

RECENT DEVELOPMENTS IN CANNABIS LAW

Jamese Hawkins, Mathew Grimes, Jana Simmons, Andrea Steel, Nolan Jackson, Lisa Pittman, and Troy Sims

I. Introduction	244
II. Laws and Regulations	244
A. Cannabis and the Dormant Commerce Clause	244
B. I.R.S. Section 280E	246
C. SAFE Banking Act	247
D. Tribal Policies and Regulation of Marijuana.....	248

Andrea Steel is a partner in the Commercial Finance practice group at Frost Brown Todd LLP's Houston office. She is part of the Firm's multifamily housing tax credit sub-team as well as its consumable goods industry sub-team. Ms. Steel has experience representing cannabis business operators across the supply chain and successfully launched and grew the cannabis practice group at her prior law firm. She serves on the Executive Committee of the International Cannabis Bar Association as Vice President of Operations, as well as Co-Chair of its Legislative Advisement Committee. Ms. Steel also serves as a Vice Chair of the ABA's Cannabis Law & Policy Committee of TIPS. She can be reached at asteel@fbtlaw.com. Nolan Jackson is a managing associate in Frost Brown Todd LLP's Washington, DC office. He specializes in complex commercial litigation and food and drug regulation. Nolan helped grow the Firm's Hemp Service Team into a nationally-recognized leader in the hemp legal space. Nolan has successfully represented clients involved at all levels of the seed-to-sale hemp supply chain, and serves as Regulatory Counsel for the U.S. Hemp Roundtable. He can be reached at njackson@fbtlaw.com. Jamese Hawkins is a 2023 graduate of the University of the District of Columbia David A. Clarke School of Law in Washington, DC. Ms. Hawkins has experience in cannabis law, labor and employment law, and compliance and public policy. Ms. Hawkins also serves as Vice Chair of the ABA TIPS Cannabis Law and Policy Committee. She can be reached at hawkins.jamese@gmail.com. Mathew Grimes is Principal of the Grimes Law Group LLC in Chicago. Matt has served on the Risk Management and Insurance Committee of the National Cannabis Industry Association, is a Vice Chair of the American Bar Association's Cannabis Law & Policy Committee, is a founding member of the Psychedelic Bar Association, and is involved with several state cannabis and psychedelics industry associations and advocacy groups. He can be reached at matt@grimeslawgroupllc.com. Jana Simmons is a partner at Ropers Majeski in Menlo Park, CA, and Detroit, MI. She can be reached at jana.simmons@ropers.com. Lisa L. Pittman is the founder of Pittman Legal, Austin, Texas. She is the immediate Past Chair, TIPS Cannabis Law & Policy Committee. She can be reached at Lisa@Pittman.Legal. Troy Sims is an associate attorney at Piskel Yabne Kovarik, PLLC, in Spokane, WA. He can be reached at tsims@pyklawyers.com. The Committee would like to thank Kristian Dobard, Lisa Dickinson, and John Chorbajian for their assistance with research, citation, and editing.

III. Delta-8 THC	250
A. Trademark and Copyright Infringement	250
B. Alabama Board of Pharmacy Letter	251
C. Marijuana Seeds Letter	252
D. FDA/CDC Health Alerts and Warning Letters.....	252
IV. Recent State Court Decisions	254
A. Georgia.....	254
B. Kentucky	254
C. Texas	255
V. Hemp and the DEA.....	256
VI. Insurance Coverage	256
A. Chemical Fire	257
B. Duty to Defend.....	257
C. Life Insurance	258
VII. Ethics and Rules of Professional Conduct Related to Cannabis Businesses	258
A. State Developments	258
1. Rhode Island.....	258
2. Mississippi	259
3. Minnesota	260
4. Virginia	261
5. New Jersey.....	261
6. Vermont.....	262
7. Nebraska.....	262
B. Cannabis-Related Attorney Disciplinary Cases	262

I. INTRODUCTION

Whether you call it cannabis or marijuana, the industry is swiftly budding. This article discusses new and noteworthy developments in the cannabis industry. Federal regulations, tribal policies, as well as states laws and their effect on the cannabis industry will be explored. This section includes references to federal and state cases, insurance coverage, advertising requirements, and the overlapping hemp industry. Though cannabis is not yet legal under federal law, as of this article twenty-one states, including the District of Columbia, have legalized cannabis recreationally, while thirty-nine states and the District of Columbia have legalized cannabis for medical purposes.

II. LAWS AND REGULATIONS

A. *Cannabis and the Dormant Commerce Clause*

An argument gaining traction in the cannabis industry is predicated upon a constitutional challenge. The legal theory is that the Dormant Commerce

Clause (DCC) limits the states' authority to regulate interstate commerce, even when that commerce is federally illegal. Pursuant to the Commerce Clause, Congress may "regulate commerce . . . among the several states."¹ Traditionally, the DCC has operated as a limitation on state power to impose substantial burdens on interstate commerce. As of this writing, there is no legal interstate commerce for cannabis because it was codified as a Schedule I controlled substance under the Controlled Substances Act (CSA) in 1970.² For a controlled substance to be deemed a Schedule I narcotic under the CSA, it must have no known medical uses; meaning that the drug is not safe for use, even under medical supervision.

This argument recently was well received in the United States Court of Appeals for the First Circuit. In *Northeast Patients Group v. United Cannabis Patients & Caregivers of Maine*, the court upheld a verdict for the plaintiffs challenging the Maine Medical Marijuana Act (MMMA),³ which found the MMMA violated the DCC. Here, "requiring "officers" and "directors" of medical marijuana "dispensaries" operating in Maine to be Maine residents ran afoul of the DCC."⁴ The court made this ruling notwithstanding that Congress enacted the CSA to "eradicate the market" in cannabis.⁵ The court held that the District Court correctly found the residency requirement to be a "facially protectionist state regulation of an interstate market in medical marijuana that continues to operate even in the face of the CSA."

Defendants first argued that Maine's residency requirement comports with the DCC because federal law makes participation in the marketplace illegal. The court rejected this argument, in large part, due to defendants' reliance on the notion that the DCC does not attach simply because the CSA ensures that there is no interstate market in commerce for the residency requirement to burden. Instead, the court relied on *Gonzales v. Raich* to support its ruling. In *Gonzales*, the Supreme Court specifically acknowledged that cannabis is a "fungible commodity for which there is an established, albeit illegal, interstate market."⁶

Defendants then argued that the district court's verdict could not stand even if there was an interstate market for medical cannabis that continues to operate in the face of the CSA. The court noted that the question is not whether the CSA preempts the residency requirement of the MMMA; rather it is whether the residency requirement cannot stand because it

1. U.S. CONST. art. 1, § 8, cl. 3.

2. 20 U.S.C. ch. 13 §§ 801–889.

3. ME. REV. STAT. ANN. tit. 22, §§ 2421–2430 (2009).

4. 45 F.4th 542 (1st Cir. 2022).

5. *Gonzales v. Raich*, 545 U.S. 1, 19 n.29 (2005) (holding that Congress may criminalize the production and use of homegrown cannabis even when the state allows its use for medicinal purposes).

6. *Ne. Patients Grp.*, 45 F.4th at 544.

transgresses the DCC. In *Northeast Patients Group*, both parties acknowledged that, but for the CSA, the Maine residency requirement is a prima facie violation of the DCC.⁷

Finally, the Figueroa defendants in *Northeast Patients Group* argued that the DCC did not prohibit Maine's residency requirement because Congress "consent[ed] to [this] otherwise impermissible state regulation."⁸ This argument turns on whether Congress intended for the CSA to allow states to burden the interstate market in medical marijuana.⁹ The court cited the Rohrabacher-Farr Amendment as evidence that Congress has acknowledged a medical cannabis market exists and that this market may continue to exist free from federal criminal enforcement in some circumstances. Further, Congress has enacted the Rohrabacher-Farr Amendment annually since its inception. In *Northeast Patients Group*, the court found nothing in the CSA that "purports to bless interstate discrimination in the market for medical marijuana," noting that Congress has allowed for interstate discrimination in other instances.¹⁰

Most states institute a residency requirement on companies and persons owning licenses when cannabis is first legalized. Now that some cases have ruled that this restriction violates the DCC, other states are now facing challenges to the residency requirements, and it will be interesting to see if states continue to enact residency requirements.

B. *I.R.S. Section 280E*

Internal Revenue Code Section 280E denies deductions and credits for expenses paid or incurred in carrying on the trade or business of trafficking controlled substances as defined under Schedules I and II of the CSA.¹¹ Because cannabis is classified as a Schedule I substance under the CSA, Section 280E prohibits cannabis businesses from claiming normal deductions and credits.¹² Section 280E forbids businesses associated with "trafficking" of Schedule I or II substances from deducting otherwise ordinary business expenses from gross income.¹³ This law emanated from a 1981 court case in which a convicted cocaine trafficker asserted his right under federal tax law to deduct ordinary business expenses.¹⁴ In response, Congress enacted

7. *Id.* at 546.

8. *Id.* at 550 (citing *United Egg Producers v. Dep't of Agric. of P.R.*, 77 F.3d 567, 570 (1st Cir. 1996)).

9. *Id.*

10. *See, e.g.*, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (announcing Congress's purpose in enacting the McCarran Act was to give support to a state regulated system for the business of insurance).

11. I.R.C. § 280E.

12. *Id.*

13. 26 U.S.C. § 280E.

14. *Edmondson v. Comm'r*, 42 T.C.M. (CCH) 1533 (1981).

Section 280E to prevent other narcotics traffickers from employing the same tactic. In short, the Code stated that “no deductions shall be allowed in carrying on trade or business if...it consists of trafficking in controlled substances.” Because cannabis is a Schedule I controlled substance, this law is applied to all legal cannabis businesses.

The argument that Section 280E is being unlawfully applied to “legal” businesses has been tried, albeit unsuccessfully, in several cases. A notable case in this arena is *San Jose Wellness v. Commissioner of Internal Revenue*.¹⁵ In *San Jose Wellness*, the plaintiff was a medical dispensary that sold cannabis to patients who had a doctor’s recommendation. The plaintiff argued that the statutory predicate was not satisfied because its business includes more than the sale of cannabis items and because it offered additional services.¹⁶ The court rejected that argument, concluding that Section 280E applies even if a business engages in other activities.¹⁷ The inability to write off normal business expenses, along with high compliance costs, leaves cannabis companies operating on very thin margins.

C. SAFE Banking Act

Because cannabis is a federally illegal Schedule I controlled substance, banks are highly reluctant to service cannabis businesses because that would expose the bank to federal crimes such as money laundering, RICO, and violations of the Bank Secrecy Act. As a result, cannabis is largely an all-cash business that is unsustainable. Efforts have been made at the federal level to create a safe harbor for banks servicing compliant cannabis businesses. The United States House of Representatives passed the Secure and Fair Enforcement Banking Act of 2021 (SAFE), which prohibits a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate cannabis-related business.¹⁸ SAFE has passed the House seven different times, most recently in June 2022 as an amendment to the FY 2023 National Defense Authorization Act. SAFE had previously passed as a standalone bill by a vote of 321-101 on April 19, 2021. Prohibited penalties include terminating or limiting the deposit insurance or share insurance of a depository institution solely because the institution provides financial services to a legitimate cannabis-related business and prohibiting or otherwise discouraging a depository institution from offering financial services to this type of business.¹⁹

15. 156 T.C. 62 (2021).

16. *Id.*

17. *Id.*

18. H.R. 1996, 117th Cong. (2021).

19. *Id.*

The SAFE Banking Act is significant because it will provide protections for financial institutions that provide services to legal cannabis businesses.²⁰ The SAFE Banking Act also will allow cannabis business owners to borrow loans and open accounts at financial institutions.²¹ Currently, many cannabis businesses are cash-only operations.²² Cash-only operations can be problematic because businesses need a convenient way for customers to access cash and a secure way to store the cash.²³ Therefore, most cannabis retail businesses have ATM machines, which can attract robberies and other like crime to cannabis businesses.²⁴ Because of the substantial risk of handling great sums of cash, cannabis businesses are forced to hire security and take other safety precautions to protect from robberies and theft.²⁵

The SAFE Banking Act has been introduced by Congress several times since 2019, and it has encouraged states to enact their own cannabis banking legislation to protect businesses' access to financial services. In 2020, California passed a similar law that provided safe harbor under state law financial institutions and accountants that provide services to the cannabis industry.²⁶ In July 2022, Pennsylvania Governor Tom Wolf signed a law permitting cannabis operators in the state to work with financial institutions.²⁷ The law allows financial institutions and insurers to conduct business with cannabis operations without fear of prosecution or adverse consequences.²⁸ At the end of 2022, a last effort was made to insert the SAFE Banking Act into the military defense spending bill, the National Defense Appropriations Act. But that effort failed once again.

D. Tribal Policies and Regulation of Marijuana

An increasing number of tribes are leveraging sovereignty and exercising jurisdiction over their lands and members for the legalization of marijuana and a piece of the explosive cannabis industry. Implementing their own laws and business structures, tribes are regulating the safe cultivation, processing, transport, and distribution of marijuana product on tribal land. Tribal courts adjudicate a myriad of disputes subject to tribal law involving tribes, their members, and their land, including business contracts, negligence, premises and product liability, and employment. Federal case law supports

20. Kyle Jaeger, *Booker Says There's Republican Support for 'SAFE Banking Plus' Marijuana Compromise*, MARIJUANA MOMENT (Aug. 4, 2022), <https://www.marijuanamoment.net/booker-says-theres-republican-support-for-safe-banking-plus-marijuana-compromise>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. CAL. CODE REGS. §§ 15037.1–15037.2 (2020).

27. 12 PA. CONS. STAT. § 5504 (2022).

28. *Id.*

certain exercises of tribal court jurisdiction over non-tribal companies and individuals engaged in business with tribes, including, more recently, under the tribal right-to-exclude doctrine, even when these businesses are not actually operating on tribal land.

As we witness major shifts in cannabis policy at federal and state levels, so too are tribal regulations, policies, and business structures rapidly evolving, making tribes well-positioned to emerge as leaders in the global cannabis industry. Marijuana is traditional plant medicine, and cannabis can generate critical revenue for tribal governments. The illegality of marijuana under the Controlled Substances Act raises unique concern for tribes. On July 22, 2022, the Senate Committee on Indian Affairs hosted a virtual listening session for tribal leadership to comment on their tribes' involvement with cannabis on tribal land, their concerns with current federal policies involving the criminalization of marijuana, and their priorities for implementing safe regulation of medicinal or recreational marijuana on tribal lands. Overwhelmingly, tribes voiced concern about the continued impact of federal criminalization of marijuana and plant-medicine practices, particularly where tribal land is generally held in trust by the federal government. So, even if a tribe—a sovereign nation—legalizes marijuana on its land, that land is still federal trust land with strings attached. That makes tribes leery.²⁹

On November 14–16, 2022, the Indigenous Cannabis Industry Association (ICIA) hosted its first Indigenous Cannabis Policy and Advocacy Summit in Washington, D.C. The Summit brought together tribal leadership to discuss and unify policy for empowering tribal governments and businesses operating in the cannabis industry and to forge relationships with congressional leaders on initiatives important to Indian Country. In September 2022, in *Lexington Insurance Co. v. Smith*, the United States District Court for the Western District of Washington held that the Suquamish Tribal Court has regulatory and adjudicatory jurisdiction over non-tribal, off-reservation insurance companies insuring properties on tribal land for coverage disputes brought in tribal court under the tribe's right to exclude.³⁰ The tribal right to exclude doctrine holds that tribes have sovereign control over their lands and the right to prevent others from entering their lands or conducting certain activities on them. In this regard, the *Lexington* court found that a tribe's inherent right to exclude non-tribal members from tribal land necessarily "imparts regulatory and adjudicative jurisdiction over conduct on tribal land."³¹ The right to exclude doctrine

29. For example, 25 U.S.C. § 415 prohibits the leasing of certain restricted tribal lands without the approval of the Secretary of Interior.

30. No. 3:21-CV-05930-DGE, 2022 WL 4131593 (W.D. Wash. Sept. 12, 2022).

31. *Id.*

creates another avenue for tribes to regulate and adjudicate business dealings with non-tribal companies and individuals involving marijuana operations on tribal lands.

III. DELTA-8 THC

A. *Trademark and Copyright Infringement*

Delta 8 is a popular isomer of the typical delta-9 THC; and because of the way hemp is defined at the federal level, it is arguably legal, though much controversy surrounds the legality of Delta 8. A recent case, *AK Futures LLC v. Boyd Street Distro, LLC*, provides support for the interpretation of Delta 8 as a legal derivative of hemp.³² The case centers around AK Futures' claims for trademark and copyright infringement by Boyd Street's line of delta-8 THC e-cigarette and vaping products. In the federal district court, AK Futures won an injunction prohibiting Boyd Street from selling the allegedly infringing products on the grounds that the 2018 Farm Bill legalized delta-8 THC.³³

In affirming the district court's injunction, the United States Court of Appeals for the Ninth Circuit held that a trademark could be held for a delta-8 THC product, implying hemp derived delta 8 is legal under the 2018 Farm Bill.³⁴ More specifically—taking a plain-reading interpretation of the 2018 Farm Bill—the Ninth Circuit concluded that delta-8 THC is a THC in hemp, and thus removed from federal scheduled control. The Ninth Circuit rejected Boyd Street's arguments that the 2018 Farm Bill does not protect synthetically created delta-8 THC and that Congress intended only to protect non-psychoactive hemp parts.³⁵ According to the Ninth Circuit, “[T]he source of the product—not the method of manufacture—is the dispositive factor for ascertaining whether a product is synthetic,” indicating that delta-8 THC sourced from legal hemp is itself legal.³⁶ Finally, the Ninth Circuit disagreed with Boyd Street that Congress intended a limitation that “substances legalized by the Farm Act must be somehow suited for an industrial purpose, not for human consumption,” writing that “[if] Congress inadvertently created a loophole legalizing vaping products containing delta-8 THC, then it is for Congress to fix its mistake.”³⁷

The Ninth Circuit's decision is the clearest support yet for the argument that the 2018 Farm Bill protects delta-8 THC, and possibly other potentially intoxicating hemp-derived cannabinoids. By no means is *AK Futures*

32. 35 F.4th 682 (9th Cir. 2022).

33. *Id.* at 685–86.

34. *Id.* at 690–94.

35. *Id.* at 692–94.

36. *Id.* at 692.

37. *Id.* at 693.

dispositive, however. While some have cited *AK Futures* in part, no federal court has fully embraced the Ninth Circuit's expansive analysis, and a different federal circuit could reach a different result. Nor does *AK Futures* address the extent to which state laws and regulations that limit delta-8 THC and similar products “more stringent[ly]” than the 2018 Farm Bill may survive.

B. *Alabama Board of Pharmacy Letter*

In October 2021, a letter issued by the DEA to the Alabama Board of Pharmacy emerged on the Internet.³⁸ The letter from the DEA was in response to an inquiry from the Alabama Board requesting the control status of delta-8 THC under the CSA.³⁹ The DEA's letter noted that delta-8 THC is a substance that is contained in the cannabis plant and “can be produced synthetically from non-cannabis materials.”⁴⁰ The letter noted the Farm Bill's exclusion of hemp and THCs in hemp from the CSA and then came to two conclusions about delta-8 THC: (1) “delta-8 THC synthetically produced from non-cannabis materials is controlled under the CSA as a ‘tetrahydrocannabinol,’” and (2) “cannabinoids extracted from the cannabis plant that have a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis meet the definition of ‘hemp’ and thus are not controlled under the CSA.”⁴¹ Interestingly, a footnote in the letter focused on the “plant” and “any part of that plant” language from the definition of hemp to further conclude that “only tetrahydrocannabinol in or derived from the cannabis plant—not synthetic tetrahydrocannabinol—is subject to being excluded from control as a “tetrahydrocannabinol[] in hemp.”⁴²

Industry experts took various views on how to interpret this letter. On one hand, many delta-8 manufacturers took comfort in knowing that their products, being derived from hemp-derived CBD, were squarely within the definition of hemp, as reiterated in this letter by the DEA. Others, however, interpreted the footnote differently—that the additional step of converting CBD into delta-8 meant that cannabinoids converted from other hemp-derived cannabinoids were not directly derived from the cannabis plant—and therefore synthetic and not part of the legal carveout for hemp. The letter did not directly address the concept of indirect derivatives, though the vast majority of delta-8 THC products currently on the market are believed to have initiated from hemp plants (cannabis), negating the assertion they are synthetic (at least inasmuch as the DEA alluded to in this letter).

38. Letter from Terrence L. Boos, Ph.D., Chief, Drug & Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration, to Donna C. Yeatman, R.Ph., Executive Secretary, Alabama Board of Pharmacy (Sept. 15, 2021).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

C. *Marijuana Seeds Letter*

A letter from the DEA to attorney Shane Pennington, dated January 6, 2022, acknowledged that marijuana seeds that do not exceed 0.3% delta-9 THC are not controlled under the CSA, regardless of where the seed originated from or the level of THC that might be expressed if cultivated.⁴³ The letter was issued in response to Pennington's inquiry as to the control status of cannabis seeds, tissue culture, and other genetic material of cannabis plants that do not exceed a delta-9 THC concentration of more than 0.3% on a dry weight basis.⁴⁴ In its response, the DEA referenced Congress's definition of "hemp" from the 2018 Farm Bill and relied on that 0.3% concentration level as the determinate factor.⁴⁵ Perhaps surprisingly, the DEA opined that "marijuana seed that has a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis meets the definition of 'hemp' and thus is not controlled under the CSA."⁴⁶ The DEA likewise opined as to "other material that is derived or extracted from the cannabis plant such as tissue culture and any other genetic material" that does not exceed the 0.3% delta-9 THC concentration as also being deemed hemp.⁴⁷ The DEA opinion letter held fast to the 0.3% delta-9 THC threshold, as it conversely confirmed that marijuana seed, tissue culture, and any other genetic material derived or extracted from cannabis having a delta-9 THC concentration level above the cap would be controlled in Schedule I of the CSA as marijuana.⁴⁸ Fascinatingly, it appears the DEA is taking the position that the determination as to control status is made with respect to a substance at the time of testing, and not whether the original source of the material is scheduled in the CSA, or what the seed, tissue, or other culture has the genetics to produce.

D. *FDA/CDC Health Alerts and Warning Letters*

Although not considered guidance, the FDA issued a consumer alert during the fall 2021 with respect to delta-8 THC products⁴⁹ and did so simultaneously with a health alert issued by the Center for Disease Control and

43. Kyle Jaeger, *DEA Says Marijuana Seeds Are Considered Legal Hemp as Long as They Don't Exceed THC Limit*, MARIJUANA MOMENT (Apr. 7, 2022), <https://www.marijuanamoment.net/dea-says-marijuana-seeds-are-considered-legal-hemp-as-long-as-they-dont-exceed-thc-limit>.

44. Letter from Terrence L. Boos, Ph.D., Chief, Drug & Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration, to Shane Pennington, Esq. (Jan. 6, 2022).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. 5 Things to Know About Delta-8 Tetrahydrocannabinol—Delta-8 THC, <https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc> (last visited Oct. 31, 2022).

Prevention.⁵⁰ Both notices state that most of the delta-8 THC products on the market have been “synthetically converted” from CBD, but did not go so far as to call them illegal. The major concerns noted were adverse events following consumption (many from inadvertent intoxication), marketing to and use by minors, and the potential presence of harmful byproducts and unsafe manufacturing practices.⁵¹ The FDA notice listed five “Things to Know” about the serious health risks of delta-8 THC and associated products: (1) they are not FDA-approved for safety; (2) adverse events have been reported; (3) they may have intoxicating effects; (4) harmful chemicals are used in the manufacturing process; and (5) they should be kept away from children and pets.⁵²

While the FDA geared the notice towards consumers, the CDC aimed its health alert at healthcare workers as well as the public.⁵³ The CDC health alert provided lists of recommendations for consumers, health departments/poison control centers, retailers, and healthcare providers, including that manufacturers use transparent and accurate labeling so purchasers are aware of the ingredients and that healthcare workers are on alert as to how to recognize and monitor and handle patients that may present with THC-like intoxication.⁵⁴

In May 2022, the FDA issued warning letters to five companies for selling products labeled as containing delta-8 THC in ways that violated the Food and Drug Act.⁵⁵ The five letters noted numerous violations, akin to those received in the past by companies selling CBD products labeled in a similar fashion, such as putting these substances in food, making health claims, and using illegal marketing tactics.⁵⁶ For practitioners representing cannabis businesses, these health alerts and warning letters are a stark reminder to work with clients in analyzing risks and using appropriate mitigation measures and taking action that may include changes to manufacturing practices, testing methods, and packaging and labeling.⁵⁷

50. CDC, Emergency Preparedness and Response, Increases in Availability of Cannabis Products Containing Delta-8 THC and Reported Cases of Adverse Events (Sept. 14, 2021), <https://emergency.cdc.gov/han/2021/han00451.asp>.

51. Andrea Steel & Brian Higgins, *Take Heed: FDA & CDC Release Health Alerts About Delta-8 THC*, FROST BROWN TODD (Sept. 23, 2021), <https://frostbrowntodd.com/take-heed-fda-cdc-release-health-alerts-about-delta-8-thc>.

52. *Id.*

53. *Id.*

54. *Id.*

55. Press Release, FDA, FDA Issues Warning Letters to Companies Illegally Selling CBD and Delta-8 THC Products (May 4, 2022), <https://www.fda.gov/news-events/press-announcements/fda-issues-warning-letters-companies-illegally-selling-cbd-and-delta-8-thc-products>.

56. *Id.*

57. Steel & Higgins, *supra* note 51.

IV. RECENT STATE COURT DECISIONS

A. *Georgia*

Litigation in Fulton County, Georgia commenced after the district attorney of Gwinnett County issued a press release stating her office intended to arrest and prosecute businesses selling delta-8 THC and delta-10 THC products on the basis that they were illegal schedule I controlled substances.⁵⁸ Following that press release, law enforcement across the state doubled down on executing on that threat, including raids at retail shops resulting in arrests.⁵⁹ Two retailers sued the state and the district attorney in her individual capacity for acting *ultra vires* in her incorrect interpretation of the definition of “hemp.”⁶⁰ The court issued a temporary restraining order and subsequently granted the plaintiffs’ motion for an interlocutory injunction and enjoined the defendant from initiating or continuing criminal enforcement or civil asset forfeiture proceedings based on delta-8 THC and delta-10 THC.⁶¹ As of December 2022, the lawsuit remains pending in the Superior Court of Fulton County, Atlanta, Judicial Circuit.

B. *Kentucky*

In April 2021, the Kentucky Department of Agriculture (KDA) issued guidance in response to inquiries regarding clarification as to the legal status of delta-8 THC. This guidance couched “hemp” as a narrow exception carved out from the definition of marijuana, which allows for hemp that does not exceed the 0.3% delta-9 THC threshold.⁶² The guidance provided that “there is no equivalent exemption for delta-8 THC” and stated that the substance was illegal both federally and under state law.⁶³ Shortly thereafter, several companies selling delta-8 products were raided. The Kentucky Hemp Association, along with a retailer and producer, sued the KDA and the Kentucky State Police (KSP) for injunctive relief.⁶⁴ In August 2022, the Kentucky Circuit Court found and ordered “that Delta-8

58. See Curt Yeomans, *Gwinnett County DA’s Office: Several Local Convenience Stores Are Selling Products That Contain Illegal—and Potentially Fatal—Forms of THC*, GWINNETT DAILY POST (Jan. 27, 2022), https://www.gwinnettdaily.com/local/gwinnett-county-das-office-several-local-convenience-stores-are-selling-products-that-contain-illegal-and/article_886d5f74-7f00-11ec-bf7a-07cfa2cb583a.html.

59. *Sass Group, LLC, v. Ga.*, No. 2022CV362007 (Fulton Cnty. Super. Ct., 2022), available at <https://www.pagepate.com/wp-content/uploads/2022/04/SASS-Group-v-State-of-Georgia.pdf>.

60. *Id.*

61. *Id.*

62. Letter from Joe Bilby, General Counsel, Kentucky Department of Agriculture, to Kentucky Hemp License Holder (Apr. 19, 2021), <https://hempsupporter.com/assets/uploads/KDAStatementApril192021.pdf>.

63. *Id.*

64. *Ky. Hemp Assn v. Quarles*, No. 21-CI-00836 (Boone Cir. Ct. Aug. 3, 2022), available at <https://hemptoday.net/wp-content/uploads/2022/08/D8-Order-8-3-22.pdf>.

tetrahydrocannabinol, as a derivative of Hemp, and any products that contain Delta-8 tetrahydrocannabinol are legally compliant Hemp pursuant to KRS 260.850(5) and 7 U.S.C. 1639o(1) so long as the same contain a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”⁶⁵ A permanent injunction was issued against the KSP, enjoining any criminal enforcement action on the basis of legally compliant hemp, specifically including delta-8 THC products that do not exceed the 0.3% delta-9 THC cap.⁶⁶

The court ruled that the notion that hemp legislation made an exemption for delta-9 THC is a mischaracterization; rather the statute does the reverse—*all* hemp is exempted *except* that containing delta-9 THC above 0.3% on a dry weight basis, as the definition of hemp was “unmistakably broad” including *all* derivatives, extracts, cannabinoids, isomers.⁶⁷ The court held that delta-8 THC was a derivative of hemp, disagreed with KSP’s contention that a “derivative of a derivative” meant it was a synthetic creation, and cited *AK Futures* for support. The court also addressed the fundamental criminal law concept that, for an offense to be prohibited by law, the law must be clear and punishment cannot be imposed without due process. The court found the plain language of the law clearly favors the plaintiffs, and any changes must come from lawmakers, not those charged with enforcing the law, as there is a mandatory separation between those two facets for a reason.⁶⁸

C. Texas

Texas plaintiffs obtained a temporary injunction against the state after challenging the Health & Human Services Commissioner’s procedure in changing the definition of tetrahydrocannabinol under the Texas Controlled Substances Act in such a way that would render delta-8 products illegal, whereby commerce of it could proceed pending the court’s decision.⁶⁹ The lawsuit is still pending.⁷⁰ In the lawsuit, a group of retailers, manufacturers, and individuals sued the Texas Department of State Health Services (DSHS), after DSHS posted a notice on its website stating delta-8 THC was an illegal Schedule I controlled substance. Plaintiffs allege the legal definitions of “tetrahydrocannabinol” and “marijuana extract” were changed in the state Schedule of Controlled Substances without

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Tex. Dep’t. of State Health Servs., v. Sky Mktg. Corp., No. 03-21-00571, 2022 WL 834090 (Tex. Ct. App. 2021).

70. *Id.*

conspicuously enough publishing the changes in the Texas Register.⁷¹ As of December 2022, the case is currently pending in the Third Court of Appeals where it is awaiting a date for oral arguments.

V. HEMP AND THE DEA

The Hemp Industries Association (HIA), a nonprofit trade association founded in 1994 with the mission to “educate the market and advance the hemp economy, for the benefit of our members, the public, and the planet,”⁷² has a history of suing the DEA over hemp-related issues.⁷³ In a pair of lawsuits challenging the DEA’s 2020 Interim Final Rule (IFR), HIA sought to have the U.S. District Court in Washington, D.C. (1) declare that intermediate hemp material and waste hemp material are not controlled substances that would be subject to the registration requirements of the CSA; and (2) enjoin enforcement by the DEA of the CSA against these in-process materials that unavoidably go above the 0.3% delta-9 THC cap during the processing phase.⁷⁴ HIA also asked the U.S. Court of Appeals for the D.C. Circuit to set aside the IFR as unlawful.⁷⁵ Both courts dismissed the lawsuits on procedural grounds, finding in part there was no injury, case, or controversy, as the DEA repeatedly admitted in the court filings that the IFR was intended only to modify the Schedule of Controlled Substances to align with the changes made to the CSA by the 2018 Farm Bill (and not to add any additional requirements).⁷⁶ While the plaintiffs lost these suits, the DEA admissions support the arguments as to the legality of novel cannabinoids beyond delta-9 THC, so long as the cap is not exceeded.

VI. INSURANCE COVERAGE

Marijuana and hemp-related businesses are considered by insurance companies to be high risk, in a similar category to night clubs, liquor, and guns. These “specialty” coverages are typically insured by excess and surplus lines of insurance that cater to these unique risks. No A-rated admitted carriers currently provide cannabis coverage. Coverage issues might arise involving acceptable policy terms, such as premium, deductibles, limits, product coverage, and limitations and exclusions. Certain brokers, however,

71. *Id.*

72. HEMP INDUS. ASS’N, HEMP INDUSTRIES ASSOCIATION’S NONPROFIT MISSION, <https://thehia.org/abouthia/hia-mission> (last visited Mar. 3, 2023).

73. *See id.*

74. *Hemp Inds. Ass’n v. Drug Enf’t Admin.*, 36 F.4th 269 (D.C. Cir. 2022).

75. *Hemp Inds. Ass’n v. Drug Enf’t Admin.*, 36 F.4th 278 (D.C. Cir. 2022).

76. *Id.*

specialize in these markets, and it is possible to secure some coverage if you know where to look. Because there are not many insurance coverage cases generally in this nascent industry, this article surveys the past twenty years of notable cannabis coverage disputes, while focusing on the last few years of precedent.

A. *Chemical Fire*

In *Kinsale Insurance Co. v. JDBC Holdings, Inc.*,⁷⁷ the insurer denied the claim and sought rescission of the insurance policy after a chemical fire resulting from hemp manufacturing occurred, due to several exclusions, including the “procedural safeguard” endorsement concerning theft. This endorsement provides that, if certain protective equipment were not installed by the insured, the policy is terminated.⁷⁸ The court viewed this endorsement as inapplicable because it only pertained to theft. The insurer then argued that coverage would not issue when there was a misrepresentation on the insurance application, which the insurer argued fell under the “concealment, misrepresentation, or fraud” exclusion. When the insured applied for coverage, it indicated that the sprinklers were “being installed,” even though installation had not begun yet, and still was not completely in place at the time of the fire. The court held that, because the insured admitted the sprinklers *only* were being installed and the insurer accepted the coverage and took the premium on that basis, the insurer had a duty to pay the claim.

B. *Duty to Defend*

*Kramer v. Nationwide Property & Casualty Insurance Co.*⁷⁹ is a duty-to-defend case in which Nationwide was ordered to pay for the defense of a wrongful death suit under a parents’ homeowner’s policy. The parents’ son had hosted a party in their absence, after which an attendee died of a drug overdose. Nationwide argued that the controlled substance exclusion prevented a defense obligation—that the policy did not apply “to bodily injury or property damage . . . resulting from the use, sale, manufacture, delivery, transfer or possession by a person of a controlled substance(s) as defined by Federal Food and Drug Law. Controlled substances include, but are not limited to, cocaine, LSD, marijuana, and all narcotic drugs.”⁸⁰

In addition to noting the ambiguity of which drugs would be considered prohibited controlled substances, the court pointed out that an allegation

77. No. 3:20-CV-8, 2021 WL 2773002, at *1 (N.D. W. Va. Mar. 31, 2021), *motion to certify appeal granted*, No. 3:20-CV-8, 2021 WL 2773003 (N.D. W. Va. Apr. 29, 2021), *reconsideration denied*, No. 3:20-CV-8, 2021 WL 5240853 (N.D. W. Va. July 7, 2021).

78. *Id.*

79. 271 A.3d 431 (Pa. 2021).

80. *Id.*

in the complaint that the parents' negligence in controlling the use of their home caused emotional distress to the plaintiff (the decedent's mother), which would be a covered claim (avoiding the exclusion for bodily injury for controlled substances), triggering a duty to defend under the policy.⁸¹ Based on this reasoning, Nationwide had a duty to defend the entire lawsuit under general insurance coverage principles.

C. Life Insurance

In *Williams v. Farmers New World Life Insurance Co.*,⁸² the United States District Court for the Eastern District of Wisconsin ruled against Farmers on a motion for summary judgment, holding that, where a life insurance company contended no coverage was owed because the insured gave a false statement about her use of marijuana in the application, the issue of whether the statement was false and whether it was material was a question of fact to be presented to the jury.

VII. ETHICS AND RULES OF PROFESSIONAL CONDUCT RELATED TO CANNABIS BUSINESSES

A. State Developments

1. Rhode Island

On May 25, 2022, Rhode Island legalized recreational cannabis.⁸³ Rhode Island has not yet changed its related rules of professional conduct.⁸⁴ However, in 2017, the Rhode Island Supreme Court Ethics Advisory Panel (Panel) issued an ethics opinion regarding the state's medical cannabis laws.⁸⁵ The Panel opined that attorneys do not violate R.I. R. Sup. Ct. Art. V, Rules of Professional Conduct 1.2 if they represent businesses or individuals active in the medical cannabis industry.⁸⁶

In explaining this conclusion, the Panel quoted the Preamble of the rules: "The Rules of Professional Conduct are rules of reason."⁸⁷ The Panel stated that the Rhode Island Supreme Court never intended for Rule 1.2 to prohibit attorneys from advising clients on Rhode Island law or assisting

81. *Id.*

82. No. 18-CV-354 (E.D. Wis. Mar. 31, 2022).

83. Press Release, Governor McKee Signs Legislation Legalizing and Safely Regulating Recreational Cannabis in Rhode Island, State of R.I. (May 25, 2022), <https://governor.ri.gov/press-releases/governor-mckee-signs-legislation-legalizing-and-safely-regulating-recreational>.

84. R.I. R. Sup. Ct. art. V, RULES OF PRO. CONDUCT, Rules 1.2, 8.4.

85. See Rhode Island Supreme Court Ethics Advisory Panel Opinion 2017-01.

86. *Id.*

87. *Id.* (quoting R.I. R. Sup. Ct. art. V, RULES OF PRO. CONDUCT pmb. & scope).

them in conduct permitted under the state's law.⁸⁸ It stands to reason that such an opinion should extend to recreational cannabis. However, Opinion 2017-01 specifically applies to "medical marijuana" and thus does not apply to recreational cannabis per se.

2. Mississippi

On February 2, 2022, Mississippi legalized medical cannabis, allowing access to cannabis for patients with debilitating conditions.⁸⁹ On June 9, 2022, the Ethics Committee of the Mississippi Bar rendered an opinion on applicable rules in light of this new law, the Mississippi Medical Cannabis Act.⁹⁰ Specifically, the Committee responded to the question "May a Mississippi lawyer consistent with Mississippi Rule of Professional Conduct 1.2(d) ethically provide legal services assisting a client to comply with the Mississippi Medical Cannabis Act (Senate Bill 2095)?"⁹¹

In its opinion, the Committee noted that Mississippi is the thirty-seventh state to legalize cannabis to some extent. Further, the Mississippi Medical Cannabis Act contemplated the conflict between state and federal law, and stated:

It is the public policy of the State of Mississippi that no contract entered into by a cardholder, a medical cannabis establishment, or a medical cannabis establishment agent, or by a person who allows property to be used for activities that are authorized under this chapter, shall be unenforceable on the basis that activities related to cannabis are prohibited by federal law.⁹²

Further, the Committee noted the need for clients to have legal assistance in navigating this new law and acknowledged that the new medical cannabis program will function better with such assistance.⁹³ Ultimately, the Committee determined that, under Mississippi Rules of Professional Conduct 1.2(d) and 1.4, Mississippi attorneys may ethically provide legal services, representing, counseling, and assisting a client with the Mississippi Medical Cannabis Act, as long as the lawyer also advises the client of relevant federal law, such as the federal CSA.⁹⁴

88. *Id.*

89. Shanna Mizelle, *Mississippi Becomes 37th State to Legalize Medical Marijuana*, CNN (Feb. 3, 2022), <https://www.cnn.com/2022/02/03/politics/mississippi-medical-marijuana-law/index.html>.

90. Miss. Bar Ethics Comm., Op. No. 265 (2022), <https://www.msbar.org/media/4958/et-op-265.pdf>.

91. *Id.*

92. *Id.* (quoting Miss. S.B. 2095 (2022)).

93. *Id.*

94. *Id.*

3. Minnesota

Minnesota passed a law broadly legalizing products containing THC.⁹⁵ The law went into effect on July 1, 2022, and allows the sale of products containing up to five milligrams of THC. The law places no restrictions on who can sell the edible cannabis products or where they are sold.⁹⁶ However, the law applies to hemp-derived THC, which is not prohibited by the CSA.

The Agriculture Improvement Act (AIA) legalized hemp at the federal level.⁹⁷ The AIA legally defined “hemp” as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”⁹⁸

In light of the passage of the AIA, the CSA revised the definition to align the two laws. The CSA now states cannabis⁹⁹ “does not include . . . hemp, as defined in section 1639o of title 7.”

Since Minnesota has only legalized THC edibles derived from hemp, the CSA arguably does not prohibit such edibles. An attorney may ethically advise a client participating in the sale of such edibles because the activity is not prohibited by Minnesota law or the CSA. Whether a court would uphold such an argument is unclear, and Minnesota has neither amended their Rules of Professional Conduct nor issued an ethics opinion in response to the new law.¹⁰⁰

Yet, in 2015, the Minnesota Office of Lawyers Professional Responsibility issued an ethics opinion regarding the state’s medical cannabis statute, stating that attorneys may advise clients on medical cannabis, so long as they advise clients on the federal CSA.¹⁰¹ However, this opinion expressly applies to medical cannabis, and may not apply to the new THC-focused law.

95. Gabrielle Matz-Carter & Hanna Barker Mullin, *Cannabis Legal Report—July 2022*, JD SUPRA (BLOG) (July 20, 2022), <https://www.jdsupra.com/legalnews/cannabis-legal-report-july-2022-2341356>.

96. *Id.*

97. Minnesota THC Overview, MINN. CANNABIS INFO., <https://minnesotastatecannabis.org/thc> (last visited Oct. 7, 2022).

98. 7 U.S.C. § 1639 (2022).

99. The CSA refers to cannabis as “marihuana” and “marijuana.” 21 U.S.C. § 802(16) (A)–(B).

100. MINN. RULES OF PRO. CONDUCT r. 1.2 (2022); *Lawyers Professional Responsibility Board Opinions*, MINN. OFFICE OF REVISOR OF STATUTES, https://www.revisor.mn.gov/court_rules/rule/prlawy-toh (last visited Oct. 7, 2022).

101. MINN. OFFICE OF REVISOR OF STATUTES, Opinion No. 23 (Apr. 6, 2015), https://www.revisor.mn.gov/court_rules/pr/subtype/lawy/id/23.

4. Virginia

In July 2021, Virginia legalized recreational cannabis. In November 2021, the Virginia State Bar petitioned the Virginia Supreme Court to amend Rule 1.2. The proposed amendment added paragraph (c)(3) to the rule, which states a lawyer may “counsel or assist a client regarding conduct expressly permitted by state or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client’s proposed course of conduct under applicable federal law.”¹⁰²

Additionally, the amendment included Comment 13 for the new paragraph, which directly addresses the conflict between state and federal cannabis laws.¹⁰³ Comment 13 provides:

[13] Paragraph (c)(3) addresses the dilemma facing a lawyer whose client wishes to engage in conduct that is permitted by applicable state or other law but is prohibited by federal law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by state law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (c)(3) applies, but is not limited in its application, to any conflict between state and federal marijuana laws.¹⁰⁴

The Virginia Supreme Court adopted the amendment on January 11, 2022, and it took effect on March 12, 2022.

5. New Jersey

New Jersey first legalized cannabis in 2021, although cannabis sales in the state officially began on April 21, 2022.¹⁰⁵ While the state amended Rule 1.2(d), allowing representation of cannabis clients, the state took a step further in 2022. On September 21, 2022, New Jersey’s Advisory Committee on Professional Ethics stated that attorneys can officially use cannabis without violating the Rules of Professional Conduct.¹⁰⁶ Rule 8.4 governs personal conduct for attorneys, and Rule 8.4(b) states that an attorney may not commit a crime that “reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”¹⁰⁷ The New Jersey

102. Adopted amendments to Rule 1.2 by Supreme Court of Virginia, VA. ST. BAR (Jan. 11, 2022), https://www.vacourts.gov/courts/scv/amendments/part_six_sect_ii_rule_1_2.pdf.

103. *Id.*

104. *Id.*

105. Gloria Oladipo, ‘*Today Is Absolutely Historic: Legal Marijuana Sales Roll out in New Jersey*’, *GUARDIAN* (Apr. 23, 2022), <https://www.theguardian.com/us-news/2022/apr/23/new-jersey-legal-marijuana-sales>.

106. N.J. Advisory Comm. Pro. Ethics, Opinion 744 (Sept. 21, 2022), <https://www.njcourts.gov/notices/2022/n220927a.pdf?c=Q5T>.

107. *Id.*

committee's official opinion is that using cannabis according to New Jersey law does not violate 8.4(b), even though such conduct violates the CSA.¹⁰⁸

6. Vermont

Vermont legalized recreational cannabis on October 7, 2020, with sales beginning in October 2022.¹⁰⁹ Originally, the court amended Rule 2016 by adding Comment 14, which allowed lawyers to advise clients on Vermont's cannabis laws.¹¹⁰ However, on September 13, 2022, the Vermont Supreme Court promulgated another amendment to Vermont's version of Rule 1.2, adding Comment 15.¹¹¹ The Supreme Court stated the purpose of Comment 15 is to clarify recent changes to Vermont's cannabis statutory scheme, which "will require participants to secure valuable legal advice."¹¹²

7. Nebraska

Finally, Nebraska issued a surprising ethics opinion during this survey period. Nebraska generally is not cannabis-friendly; it does not have legal medical or recreational cannabis.¹¹³ However, on August 11, 2022, the Nebraska State Bar Association Ethics Advisory Committee issued an ethics opinion allowing lawyers to ethically invest in cannabis companies from other states.¹¹⁴ Further, the Committee "permitted [Nebraska attorneys] to advise Nebraska clients on employment issues surrounding medical cannabis where the employees of said client live in a state where medical cannabis is legal but, [sic] who are employed in Nebraska."¹¹⁵

B. Cannabis-Related Attorney Disciplinary Cases

In *In re Self*, the Supreme Court of Louisiana found an attorney violated the Rules of Professional Conduct, due in part to her arrest for possession

108. *Id.*

109. MARIJUANA POLICY PROJECT, VERMONT, <https://www.mpp.org/states/vermont> (last visited Mar. 3, 2023).

110. VT. R. PRO. COND. 1.2 (Board's Notes–2016 amend.) <https://casetext.com/rule/vermont-court-rules/vermont-rules-of-professional-conduct/client-lawyer-relationship/rule-12-scope-of-representation-and-allocation-of-authority-between-client-and-lawyer-effective-until-november-14-2022>.

111. Vt. Sup. Ct., Order Promulgating Amendments to Rules 1.2(c), 1.6, 1.15A, 3.1, 4.4, 5.3, 5.5, 8.3, and 8.4 of the Vermont Rules of Professional Conduct (Sept. 13, 2022), <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVPRPrC1.2%201.6%201.15A%203.1%204.4%205.3%205.5%208.3%20and%208.4--STAMPED.pdf>.

112. *Id.*

113. MARIJUANA POLICY PROJECT, NEB., <https://www.mpp.org/states/nebraska>.

114. Neb. State Bar Ass'n Ethics Advisory Comm., Nebraska Ethics Advisory Opinion for Lawyers No. 22-03 (Feb. 3, 2022), <https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Lawyer/22-03.pdf> [hereinafter Nebraska Advisory Opinion]; Paul Hammel, *Nebraska lawyers not going to pot, but they can invest in medical cannabis operations, an advisory panel says*, (Aug. 11, 2022) <https://nebraskaexaminer.com/briefs/nebraska-lawyers-not-going-to-pot-but-they-can-invest-in-medical-cannabis-operations-an-advisory-panel-says>.

115. Nebraska Advisory Opinion, *supra* note 114.

of cannabis.¹¹⁶ Because the attorney had an outstanding motor vehicle violation, the city marshal took the attorney out of a courtroom while she was representing a client and put the attorney in a holding cell.¹¹⁷ The city marshal then obtained a search warrant for her vehicle and upon the search found 0.2 grams of cannabis in her center console.¹¹⁸ Although the attorney alleged the cannabis belonged to her brother, the court found that the attorney violated Rule 8.4(b).¹¹⁹ The court also found that, due to this violation, along with an unrelated Rule 5.5 violation, a thirty-day suspension and one year of unsupervised probation were appropriate sanctions.¹²⁰

The Oklahoma Supreme Court disbarred an attorney for numerous violations, among which was the possession of cannabis in *State ex rel. Oklahoma Bar Ass'n v. Willis*.¹²¹ The attorney's misconduct involved client neglect, misuse of client funds, lack of cooperation in disciplinary proceedings, and criminal conduct involving a federal weapons charge.¹²² In connection with a federal investigation of a weapon violation, authorities found cannabis, psychedelic mushrooms, and methamphetamine in the attorney's home.¹²³ Even though the attorney was not convicted of possessing the substances, the court considered it a factor in the attorney's disbarment.¹²⁴

Finally, in *Matter of Holmes*, the Supreme Court of South Carolina disbarred an attorney for numerous violations, one of which was an arrest for trafficking cannabis.¹²⁵ The attorney was arrested in February 2017 and charged with trafficking cannabis and possession with intent to distribute THC oil.¹²⁶ Police had found 305 pounds of cannabis and 328 THC cartridges in the attorney's home and commercial warehouse.¹²⁷ The court explained that the attorney had failed to report a 2003 conviction for possession with intent to distribute cocaine and failed to cooperate with the Georgia Commission on Lawyer Conduct.¹²⁸ The court noted that the cannabis-related charges were an "aggravating circumstance."¹²⁹

116. 326 So. 3d 1233, 1238 (La. 2021).

117. *Id.* at 1235.

118. *Id.*

119. *Id.* at 1238.

120. *Id.* at 1233.

121. 504 P.3d 1141, 1143 (Okla. 2022).

122. *Id.* at 1151–52.

123. *Id.* at 1151.

124. *Id.*

125. 866 S.E.2d 810, 812 (S.C. 2021).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

