operating in the state, and individual income taxes paid by employees of those businesses.⁸

2021, 3:14 PM), <https://blog.bdsa.com/cannabis-sales-in-2020> [https://perma.cc/A8HJ-U5GC] (projecting growth in U.S. legal cannabis market to reach \$41.2 billion in 2026).

² See *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEG. (Aug. 23, 2021), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [https://perma.cc/5WXJ-86MP] (providing snapshot of state cannabis laws as of June 2021).

³ See Peter Grinspoon, *Cannabidiol (CBD)-What We Know and What We Don't*, HARV. HEALTH PUBL'G (Apr. 15, 2020), <https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-dont-2018082414476> [https://perma.cc/9Q4N-EVFZ] (describing the difference between cannabidiol and cannabis); *What is Marijuana?*, CDC, <https://www.cdc.gov/marijuana/faqs/what-is-marijuana.html> (Mar. 8, 2018) [https://perma.cc/3DJ2-9MAD] (describing THC and CBD).

⁴ See CAL. HEALTH & SAFETY CODE § 11362.5 (1996) (also referred to as California's Compassionate Use Act of 1996).

⁵ See COLO. CONST. art. XVIII, amend. 64, § 16(1) (ballot initiative approved by voters); see 2012 Wash. Sess. Laws 1 (ballot initiative approved by voters).

⁶ See NAT'L CONF. OF STATE LEG., *supra* note 2.

⁷ See Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization> [https://perma.cc/2FKT-G2FX].

⁸ The Tax Policy Foundation estimates that actual excise revenue generated by sales of adult use marijuana in 2020 ranged from approximately \$9.7 million in Michigan to \$474.1 million in California. See Ulrik Boesen, *Several States Considering Legal Recreational Marijuana*, TAX FOUND. (Jan. 13, 2021), <https://taxfoundation.org/recreational-marijuana-tax-revenue-by-state> [https://perma.cc/8Z64-ZPSJ].

As the legal cannabis industry continues to expand, clients increasingly will turn to estate planners for advice related to their cannabis business interests. At the outset, it is important to distinguish between “plant-touching” and “no-touch” cannabis businesses.⁹ The former are highly regulated by the states in which they are legal and typically involve the cultivation, processing, or dispensing of cannabis.¹⁰ The latter are suppliers of fertilizer, real estate, and consulting services, for example; the operators of “no-touch” businesses have no contact with the plant itself, and thus mostly avoid the heaviest regulations.¹¹

This essay provides forward-thinking estate planning professionals with an introduction to four areas of particular relevance for owners of plant-touching cannabis businesses: (1) choice-of-entity concerns when starting a cannabis business; (2) state law limitations on the lifetime or deathtime transfers of either (or both) cannabis licenses and beneficial interests in legal cannabis businesses; (3) whether a trust may own an interest in a legal cannabis business; and (4) gift, estate, and income tax considerations associated with estate planning for cannabis business owners. The essay concludes with a brief reference to ethical and other considerations that estate planners should take into account when advising owners of cannabis businesses. Far from serving as a comprehensive guide, however, the essay’s primary purpose is modest. It seeks to raise awareness and bring attention to the unique estate planning needs of plant-touching cannabis business owners.

II. BUSINESS FORMATION CONCERNS

Even in the most permissive jurisdictions, cannabis businesses are highly regulated. Through its licensing rules, each individual state tightly controls participation in any cannabis-related business, including production, transportation, cultivation, and sales within the jurisdiction.¹² States have detailed rules about who may apply for a “plant-touching” cannabis license; these rules tend to favor in-state residents and businesses. For example, in Washington, an individual must be at least twenty-one years old and have resided in the state for a minimum of six

⁹ See, e.g., Daniel Hughes, *Risk & Reward: A Primer on Plant-Touching Cannabis Companies*, CANNABUSINESS ADVISORY (May 21, 2018), <http://www.cannabusinessadvisory.com/2018/05/21/risk-reward-primer-on-plant-touching-cannabis-companies> [https://perma.cc/D9AH-2CYR].

¹⁰ See *id.*

¹¹ See *id.*

¹² See, e.g., WASH. REV. CODE § 69.50.331(1) (2021) (listing different types of cannabis-related business licenses).

months prior to applying for a license.¹³ In Oregon, the age requirement for individuals is the same, but there is no residency requirement.¹⁴

In the case of businesses, the “residency” rules can be tricky to navigate. In Washington, for example, a business entity applying for a plant-touching license must be organized under the laws of Washington.¹⁵ Furthermore, Washington requires that the license list the “true parties of interest” in a cannabis business and each must qualify separately for a cannabis license (meaning, each must meet the age and residency requirements).¹⁶ In the case of a limited partnership, the true parties of interest are all general partners and all limited partners.¹⁷ For a limited liability company, they are all the members and managers.¹⁸ For privately held corporations, the true parties of interest are all of the corporate officers, directors, and stockholders.¹⁹ It is not clear, however, how far “up the ownership chain,” so to speak, these disclosure rules apply. In the case of a limited partnership with an LLC acting as a general partner, is it sufficient to disclose the name of the LLC, or do the names of the LLC’s members also need to be disclosed? What if a trust owns an LLC membership interest? Would disclosure of the trustee’s name be sufficient? The statute provides no guidance on these questions; thus it seems to be relatively easy to violate the spirit, if not the letter, of the law with the interpolation of enough layers of business entity-owners.²⁰

In New York, any “person” may apply for a license to grow, process, distribute, deliver, or dispense cannabis for sale.²¹ A person includes an individual, trust, partnership, “or any other legal entity.”²² To acquire a license, the applicant must have a “significant presence” in the state, defined in the case of a business entity as having a principal “corporate” location in the state (although it is not clear what that means when applied to LLCs, which are not corporations), being organized or incorporated under New York State law, or having a majority of owners who are state residents.²³ Thus, the New York rules on cannabis licenses are not as strict as Washington’s but not as permissive as Oregon’s.²⁴

¹³ See *id.* § 69.50.331(1)(b)(i)-(ii).

¹⁴ See, e.g., H.B. 4014, 78th Leg. Assemb., Reg. Sess. (Or. 2016) (removing two-year residency requirement).

¹⁵ See WASH. REV. CODE § 69.50.331(1).

¹⁶ See WASH. ADMIN. CODE § 314-55-035(1) (2021).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *id.*

²¹ See N.Y. CANNABIS LAW § 61.1 (McKinney 2021).

²² *Id.* § 3.1.

²³ *Id.*

²⁴ See H.B. 4014, 78th Leg. Assemb., Reg. Sess. (Or. 2016); WASH. REV. CODE § 69.50.331(1) (2021).

Based on limited anecdotal evidence, the overwhelming number of plant-touching cannabis businesses appear to be organized as limited liability companies.²⁵ Far less common, although not rare, are corporations.²⁶ Even less common still are sole proprietorships.²⁷ Trusts do not appear to have any discernible representation as cannabis licensees, although we have not made an exhaustive search of all publicly available databases, and in any event, databases may not disclose enough information to permit accurate identification of all the beneficial holders of a cannabis license.²⁸

III. LIFETIME OR DEATHTIME TRANSFERS OF CANNABIS BUSINESS LICENSES

States have widely divergent rules on whether (and how) cannabis licenses may be transferred. In California, for example, the license technically “attaches” to the individual or the business entity to whom it is issued; the license is non-transferrable.²⁹ Practically speaking, however, transfers can and do happen. For example, in the case of the death of a cannabis licensee who is an individual, the licensee’s successor in interest (typically the executor) must notify the appropriate state agency within a very short window of time (which can be as little as ten calendar days after the license holder’s death).³⁰ If the successor in interest otherwise qualifies as a license holder and the state agency approves, the successor in interest can continue business operations.³¹ Presumably, the fiduciary then would distribute out the license to the beneficiaries under the will (or applicable laws of intestacy) pursuant to the same notification and approval process. Each beneficiary would need to independently qualify as a license holder. A well-drafted will should provide

²⁵ See, e.g., *Marijuana Business Licenses Approved as of 9/9/21*, OR. LIQUOR CONTROL COMM’N, https://www.oregon.gov/olcc/marijuana/Documents/MarijuanaLicenses_Aproved.pdf.

²⁶ See, e.g., *id.*

²⁷ See, e.g., *id.*

²⁸ See *id.*; see also WASH. ADMIN. CODE § 314-55-035(1), (3)(b), (4)(g) (2021).

²⁹ See Mio Asami, *How Do I Get a Cannabis License in California?*, CULTIVA L. (Aug. 20, 2020), <https://culturalaw.com/how-do-i-get-a-cannabis-license-in-california> [<https://perma.cc/H9LQ-SH2E>].

³⁰ See CAL. CODE REGS. tit. 4, § 15024(a) (2021) (indicating a fourteen-calendar-day notification requirement in the event of the death or incapacity of retail or distribution licensee); *id.* tit. 4 § 16206(a) (2021) (indicating a ten-calendar day notification requirement in the event of the death or notification of a cultivation licensee). There are publicly traded cannabis companies, but most of these are “no touch” businesses to which the rigorous state-law restrictions do not apply. See, e.g., Melissa Pistilli, *US Cannabis Stocks*, INVESTING NEWS NETWORK (Apr. 21, 2021), <https://investingnews.com/daily/cannabis-investing/american-cannabis-stocks/> [<https://perma.cc/94H2-AMB5>].

³¹ See CAL. CODE REGS. tit. 4, § 15024(c).

explicit direction on how the decedent's interests in any plant-touching cannabis businesses should be distributed, and any alternate provisions (such as a direction to sell) that shall apply if any intended beneficiary fails to qualify as a plant-touching cannabis business owner in the state.

As in most states, in California, in the case of a sale of an interest in a plant-touching cannabis business, the new intended owner must independently qualify for the license and the applicable state agency must approve the transfer.³² (Presumably these rules also apply to lifetime gifts or deathtime transfers, but the rules do not seem to contemplate donative transfers.) To avoid any delays or the possibility that an intended purchaser, transferee, or even a legatee under a will might not qualify under state law, the governing documents of any plant-touching cannabis business should be drafted carefully. An LLC Membership Agreement or a Shareholders Agreement, for example, might include a buy-sell provision or other specific terms that grant the remaining owners—who presumably already qualify as plant-touching cannabis business owners under state law—a right of first refusal with respect to the exiting owner's interest in the cannabis business.

In New York, a license or permit to sell cannabis is specifically denominated by statute as *not* a property right.³³ Nevertheless, the statute enacted in March 2021 contemplates that, in the future, a state regulatory board will promulgate regulations governing the transfers or changes of ownership, interest or control after an applicant receives a license.³⁴ It is likely that these rules will provide for similar notice and approval processes that other states follow. New York may wish to consider enacting specific regulations that apply to lifetime or testamentary gratuitous transfers, whether outright or in trust. In an analogous set of existing license transfer rules in New York—those governing the transferability of New York City taxi medallions—there is a notable gap when it comes to trusts. Those regulations are silent about the lifetime transfer of taxi medallions to trusts;³⁵ and there is only one rule that

³² See CAL. BUS. & PROF. CODE §§ 26012(a), 26013(a) (West 2021).

³³ See N.Y. CANNABIS LAW § 128.3(d) (McKinney 2021) (requiring cannabis permits, registrations, and licenses to contain a statement that such license is subject to revocation at any time and “shall not be deemed a property or vested right. . .”).

³⁴ See *id.* § 62.8 (“The board pursuant to regulation, may wholly prohibit and/or prescribe specific criteria under which it will consider and allow limited transfers or changes of ownership, interest, or control during the registration or license application period and/or up to two years after an approved applicant commences licensed activities.”).

³⁵ Cf. N.Y. COMP. CODES R. & REGS. tit. 35, § 58-48(b)(2) (2021). A cursory review of public records reveals that the majority of New York City taxi medallions are held by LLCs or corporations, with a few held by individuals. However, the listed owner of at least one medallion has the words “Living Trust” in its title, suggesting that the medallion is owned by the trustee of a revocable trust intended to manage that asset, and possibly

speaks, somewhat imprecisely, to transfers of medallions to testamentary trusts for minors.³⁶ In the absence of clear guidance, the owner of an interest in a plant-touching cannabis business will find it difficult to engage in any sophisticated estate planning with long-term trusts.

IV. TRUSTS AS OWNERS OF CANNABIS BUSINESS LICENSES

As is the case with New York's taxi medallion regulations, trusts do not seem to have been at top of mind for drafters of licensing rules and regulations for any state's legal cannabis industry. Consider, for example, that in New York, the cannabis statute specifically names trusts as among the entities that may apply for a license.³⁷ But in a later provision that provides detailed guidance for who must sign an application, trusts are not mentioned at all (although the statute does provide clear rules for applications filed on behalf of a partnership, LLC, or corporation).³⁸ Similarly, in California, the Secretary of State promotes *10 Easy Steps to Start a Cannabis Business Entity in California* and advises which cannabis-business owners must register with that government office.³⁹ There is explicit guidance for corporations, LLCs, limited partnerships, limited liability partnerships, general partnerships, and sole proprietorships, but no mention of trusts at all.⁴⁰

On the one hand, this statutory silence about trusts may reflect the absence of any perceived desire by owners of interests in plant-touching cannabis businesses to make transfers in trust. But as the legal cannabis market continues to grow and these owners become wealthier, state regulators may want to provide clear guidance that addresses the role of trusts as owners of plant-touching cannabis businesses. Would all present, future, or discretionary beneficiaries of a trust need to independently qualify as owners? If not, is it enough that a trustee can qualify? What nexus with the state would the trustee or beneficiaries need to have? Does it matter whether the trustee holds the cannabis license itself, as opposed to LLC membership interests or partnership interests in

others, upon the mental incapacity or death of the trust's grantor. *See For Hire Vehicles (FHV) - Active*, N.Y.C. OPEN DATA, <https://data.cityofnewyork.us/Transportation/For-Hire-Vehicles-FHV-Active/8wbx-tschr/data> [<https://perma.cc/UF2Y-G2V5>].

³⁶ If a decedent leaves such a business interest in a trust for the benefit of a minor legatee, the beneficial ownership interest in the business interest owning the taxi medallion must be distributed outright when the beneficiary turns eighteen. *See* N.Y. COMP. CODES R. & REGS. tit. 35, § 58-48(b)(2)(ii).

³⁷ *See* N.Y. CANNABIS LAW § 3.1 (McKinney 2021).

³⁸ *See id.* § 62.3 (detailing who must sign a cannabis license application).

³⁹ *See 10 Easy Steps to Start a Cannabis Business Entity in California*, CAL. SEC'Y STATE 2, <https://bpd.cdn.sos.ca.gov/cannabizfile/10steps2.pdf>.

⁴⁰ *See id.*

a cannabis business? As clients want to engage in more sophisticated estate planning, states will need to provide clearer guidance.

V. GIFT, ESTATE, AND INCOME TAX CONSIDERATIONS

Notwithstanding the dramatic changes to state laws regarding cannabis, the federal Controlled Substances Act continues to prohibit the cultivation, distribution, and possession of cannabis for anything other than research purposes; thus plant-touching cannabis businesses are treated as trafficking in controlled substances for purposes of federal law.⁴¹ Practically speaking, this characterization has two salient consequences for the purposes of this discussion. The first is the significant obstacles faced by owners of plant-touching cannabis businesses in accessing banking services—including opening an account, depositing business proceeds, or handling credit card transactions.⁴² The second is the limitation under IRC § 280E on business deductions for income tax purposes.⁴³ Both of these topics have received substantial attention in the legal literature.

There is virtually no commentary from practitioners or academics, however, on how the characterization of legal plant-touching cannabis businesses as trafficking in a controlled substance impacts federal gift and estate tax considerations. For example, estate administration expenses generally are deductible either on the estate's annual income tax return or against any estate tax liability. By parity of reasoning, IRC § 280E's limitations on IRC § 162 deductions should mean that the income tax deduction under IRC § 212 will either be limited or wholly unavailable in the case of a decedent whose wealth derives substantially from interests in a plant-touching cannabis business. It is also possible that the IRS would seek to disallow, on public policy grounds, an estate tax deduction for estate administration expenses under IRC § 2053, or at least to the extent that those expenses are attributable to the plant-touching cannabis business. Indeed, the Supreme Court has held that in the absence of an applicable federal statute (and IRC § 280E is an in-

⁴¹ See 21 U.S.C. §§ 812(c) (defining "marihuana" as a Schedule I controlled substance), 812(b)(1) (defining Schedule I substances as a drug having high potential for abuse and no currently accepted medical use treatment in the United States), 841(a) (prohibiting certain acts with respect to controlled substances). In 2020, the United States House of Representatives passed legislation to remove cannabis from its classification under the Controlled Substances Act, but it is unlikely that the legislation will pass the Senate in the near term. See *Marijuana Opportunity Reinvestment and Expungement Act of 2019*, H.R. 3884, 116th Cong. § 2(a)(1)-(2) (2019).

⁴² See, e.g., Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. REV. 1043, 1049-61 (2021).

⁴³ See, e.g., Jeremy M. Vaida, *Tax Traps and Tips for Cannabis Businesses*, MD. BAR J., Nov./Dec. 2017, at 30, 30.

come tax provision, not an estate tax provision) or a Treasury Regulation, the IRS may disallow deductions where otherwise permitting those deductions would “frustrate sharply defined national or state policies proscribing particular types of conduct.”⁴⁴

For federal gift and estate tax purposes, the ordinary rules under IRC § 2501 (for gifts) and IRC § 2031 (for estates) should apply, making these wealth transfers subject to tax. The tricky question is how a cannabis license or interest in a plant-touching cannabis business should be valued for wealth transfer tax purposes. There is some authority, albeit authority that predates any state-law cannabis legalization, that suggests “street value” is appropriate for *illegal* drugs, at least where the taxpayer has not maintained adequate books and records.⁴⁵ In *Jones v. Commissioner*, the IRS asserted a deficiency against a taxpayer deemed to have unreported income from the sale of cocaine. In the absence of any documentary evidence submitted by the taxpayer, the Tax Court upheld the IRS’s calculation of income based on the “street value” of the cocaine it deemed the taxpayer to have sold.⁴⁶ Similarly, when a decedent piloting an airplane carrying large bales of cannabis crashed and died, the IRS included in the value of the decedent’s gross estate the “retail street value” of the cannabis.⁴⁷ We believe that these cases should not apply to interests in *legal* cannabis businesses that keep careful corporate records. Furthermore, for interests in a legal plant-touching cannabis business, local retail prices would seem to provide the best evidence of fair market value. Nevertheless, the government might assert that because cannabis is illegal for federal purposes, it should have broad discretion in assigning a value to the business.

Even more complicated are questions about the availability of certain tax deductions for transfers of interests in plant-touching cannabis businesses. Might the IRS invoke public policy as a reason to disallow the federal marital deduction under IRC § 2523 (for lifetime gifts) or IRC § 2057 (for death-time transfers) in the case of a spousal transfer of a cannabis license or interest in a cannabis business? What about the charitable deduction under IRC § 2522 (for lifetime gifts) or IRC § 2055 (for death-time transfers)?

Estates involving so-called “illegal art” may provide some guidance, but they should be distinguished carefully from estates with interests in

⁴⁴ *Comm’r v. Heininger*, 320 U.S. 468, 473 (1943); *see also Lilly v. Comm’r*, 343 U.S. 90, 94, 96 (1951); *Comm’r v. Tellier*, 383 U.S. 687, 693-94 (1966).

⁴⁵ *See Jones v. Comm’r*, T.C. Memo. 1991-28 (holding that unreported income from the importation and distribution of illegal cannabis to be computed at “street value”); *see also Kent v. Comm’r*, T.C. Memo. 1986-324.

⁴⁶ *See Jones*, 61 T.C. Memo. at 109.

⁴⁷ TAM 9207004 (Oct. 21, 1991).

lawful plant-touching cannabis businesses. One well known “illegal art” case involved a collage by artist Robert Rauschenberg containing a stuffed bald eagle; the heirs of a New York art dealer Ileana Sonnabend settled a valuation dispute with the IRS by donating the art to the Museum of Modern Art.⁴⁸ Because federal law makes it crime to “take, possess, sell, purchase, barter, offer to sell” any bald eagle, dead or alive, the estate had argued that that the art had no value.⁴⁹ The IRS disagreed, valuing the art at over \$65 million.⁵⁰ The case settled when the heirs agreed to donate the art to the museum in return for an agreement not to take an estate tax charitable deduction.⁵¹

Arguably, interests in cannabis businesses are quite different than art for which there is no lawful market; interests in LLCs, LLPs and other entities operating plant-touching cannabis businesses can be bought and sold, subject to appropriate approvals by the state licensing authorities.⁵² But it is not inconceivable that the federal government could invoke public policy in seeking to disallow the estate and gift tax marital or charitable deductions with respect to transfers of interests in cannabis businesses. If the IRS were to be successful, the taxpayer or a decedent’s estate could be facing a large and unexpected tax bill.⁵³ Estate planners should make sure to advise clients that there are many unresolved federal tax questions.

VI. CONCLUSION

Estate planning for the plant-touching cannabis business owner is new and uncharted terrain. Indeed, there may be many lawyers who are apprehensive about the ethics of advising these types of clients, given that cannabis is a controlled substance for federal purposes. In 2013, the Connecticut Bar Association issued an informal ethics opinion that an attorney may advise clients about the requirements of Connecti-

⁴⁸ See Patricia Cohen, *MoMA Gains Treasure That Met Also Coveted*, N.Y. TIMES (Nov. 28, 2012), <https://www.nytimes.com/2012/11/28/arts/design/moma-gains-treasure-that-metropolitan-museum-of-art-also-coveted.html> [<https://perma.cc/T8S9-EHRA>].

⁴⁹ See *id.*; see also 16 U.S.C. § 668(a).

⁵⁰ See Cohen, *supra* note 4848.

⁵¹ See *id.*

⁵² See Hilary Bricken, *Buying a Cannabis Business: The Top Five Due Diligence Items or Buyer Beware*, HARRIS BRICKEN (Mar. 9, 2017), <https://harrisbricken.com/canna-lawblog/buying-a-cannabis-business-the-top-five-due-diligence-items-or-buyer-beware> [<https://perma.cc/DQ48-6T7P>].

⁵³ Although space constraints prevent a full discussion, there is a related question that could arise in the case of a decedent’s estate comprised in large part of interests in a closely held legal cannabis business. Would that estate be eligible for the extension of time to pay federal estate taxes under IRC § 6166, if all other statutory requirements are met? There is no guidance on this point.

cut's state cannabis law, but that lawyers "may not assist clients in conduct that is in violation of federal law."⁵⁴ The ethics opinion instructed attorneys to "carefully assess where the line is between those functions and not cross it."⁵⁵ That opinion is so vague as to provide almost no guidance at all, and many estate planners may be reluctant to do work for cannabis business owners for that reason.⁵⁶ It is at least arguable, if not certain, however, that giving estate planning advice with respect to a legal plant-touching cannabis business should not violate any ethical rule.

The market for professional services by lawyers, bankers, and accountants relating to legal cannabis businesses will undoubtedly continue to expand. Advisors in all of these areas will need to be conversant with a host of issues, some of which this essay covers. Space constraints require omission of other important implications of cannabis business ownership for criminal law, employment law, housing law, local land use and zoning, and even organ donation.⁵⁷ In order to best meet the needs of current and future clients, estate planners must become conversant with all of the basic issues confronting cannabis clients while also advocating for clear statutory and regulatory guidance that will allow plant-touching cannabis business owners to engage in standard estate planning, including outright wealth transfers and transfers in trust.

⁵⁴ Conn. Comm. on Pro. Ethics, Informal Op. 2013-02 (2013), https://www.ctbar.org/docs/default-source/publications/ethics-opinions-informal-opinions/2013-opinions/informal-opinion-2013-02.pdf?sfvrsn=dddb9d4d_6 [<https://perma.cc/KZ54-XHFM>].

⁵⁵ *Id.*

⁵⁶ See, e.g., Gerry W. Beyer & Brooke Dacus, *Estate Planning for Mary Jane and Other Marijuana Users*, PROB. & PROP., Mar./Apr. 2019, at 17, 19-20 (discussing lack of state attorney ethics guidance for estate planners drafting wills or other estate planning documents for clients with cannabis-related assets).

⁵⁷ See, e.g., *id.* at 18-20.

