

SMOKE POINT

How BigLaw Finally Learned To Try Pot

By Bill Donahue | December 19, 2016



It was a week after the election and Shabnam Malek and Amanda Conley, the founders of the National Cannabis Bar Association, were at the yearly Marijuana Business Conference & Expo in Las Vegas.

It had been, to say the least, a week of ups and downs.

The duo saw their home state of California, the sixth-biggest economy in the world, vote to legalize the recreational use of marijuana — one of four full “yes” votes in a night that has been heralded as a tipping point in the decadeslong legalization effort. Florida and another three states voted in favor of medical marijuana, pushing the number of states with some level of legal cannabis to 28.

But the election had also seen Donald J. Trump win control of the White House and with it the U.S. Department of Justice — an agency that, under new leadership, could suddenly remember that marijuana remains a Schedule I illegal drug under the federal Controlled Substances Act.

Conley recalled the moment that attendees at the conference learned of Trump's pick to head the DOJ, Alabama Republican Sen. Jeff Sessions, a staunch opponent of legalization.

“It definitely sent ripples of horror through the crowd,” Conley said with a nervous laugh. “It means a lot more uncertainty.”



Shabnam Malek, left, and Amanda Conley, co-owners of the two-attorney boutique Brand & Branch LLP, founded the National Cannabis Bar Association in early 2015. “We’re nimble and can take more risks,” Malek said of her firm's practice. “Big firms are necessarily risk-averse, and taking on a cannabis practice can be quite risky.”

Such is life for attorneys in the marijuana industry: Getting in on the ground floor of a booming business, but one that could be made unlivable with a pen stroke from Washington; aiming to ethically advise fully legitimate clients, but on a product that remains illegitimate at the federal level; building relationships with new clients that could be massively lucrative, but risking reputational damage with old ones who are uncomfortable with a still-stigmatized product.

That momentum and potential for new opportunity have pushed a growing number of large law firms — shops with several hundred attorneys and national reach — to dive head first into the cannabis business over the past two years, establishing multidisciplinary marijuana practice groups and marketing them publicly. Some say they’re chasing new business; others say existing clients demanded it.

But the uncertainty has continued to limit how far the biggest of BigLaw are willing to go, even in an industry desperate for legal advice that’s forecast to nearly quadruple from \$5.7 billion last year to \$20 billion in 2020. No firm in top half the AmLaw100 has a publicly advertised cannabis practice; those that are rumored to be working quietly in the space don’t like to talk about it.

"For the bigger firms, it's like they're watching the penguins on the edge of the iceberg," Conley joked. "They're waiting to see if the smaller firms fall into the water."

Diving In

For years after California became the first state to legalize medical marijuana in 1996, lawyers representing growers and sellers were working in solo practices and small specialty shops — the kind of outfits flexible enough and sufficiently risk-tolerant to dive into uncharted territory.

Like the companies they represented, those firms grew as the legalization effort spread and matured over the next 15 years. By 2010, 11 more states had authorized medical marijuana, leading to the creation of small but sophisticated cannabis-focused firms like Denver-based Vicente Sederberg LLC and the Canna Law Group at Seattle-based Harris Moure, which both aimed to bring a big firm approach to companies operating in the industry.

The next few years would see the spread of legal cannabis further accelerate. In 2012, Colorado and Washington became the first two states to legalize fully recreational use of marijuana; Alaska and Oregon did the same two years after that. Many more states, including behemoths like New York, approved medical pot during the same stretch.

As that march toward legalization went on — and as full recreational pot loomed in far bigger jurisdictions like California — the kind of clients seeking help with marijuana changed markedly, according to attorneys working in the industry.

Small independent growers and retailers with a specific legal problem gave way to large-scale corporate operations and investors with potentially years of complex legal work spread across numerous practice areas — corporate, tax, employment, real estate, intellectual property. A few medical clients gave way to far more recreational clients.

Case in point: Last year, Peter Thiel’s Founders Fund venture capital firm anchored a \$75 million investment in Privateer Holdings, a company focused squarely on cannabis and related services, like a marijuana news web startup.

In other words, precisely the kind of clients that retain large, full-service law firms.

“It’s gone from ‘Cheech and Chong’ to more like the wine industry,” said John McKay, a partner with Davis Wright Tremaine LLP who works with cannabis clients. “We’re talking about sophisticated business people on the finance side, on the product side, on the

HISTORY OF CANNABIS LEGALIZATION



marketing side and so on.”

Companies not directly involved in the industry also started to need more and more cannabis-related legal help. Employers in legal jurisdictions need to know how they can deal with workers using legal marijuana; landlords need to know how they can rent to cannabis businesses; media platforms need to know what kind of ads they can run. The questions only get tougher from there.

But even at the start of 2015, when Malek and Conley founded the Cannabis Bar, most of the firms publicly representing clients in the marijuana business were still small operations, like the duo’s own two-attorney firm, Brand & Branch LLP.

“We’re nimble and can take more risks,” Malek said. “Big firms are necessarily risk-averse, and taking on a cannabis practice can be quite risky.”

Over the past two years, as legal cannabis markets have thrived in Washington, Colorado, Alaska and Oregon and legalization looked likely in California and elsewhere, that dynamic has begun to rapidly change.

One of the first big firms to publicly take the leap was Miami-based Akerman LLP, a 650-attorney, 24-office heavyweight that announced a regulated substances task force in June 2014 to coincide with the enactment of Florida’s Compassionate Medical Cannabis Act, which allowed for highly limited uses of medical marijuana.

In November, Florida voted to expand the CMCA, widening the number of conditions that can be treated with cannabis.

For Jonathan Robbins, who heads up Akerman’s group, the decision to embrace cannabis early was easy. More legalization was coming, and all those new businesses were going to need lawyers; if it could be done legally and ethically, the firm should do it.

“It’s already a multibillion-dollar market and it’s only going to continue to grow,” Robbins said. “I think there’s going to be plenty of room for other players, but will we have an advantage by getting there first? I hope so.”

Robbins was a founding member of the Cannabis Bar. At the time, as an attorney from a big, old, national law firm, he stuck out like a sore thumb.

“I was the Suit, so to speak,” Robbins said with a laugh. “I was the big firm guy.”

He wouldn’t be the only Suit for long.

In December 2014, Anderson Kill PC, a small but national-facing firm based in New York, launched a regulated products practice group aimed squarely at marijuana. A few months later, in May 2015, 600-attorney Cozen O’Connor launched an interdisciplinary cannabis team spread across its national offices. That same month, 350-attorney Thompson Coburn LLP announced a similar comprehensive cannabis group.

Like many of the big firms that have rolled out these kinds of groups over the past two years, Thompson Coburn wasn't exactly starting fresh on Day One. A few individual partners in legal jurisdictions had quietly done some cannabis-related work over the preceding years, while others had existing clients asking about marijuana.

Formalizing those folks into a group was less about creating a practice from scratch as it was creating a more comprehensive offering and marketing the group as a firm specialty.

"For us, it was client-driven," said Barry Weisz, the managing partner of Thompson Coburn's Los Angeles office and a founder of the cannabis group. "We had clients in several different states with different needs that were all cannabis related, so it made sense for us."

Less than two years later, Weisz said, the group has more than 30 lawyers working on cannabis — real estate lawyers helping with zoning, regulatory attorneys helping with U.S. Food and Drug Administration approval for edibles, trademark lawyers helping with branding, and so on.



It's a similar story for 750-attorney Fox Rothschild LLP, which formally launched a practice in September 2016. Cannabis group co-chair William Bogot joined the firm in April 2015 from Nixon Peabody LLP with a little bit of experience getting cannabis licenses under Illinois's medical marijuana law; he quickly realized that many of his new colleagues had quietly developed similar skill sets.

"We'd have a guy who specialized in banking, and it would turn out he'd been doing Treasury Department compliance for a cannabis company for the last year," Bogot said. "We have another partner in San Francisco working on leases and business formation for cannabis businesses.

"As we dug deeper, we realized we have a couple dozen lawyers who have experience and clients in the space."

Coming into Fox, Bogot's bread and butter was gaming, something of a recurring pattern in BigLaw attorneys and firms that have gotten into cannabis. Experience and comfort with gambling, alcohol, tobacco and other closely scrutinized industries seems to translate well to the labyrinthine and uncertain world of legal cannabis.

That was the case for R. Lance Boldrey, a tribal and commercial gaming partner who founded the new cannabis practice that 400-plus attorney, 15-office Dykema Gossett LLP launched in May.

"We've done this with casino gaming, and we saw cannabis as presenting many of the same opportunities," Boldrey said.

Dykema's story is also illustrative of the watching-and-waiting approach many firms have taken with cannabis. Back in 2008, Boldrey and his firm were heavily involved in the drafting and passage of Michigan's Medical Marijuana Initiative, but the extremely restrictive nature of the law limited the level of commercial investment and kept the firm on the sidelines for years.

But as more and more states swapped tightly regulated medical marijuana for full recreational, and more and more money poured into cannabis, Dykema decided the time was once again right.

"Michigan's structure just really didn't provide for an industry to grow immediately," Boldrey said. "We then watched the change among our own clients' attitudes in the wake of legalization in Colorado and Washington and other states. We saw much more sophisticated entrepreneurial clients begin to see real opportunities in that space."



Other firms, like Davis Wright Tremaine, have taken a more informal approach.

With a big presence in the Pacific Northwest, Davis handles a significant amount of cannabis-related work — both for non-cannabis companies on issues stemming from legalized marijuana, like employment law questions related to company marijuana policies or landlord-tenant issues, and for cannabis companies themselves, like a leading processor in Washington. The media law powerhouse also advises big entertainment companies on things like cannabis-related advertisements.

But Davis Wright doesn't market the practice or treat it as formal group, viewing cannabis expertise more as an extra tool rather than a focal point.

"We're not afraid of this, nor are we afraid of representing sophisticated clients in the cannabis industry," said Bill Miner, the partner-in-charge of Davis' Portland, Oregon, office. "We're not broadcasting that we have a cannabis practice, we're more just saying we have these abilities."

"It became increasingly clear our large institutional clients wanted and needed this type of advice," Miner said. "If we're going to have this multibillion-industry pop up overnight, we need to have some folks that are going to know this stuff."

Hurdles and Headaches

That it took a few years for major firms to begin diving into cannabis should come as no surprise. Though filled with potential, the industry has also presented vexing and continued challenges for the attorneys who want to represent it.

Top of the list: Legal ethics rules, which bar attorneys from advising their clients to do anything that breaks the law. How, then, could attorneys advise their clients on selling a product that the federal government has declared illegal?

By and large, the answer has been for each state to tweak its ethics rules, usually to make clear that attorneys can counsel their clients about complying with state law so long as they also clearly warn them about the risks of selling a product that remains criminal at the federal level.

Some states, like Minnesota, have included these reforms in the legislation that legalized marijuana, but in most cases it's required a separate rule change after the fact. In Colorado, for instance, the state's Supreme Court only changed its rules in 2014 following an opinion from the state bar association warning that attorneys could be violating the rules by counseling cannabis clients.

"Colorado is one of a handful of states conducting an experiment in democracy: the gradual decriminalizing of marijuana," the bar association wrote ahead of the changes. "Colorado risks conducting this experiment either without the help of its lawyers or by putting its lawyers in jeopardy of violating its rules of professional conduct."

According to Tom Wilkinson, a member of Cozen O'Connor's cannabis practice and an expert in legal ethics and professional responsibility who helped craft a similar ethics change in Pennsylvania this year, ethics bodies in states that have voted to legalize have been generally been receptive to such changes.

"Most states have understood that, for the law to be effective and for businesses to comply with it, they all need appropriate legal advice," Wilkinson said.

But the changes to ethics rules have often come after extended periods of uncertainty, and the willingness to offer clear guidance has not been universal.

In California — where the legal cannabis movement began two decades ago — a formal ethics amendment has yet to be issued. Attorneys instead continue to rely on more informal opinions, like one

last summer from the Bar Association of San Francisco that said attorneys in the state could already ethically advise cannabis clients.

“Nevertheless, because of the risks to both lawyer and client, we recommend that the Bar Association of San Francisco urge the Rules Revision Commission, the Board of Trustees of the State Bar and the Supreme Court to adopt rules and propose legislation that would protect the lawyer from discipline under these circumstances,” the group wrote in its June 2015 opinion.

Meanwhile, in Arizona — which currently has medical marijuana but voted last month to reject a referendum legalizing recreational marijuana — the state’s bar association has opined that attorneys can ethically advise on pot, but the state’s Supreme Court flatly rejected a request for a formal update to ethics rules in September.

Maine, where medical cannabis was legalized in 1999, has taken the hardest line. The state’s Supreme Judicial Court has not updated the state’s ethics rules and, without such changes, the bar association has offered little reassurance that attorneys can avoid ethics violations while counseling cannabis clients.

Complicating things further is the fact that, even in states that have provided clear guidance, the rules have generally only allowed lawyers to ethically advise clients on conduct under that particular state’s law, rather than allowing them to counsel on the laws of any legal jurisdiction.

Needless to say, that’s a major headache for attorneys at national firms who regularly counsel clients on matters extending beyond the borders of a particular state. Wilkinson mentioned something as simple as a large client who wants to invest in cannabis, but wasn’t sure which jurisdiction to choose.

“It requires a lot more caution when advising about another state, and many large clients are interested in operating in more than one state, whether in growing or distributing or advertising,” Wilkinson said. “It’s a major area of concern.”

For firms that have taken the plunge, assessing this still-murky ethics situation was the first and biggest hurdle for getting into cannabis. Each did months of research with ethics specialists, figuring out the lay of the land and assessing whether they could create firm-scalable processes for staying within the boundaries. They then presented the pros and cons to firm management, which weighed the risks and the costs against the value of the business.

For those firms that haven’t taken the plunge, it’s likely one of the top reasons they’ve held back.



“That's one of the major reasons firms have been slow to get into this space,” said Bogot, the founder of Fox Rothschild’s practice. “Without explicit guidance, it’s been hard to know what you could and couldn't do.”

Other deterrents for big firms have been more rudimentary.

Owing to the fact that cannabis businesses are largely denied access to the banking system, many of them operate almost entirely in cash. Among the many problems caused by that situation is how they pay for lawyers, who aren’t typically used to receiving payment in a bag of cash.

“A big firm like O’Melveny [& Myers LLP] is simply not set up to take cash,” Malek said, using the BigLaw firm where she and Conley first practiced as a hypothetical. “Everything is wired and electronic, and those systems just aren’t available in this industry.”

And then, of course, there has been and still is the reputational concern — the aesthetic risk of embracing an industry that, for all its progress and newfound legitimacy, still calls to mind images of stoned slackers and corner drug dealers for some.

“Yes, there still is a stigma, but I think it's eroding,” said Akerman’s Robbins. “I'm not looking to put our firm's reputation on the line, but why can’t you represent someone who is operating perfectly legally under state law?”

It’s a frank conversation that happens at every big firm that weighs opening and advertising a cannabis practice, according to those who have been there.

“There’s no doubt that a firm of our size and our reputation, we didn't just back into it,” said Thompson Coburn’s Weisz. “What extent would it have an impact on other clients? Would it cause other clients to re-evaluate our firm? Ultimately, we made that the decision that it would not.”

The Missing Giants

For all the new legal jurisdictions and all the new practice groups that have opened over the past two years, there’s still one glaring absence: The presence of the country’s biggest, most elite law firms.

Of the firms that are actively marketing their presence in the cannabis industry, Fox Rothschild is the biggest, as well as the highest ranked on the AmLaw100 at 86th. Cozen O’Connor and Akerman are just a few spots down the list. Dykema and Thompson Coburn are a bit smaller; other big firms that have set up practices, like Anderson Kill, Greenspoon Marder PA and Farella Braun & Martel LLP, are smaller yet.

Some bigger firms are working with cannabis, but haven’t made it outwardly official.

Cooley LLP, a Silicon Valley bigwig that’s 32nd on the the AmLaw100, has had intellectual property attorneys representing clients on issues like patenting new strains of cannabis in recent years, but the firm doesn’t advertise it. Seyfarth Shaw LLP, a 14-office powerhouse that ranks 58th on the same list, launched a 20-attorney multidisciplinary cannabis group in May. That team runs a blog about marijuana law on Seyfarth’s website, but isn’t listed as one of the firm’s industry groups.

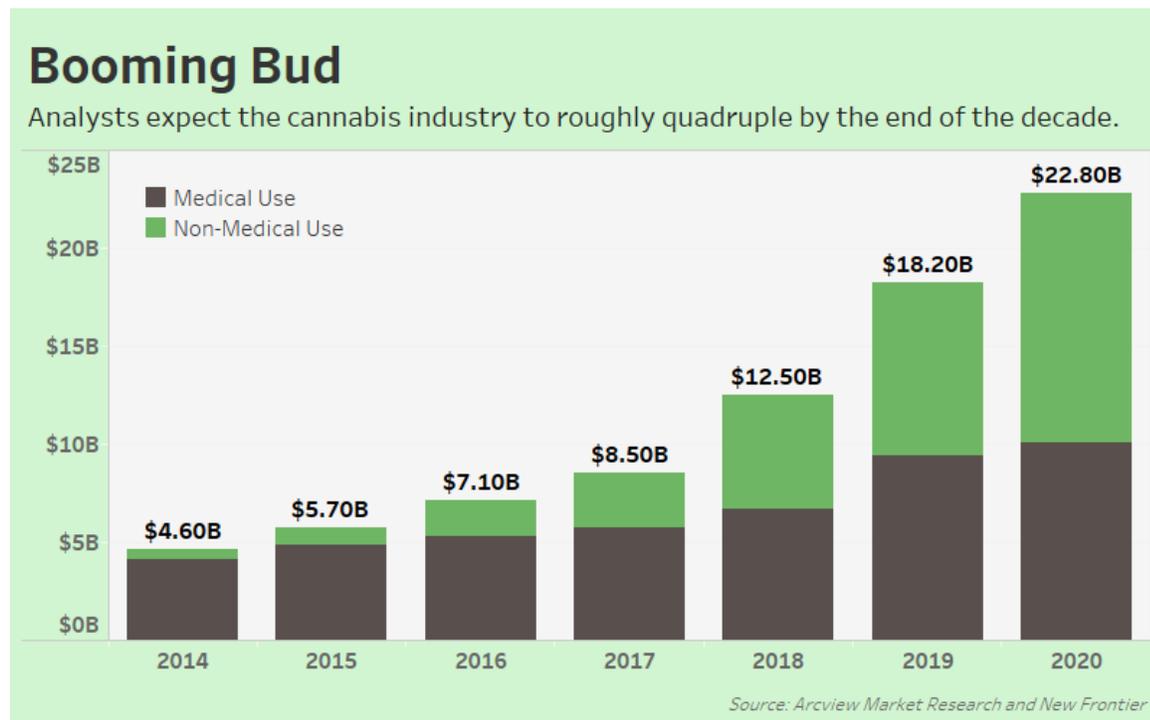
“There has been some pushback, I’m not going to tell you otherwise,” said Stanley S. Jutkowitz, who put together the group at Seyfarth. He said they spent months working through ethical and other concerns with the highest levels of firm management.

“I know other firms that have simply taken the position: ‘No, we’re just not going there,’” Jutkowitz said. “But we saw a real opportunity and worked through the concerns.”

Other attorneys working in the industry report similar hesitance at BigLaw’s biggest to dive into a challenging and still-stigmatized area, leaving a ripe market on the vine for slightly smaller firms to pluck.

“By all predictions, this is soon going to be a \$20 billion-a-year business,” said Joshua Horn, the co-chair of Fox Rothschild’s cannabis practice. “But you still have a lot of internal discomfort at some of the big firms.

“I was talking to a partner at another firm who just said, ‘We’re just not going to touch it for now, and that’s the way it is.’”



The more likely course of action, according to some experts, is that the biggest, most conservative behemoths will stay on the sidelines until full federal legalization — a change nobody in the industry is expecting anytime soon. At that point, when the risk is far lower, they’ll buy up the boutique practices that have spent years learning the industry.

“Absolutely the big firms are going to come in and acquire small firms,” Malek, the co-founder of the cannabis bar, said. “It makes more sense to acquire talent at that point. The large firms are going to eat up the small ones.”

The Trump Effect

Complicated as they are, the ethical, logistical and reputational challenges of taking on marijuana-related work pale in comparison to the existential threat that sent those “ripples of horror” across that Las Vegas cannabis conference.

As legalization has spread across the country in recent years, the Department of Justice has taken an informal, hands-off approach, codified most recently in a 2013 DOJ notice dubbed “The Cole Memo” that said federal prosecutors and officers should prioritize their drug enforcement resources elsewhere. But that kind of federalism-by-détente is not law; cannabis is still an illegal drug, and federal authorities could still decide to act as much whenever they want.

For cannabis attorneys, even as new practice groups pop up across the country and the industry booms, the question of whether the new administration will alter the status quo is the 800-pound gorilla in the room.

President-elect Trump, for his part, has indicated that he believes marijuana is a state issue and that he would favor continuing the current administration’s hands-off approach. Trump is also rumored to be considering appointing Silicon Valley investor Jim O’Neill, a longtime legalization proponent, to head the Food and Drug Administration.

But Trump’s pick for attorney general has decidedly different views on things.

“Jeff Sessions has a long history of being very much against the decriminalization of marijuana, even medical,” said Akerman’s Robbins. “He has been very public about the fact that he does not believe that anybody should be entitled to legally consume cannabis.

“Everybody is on the edge of their seats,” he said.

Attorneys who deal with cannabis issues are quick to stress that — Doomsday fears aside — they are highly skeptical that federal authorities under any administration would take on the monumental task of shutting down a flourishing legal cannabis market, particularly one that’s shifted billions from drug cartels and gangs to small businesses and state tax coffers.



One of those people is McKay, the Davis Wright Tremaine partner. He’s a former U.S. attorney for Washington and one of the top advocates for the 2012 reform that legalized marijuana in that state; now in private practice, he’s representing a number of sophisticated clients in the cannabis space.

Reverting to the old system of federal marijuana enforcement — which he saw firsthand as a federal prosecutor along the Canadian border — would not only be an incredibly difficult task, according to McKay, but also contrary to public policy.

“What’s taking place is the shift away from a system that saw organized crime getting gigantic profits and funding their terrible trade in drugs like heroin and meth, and toward a legal, regulated and taxed structure,” McKay said.

That said, should federal prosecutors decide to make an about-face, it could be a perverse boon for BigLaw firms that have already jumped into cannabis.

McKay and Davis Wright, for instance, are already positioning themselves to defend their current clients and other members of the cannabis industry from harm. That means preparing to defend companies targeted with prosecution, as well as creating contingency plans for even more extreme federal action, like an attempt by federal authorities to preempt state marijuana laws.

McKay said he and the firm have already talked to trade associations about how they might respond to such actions.

“I think Jeff Sessions is a reasonable guy. I know him,” he said. “On the other hand, he has not indicated any kind of openness to legalized marijuana.

“There are some things that could happen, and we’re trying to prepare for them,” McKay said. “Our job is to give our clients comfort that should the worst happen, we’re prepared to defend them, to advocate for them, and to make sure that their investment and they themselves are safe.”

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