HEMP – A BUDDING INDUSTRY FOR NC

October 18, 2019 Presentation Summary for Annual Local Government CLE/CPE

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I. Overview

These materials, and our presentation on October 18th, are not comprehensive. Instead, they seek to provide a generalized understanding of the hemp industry, which is rapidly growing and changing, and considerations that may impact your legal practice and your clients' business operations, investments, and transactions. We welcome any and all questions, calls, and comments at or after our presentation. The hemp industry is incredibly dynamic and the rules, regulations, and statutes governing industry participants are still developing and changing – both nationally and in North Carolina.

As used in these materials and in our discussion, the term "hemp" refers to both: "Industrial Hemp", as defined under Section 7606 of the Agricultural Act of 2014 (the "2014 Farm Bill")[1]; and "Hemp", as defined under the Agriculture Improvement Act of 2018 (the "2018 Farm Bill"[2]). As used herein, the term "THC" refers specifically to delta-9 tetrahydrocannabinol and the term "CBD" refers specifically to cannabidiol.

Hemp and marijuana are not the same thing, and the law is only beginning to catch up with that fact. Hemp, like marijuana, is a variety of the plant species *Cannabis sativa L.* (the "Plant"). Hemp can be mistaken for marijuana based on its visual appearance and smell. But unlike marijuana, hemp contains only trace amounts of THC, the cannabinoid primarily responsible for the Plant's intoxicating or psychoactive effects. Simply put, hemp doesn't give users the "high" associated with smoking or ingesting marijuana.

II. 2014 Farm Bill

Since passage of the Marihuana Tax Act in 1937, all forms of cannabis (including hemp) have been effectively prohibited at the federal level. Over the last 5 decades, hemp has been regulated by the Drug Enforcement Administration ("DEA") as a Schedule I controlled substance pursuant to the Controlled Substances Act of 1970 (the "CSA")[3]. Its cultivation, possession, and use in commerce has been, effectively, illegal under the CSA's blanket prohibition. But, the 2014 Farm Bill loosened those restrictions by allowing cultivation under authorized state research programs

[1] 7 U.S.C. § 5940.
[2] PL 115-334, December 20, 2018, 132 Stat 4490
[3] 21 U.S.C. Ch. 13, § 801 et seq.

pursuant to certain specified conditions. The 2014 Farm Bill defines "Industrial Hemp" as "the plant Cannabis sativa L., and any part of such plant, whether growing or not, with a delta-9 THC concentration of not more than 0.3% on a dry weight basis."[4]

The 2014 Farm Bill does not amend the CSA to remove Industrial Hemp from its list of Schedule I controlled substances. However, the 2014 Farm Bill does explicitly state that the cultivation of Industrial Hemp in compliance with the 2014 Farm Bill is permitted "notwithstanding the CSA or any other federal law," and the United States Court of Appeals for the Ninth Circuit has concluded that the 2014 Farm Bill therefore "preempts" the CSA.[5] Further, as stated above, the 2018 Farm Bill has since become law and it does expressly remove Hemp (which includes Industrial Hemp) from the CSA.

The 2014 Farm Bill permits the cultivation of Industrial Hemp under limited circumstances only where authorized by state law. The cultivation must be conducted by either "an institution of higher education (as defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. § 1001))" or "a State department of agriculture."[6] And, institutions of higher education or state departments of agriculture must satisfy the following conditions: (a) the Industrial Hemp must be cultivated for research purposes, conducted under an agricultural pilot program or other agricultural or academic research; and (b) the cultivation of Industrial Hemp must be allowed under applicable law.[7]

The 2014 Farm Bill defines "agricultural pilot program" as a "pilot program to study the growth, cultivation, or marketing of [I]ndustrial [H]emp," in a state that permits such cultivation, provided that: (1) "only institutions of higher education and State departments of agriculture are used to cultivate Industrial Hemp"; and (2) the site used for cultivation is "certified by, and registered with, the State department of agriculture."[8] The 2014 Farm Bill also authorizes the applicable State department of agriculture to "promulgate regulations to carry out the pilot program in the State [] in accordance with the purposes of [the 2014 Farm Bill]."[9] Generally speaking, the 2014 Farm Bill does not specify the regulations that a State department of agriculture may promulgate and does not establish any federal regulatory framework for hemp cultivation. Instead, states were afforded the authority to determine the appropriate regulatory regimes for their respective jurisdictions and, as such, states have taken varying approaches in their pilot programs. Since the passage of the 2014 Farm Bill, some states have promulgated regulations governing (and issued registrations permitting) not only the cultivation

[4] 7 U.S.C. § 5940(b)(2).
[5] *See Hemp Indus. Ass'n v. U.S. Drug Enf't Admin.*, 720 F. App'x 886, 887 (9th Cir. 2018).
[6] 7 U.S.C. § 5940(a).
[7] *Id.*
[8] 7 U.S.C. § 5940(b)(1).
[9] *Id.*

of Industrial Hemp, but also the processing and handling of Industrial Hemp. North Carolina only licenses hemp cultivation under its research pilot program (discussed more below).

In addition to permitting the cultivation of Industrial Hemp for research purposes, the 2014 Farm Bill also permits agricultural pilot programs to study the "marketing of industrial hemp," a phrase that is not defined in the 2014 Farm Bill. In August 2016, the Federal Food and Drug Administration ("FDA"), U.S. Department of Agriculture ("USDA"), and DEA issued a Statement of Principles attempting to define the scope of market research activities permitted under the 2014 Farm Bill. In relevant part, the Statement of Principles provides that "[f]or purposes of marketing research…but not for the purposes of general commercial activity, industrial hemp products may be sold in a State with an agricultural pilot program or among States with agricultural pilot programs but may not be sold in States where such sale is prohibited."[10] Thus, at a minimum, the 2014 Farm Bill allows commercial activity in conjunction with market research, and permits Industrial Hemp-derived products to be transferred amongst states with agricultural pilot programs authorizing such activity. It is worth noting, however, that the Statement of Principles is not legally binding and is disputed by many, including members of Congress who drafted the 2014 Farm Bill, as contravening the intent of the 2014 Farm Bill and exceeding the FDA's, USDA's, and DEA's authority.[11] However, as recently as February 27, 2019, the USDA referenced the Statement of Principles as "additional guidance" that remains applicable to the 2014 Farm Bill.[12]

In summary, the 2014 Farm Bill permits the limited cultivation and marketing of Industrial Hemp (which, by definition, cannot contain more than 0.3% THC), if (i) the Industrial Hemp is grown for research purposes; (ii) by an institution of higher education or pursuant to an agricultural pilot program, and (iii) in a state that permits its cultivation. In addition, if the cultivation is conducted pursuant to an agricultural pilot program, the cultivator must register with the State's department of agriculture and comply with all regulations promulgated by same.

III. NC Industrial Hemp Research Pilot Program

The North Carolina General Assembly responded to the passage of the 2014 Farm Bill by, in turn, adopting and enacting its own industrial hemp authorization laws[13] and regulations[14] in 2015. Among other things, that legislative action created the

[10] Office of the Secretary, USDA; DEA, DOJ; FDA, HHS, "Statement of Principles on Industrial Hemp," 81 Fed. Reg. 53395-01 (August 12, 2016), http://federalregister.gov/a/2016-19146.
[11] *See, e.g.* Amicus Brief of Members of United States Congress in *Hemp Indus. Ass'n v. U.S. Drug Enf't Admin.*, Case No. 17-70162, Jan. 11, 2018, Dkt. 47 (available at https://files.iowamedicalmarijuana.org/imm/federal/usca9_17_70162_047.pdf)
[12] *See* https://www.ams.usda.gov/content/hemp-production-program.
[13] *See* NC General Statutes Chapter 106, Article 50E.
[14] *See* NCAC, Title 2, Chapter 62.

North Carolina Industrial Hemp Commission (the "Hemp Commission") – our state's licensing body for hemp cultivators – and decriminalized the production and use of industrial hemp if certain rules are followed. The Hemp Commission, in partnership with the North Carolina Department of Agriculture, presently licenses and oversees the production of industrial hemp in North Carolina through the administration of a highly regulated pilot program.

At present, the Hemp Commission only approves and issues hemp cultivation licenses. To obtain a license, applicants must meet all of the threshold criteria for licensure described in the applicable program rules – including, qualification of the applicant as a bona fide farmer. The Hemp Commission does not approve or issue licenses for other participants in the hemp industry – including extractors, product formulators, manufacturers, distributors, and retailers. The Hemp Commission does, however, require "processors" (a term that is not defined by the law) to *register* with the state and to provide certain annual reports on their operations.

IV. 2018 Farm Bill and its Changes

The passage of the 2018 Farm Bill and its execution by President Donald Trump on December 20, 2018 materially altered the legal landscape governing the production of hemp in the United States. The 2018 Farm Bill, in effect, decriminalized hemp and hemp-derived cannabinoids, extracts, and isomers by: (a) expressly excluding hemp (as defined under the 2018 Farm Bill) from the definition of "marijuana"; and, (b) expressly excluding any THC that exists in hemp (as defined under the 2018 Farm Bill) from the Schedule I controlled substances list. Under the 2018 Farm Bill, hemp is now regulated as an agricultural crop by the USDA in coordination with state departments of agriculture and tribal authorities (as explained below).

The 2018 Farm Bill defines 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."[15] This definition is a notable expansion from the limited definition of "Industrial Hemp" contained in the 2014 Farm Bill, which did not explicitly include cannabinoids and extracts, and thus left room for debate amongst agencies. Most significantly, the 2018 Farm Bill amends the CSA to explicitly exclude hemp – inclusive of all of its derivatives, extracts, and cannabinoids containing not more than 0.3% THC – from the federal definition of "marihuana" and also creates a specific exemption for THC found in hemp.[16]

Unlike the 2014 Farm Bill, the 2018 Farm Bill establishes a federal regulatory framework for hemp production in the United States. The 2018 Farm Bill

[15] PL 115-334, December 20, 2018, 132 Stat 4490, Section 10113, Sec. 297A.
[16] *Id.* Section 12619

establishes the USDA (as opposed to the DEA) as the primary federal regulatory agency overseeing hemp production in the United States. However, any states, U.S. territories, and Indian tribes desiring to obtain (or retain) primary regulatory authority over hemp activities within their borders are allowed to do so after submitting a plan for regulating hemp production to the USDA and receiving approval from the USDA for that plan.[17] State plans must be submitted through the state's department of agriculture in consultation with the Governor and chief law enforcement officer of the state (or the tribal government, as applicable).[18] The USDA is required to approve or disapprove any state or tribal plan within sixty (60) days of receiving it.[19] However, the USDA previously announced that it will not approve any state or tribal plan until the USDA's own regulations have been promulgated.[20]

States or tribal authorities that choose to submit and subsequently receive USDA-approval for their own plans will be responsible for issuing licenses through their respective departments of agriculture. Hemp production in jurisdictions that do not submit their own plans (and that do not otherwise prohibit hemp production) will be governed by USDA regulation,[21] and individuals seeking to cultivate hemp in such jurisdictions will be able to apply to the USDA for licensure.[22] Once USDA regulations are implemented, (1) in jurisdictions *without* USDA-approved plans, it will be unlawful to cultivate hemp in the state (or territory or Indian tribe, as applicable) without a license issued by the USDA[23]; and (2) in jurisdictions *with* USDA-approved plans, it will be unlawful to cultivate hemp in the state (or territory or Indian tribe, as applicable) without a license issued by that state's department of agriculture (or tribal government, as applicable[24].

The USDA has yet to approve or disapprove any state or tribal plans, and the USDA previously announced that it will not do so until its regulations have been promulgated.[25] The USDA has consistently maintained that it intends to issue such regulations in the Fall of 2019 in order to accommodate the 2020 planting season.[26] At the time of preparation of these materials, the USDA regulations have been internally promulgated and submitted to the White House Office of Management and Budget (OMB) for interagency review and approval. There has been no indication as to when the OMB interagency review process will conclude and the regulations released for public review and consumption.

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[17] *Id.* Section 10113, Sec. 297B(a)(1).
[18] *Id.*
[19] PL 115-334, December 20, 2018, 132 Stat 4490, Section 10113, Sec. 297B(b)(1).
[20] *See* https://www.ams.usda.gov/content/hemp-production-program.
[21] *Id.* Sec. 297C(a).
[22] *Id.* Sec. 297C(b).
[23] *Id.* Sec. 297C(c)(1).
[24] *Id.* Sec. 297B(e)(2)(A)(ii).
[25] *See* https://www.ams.usda.gov/content/hemp-production-program.
[26] *Id.*

Accordingly, no hemp cultivated in the United States today is being grown pursuant to the 2018 Farm Bill's newly-enacted hemp production regulatory regime. However, the 2018 Farm Bill includes a provision continuing the operation and applicability of the 2014 Farm Bill until one year after the United States Secretary of Agriculture publishes regulations governing commercial production of hemp in jurisdictions without USDA-approved programs.[27] Accordingly, until the 2018 Farm Bill regulations are implemented and effective, hemp cultivation in the United States must be conducted in compliance with state agricultural pilot programs pursuant to the 2014 Farm Bill.

V. Federal and State Regulatory Considerations

Federal decriminalization of hemp and hemp-derived products through the 2018 Farm Bill was a watershed moment for the hemp industry. But, by decriminalizing hemp, the 2018 Farm Bill also ushered in a new era of regulatory scrutiny and control within the hemp (and, particularly, CBD) industry. On the same day that the 2018 Farm Bill was signed into law, the FDA released a statement which forecast its clear intention to take an active role in regulation and enforcement for hemp and CBD products going forward.[28] Since then, the FDA has reaffirmed this statement on multiple occasions and it has been actively involved in the industry from an enforcement standpoint.

Under its own interpretation of the Federal Food Drug & Cosmetic Act ("FD&C Act"), the FDA has concluded that it is illegal to market or sell food, beverage, and dietary supplement products containing CBD in interstate commerce. The North Carolina Department of Agriculture has adopted this position for intrastate commerce activities as well, and it has warned CBD companies and consumers of its position in advisory letters. The FDA has publicly affirmed its desire to establish a regulatory "pathway forward" for hemp-derived CBD and CBD products, but there is no certain timeline for the agency's efforts on that topic.

The Federal Trade Commission ("FTC") has also begun to show increased regulatory scrutiny and concern in the hemp and CBD industries. The FTC joined with the FDA in warning letters issued to CBD product companies in the Spring of 2019 involving claims made in those companies' marketing materials that were false, misleading, unsubstantiated by competent evidence, and that otherwise violated the FTC Act and the FD&C Act. This Fall, the FTC – for the first time – issued its own standalone warning letters to three (3) undisclosed CBD product companies in connection with their product marketing claims. Companies can expect the interest and influence of regulatory agencies like the FDA and FTC to continue to grow and develop as the commercial hemp and CBD industries mature.

[27] PL 115-334, December 20, 2018, 132 Stat 4490, Section 7605.

[28] https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys

As noted above, the USDA is working to develop its rules and regulations that will establish our country's first ever, nationwide hemp cultivation program. There is no set timeframe for the USDA's release of those rules and regulations. However, the USDA has indicated its strong desire to publish those rules in advance of the 2020 crop year. As of the finalization of this manuscript, those regulations have not yet been publicly published or released. Once available, they will have a significant impact on the cultivation of hemp in the United States and on the individual states' efforts to implement state-level cultivation plans in accordance with the 2018 Farm Bill.

VI. Doing Business with the Hemp Industry

The following briefly summarizes key considerations for any clients that are involved (or considering involvement) in the hemp industry, regardless of whether or not they actually "touch the plant."

a. Landlords, know your tenants

Whether a landlord-client owns farm land or commercial properties, if they are considering a lease to a hemp-related operation, it is imperative that they understand who the tenants are, and what they plan to do in business. Landlords should be comfortable that their tenants are fully licensed or authorized (as applicable) by the state to conduct their business operations, and that those operations are being conducted in compliance with all applicable hemp laws and regulations. Landlords should protect themselves with written lease agreements that contain appropriate representations, warranties, covenants, and indemnification. Written leases should also give landlords an appropriate "out" in the event a company loses its licensure or governmental authorization to operate, operates in violation of the law, etc. Landlords may also want to address what will happen to the tenant's possessions at the property if a default and/or eviction occurs. For example, if plant material (flower or biomass) is left at the premises following default, what can (and should) the landlord do to dispose of it? Landlords may also want to scrutinize the tenants' financials (or, the financials of the tenants' principals) to mitigate risk of default issues.

b. Insurance

Will typical general liability policies be sufficient to protect your client and its business from a risk-related event? Your clients should be fully assessing all available insurance products for their business and comparing the costs of same against the real risks and liabilities they may face in their hemp-related operations.

Governmental crop insurance is not yet fully available for hemp cultivators. But, whole farm revenue coverage is available this year for certain farmers who may qualify. Private crop insurance options may also be available in some instances.

Products liability insurance is important for any company that is making, selling, or re-selling any consumer products intended for consumption or ingestion (or, any ingredients utilized in those ultimate end-use products). Products liability lawsuits have not yet begun to hit the industry in waves – but, it is only a matter of time before those claims are made in the court system.

c. Banking concerns

Whether your client's business "touches the plant" or not, there are real banking considerations and concerns for anyone involved in the industry. Your clients should communicate with their lenders before diving into hemp-related activities. Although it is legal for banks and lenders to do business with lawful, compliant hemp-related businesses, many traditional financial institutions and credit unions are nonetheless choosing to mitigate their compliance risks by refraining to do business with hemp-related companies. In some instances, those banks and credit unions are also terminating their relationships with vendors, landlords, and other companies that do not directly cultivate, produce, or sell hemp or hemp products. It is important to know and understand the risk appetite of their existing lenders before your client begins any hemp-related operations. Some lenders may be willing to continue to do business with your clients, but others may close out accounts, call debt obligations, and otherwise seek to terminate their deposit and/or lending relationships.

The SAFE Act is currently pending in U.S. Congress. It passed the U.S. House of Representatives with overwhelming support, and awaits action in the U.S. Senate. This bill seeks to mitigate the regulatory risks and concerns of banks that desire to do business with state law-compliant marijuana related businesses. It also contains several protections for banks that desire to mitigate their risks by doing business with lawful hemp businesses. It is unclear when, or if, this bill will receive a vote in the U.S. Senate. If it does later become law, it should provide more widespread access to banking and financial services within the hemp industry itself.

d. Investments; Availability of Capital

As indicated above, banking relationships for hemp businesses can be difficult to obtain. There are real access to capital concerns for hemp businesses today. Loans and credit lines are not easy to obtain within the industry. Even deposit accounts can be difficult to obtain for hemp-related businesses.

Merchant services are often denied to the industry due to its "high risk" status. Few providers are willing to offer credit card services for brick-and-mortar and online sellers. Those companies that do offer merchant services to the industry usually require burdensome capital reserves and charge fees much higher than those charged to other industry groups. Your clients should be cognizant of these access to capital issues before they embark on their business operations. Square

has recently begun to accept hemp and CBD businesses back onto its merchant services platform, but the onboarding is occurring selectively and slowly. Hopefully, the financial services available to the industry will continue to grow.

Often, today, hemp-related businesses are funded through private investment (capital raises from accredited investors, private equity groups, and other sources) and/or self-financing of operations by the owners/operators of the companies.

e. Bankruptcy issues

Rarely considered, but important if a business venture does not ultimately succeed, are bankruptcy concerns for the industry. Hemp-related operations that are fully and properly licensed and operating in compliance with applicable state and federal laws should be afforded bankruptcy protection under the United States Bankruptcy Code. However, before seeking bankruptcy protections, it is imperative that your clients confirm that their hemp-related operations are fully legal and operating in compliance with the law. Federal bankruptcy courts have rejected marijuana-related businesses from seeking protection due to illegality of that industry at the Federal level, even if the businesses were compliant with the state laws of their operational jurisdiction. If a hemp-related business is not operating in compliance with Federal laws and regulations, bankruptcy courts may reject those hemp-businesses as well in the event of a filing. The same analysis must also apply if your company does not "touch the plant" but, instead, offers services or goods to a hemp-related business. If your client's plan to reorganize its debts hinges on an ongoing relationship with a business that is not operating in full compliance with Federal laws and regulations, it may create issues. Even a commercial landlord that leases space to a non-filing hemp-related business may be prevented from reorganizing its debts in some instances.

f. Employment issue

Employers had a much simpler time policing illicit drug use before the legalization of hemp. THC was a derivative of marijuana and a positive test for THC definitively indicated drug use. Punishment was straightforward. That is no longer the case, as hemp can contain up to .3% THC. Many CBD products, such as tinctures, call for frequent or even daily use. Over time, it is entirely possible that enough THC can stack up and trigger a positive result on a drug test. In North Carolina, employers may not discriminate against a current or prospective employee based on that person's lawful use of a lawful product during non-working hours absent certain and proper policies and procedures. N.C. Gen. Stat. § 95.28.2. As THC now is a component of a lawful product in hemp, employers should take care before reacting rashly to a positive test for THC. Also, CBD is considered to be non-psychoactive, so employers should strongly consider their treatment of CBD use among their employees.

VII. Ethical Considerations

Given the recent decriminalization of hemp and CBD, and the still evolving state of applicable laws and regulations, every interaction with a hemp and CBD client must – to some degree – involve an ethical analysis on the part of the lawyer. This is necessitated, in large part, by the lightning speed with which the commercial markets for hemp and CBD are growing (and the slowness with which our regulators and lawmakers are acting to develop laws, policies, and programs to oversee those commercialized efforts).

This is especially true given that Rule 0.1 of the Rules of Professional Conduct (each a "Rule" and collectively the "Rules") requires lawyers to be competent, prompt and diligent, and their conduct to conform to the requirements of the law.

A. Who is Your Client?

Who is your client? Are you representing an individual person? Or, are you representing an organization? Do you also represent the owners or operators of that organization in their individual capacity? If an organization, who is authorized to act as an agent of the organization and to give you instructions as the entity's attorney?

What is the nature of your client's business? Do they "touch the plant" or not? Do they have all required licenses, approvals, and authorities to lawfully conduct their business in each jurisdiction where they operate?

These questions (and their answers) matter. If you do not know who your client is, or what they do, then you cannot effectively counsel your client, and you cannot be sure that you are satisfying your professional and ethical obligations in that representation.

Rule 1.2

Rule 1.2 prohibits a lawyer from counseling a client to engage, or assisting a client, in conduct that the lawyer knows is criminal. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. Rule 1.2 also allows an attorney to limit the scope of the representation if such limitation is reasonable under the circumstances.

Example: Prospective client calls your office to discuss their business venture. They would like your help setting up an LLC for a new operating entity. They would also like your advice and assistance as it relates to their development of an edible CBD product that they intend to market and sell in interstate commerce. They believe that their product formulation has healing properties and treats or heals diagnosed medical conditions (but they have not obtained FDA approval for those claims), and

they intend to indicate same on their labels and in the product's marketing materials. How do you respond? And will you take them on as a client?

Rule 1.13

Rule 1.13 allows a lawyer employed or retained by an organization to act through that organization's duly authorized representatives. If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law. If, despite the lawyer's efforts, the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may reveal that information outside the organization (if permitted by Rule 1.6) and may resign in accordance with Rule 1.16.

Example: You represent a hemp-related business entity. Part of its business involves the processing of hemp biomass and the resulting production of CBD-rich oils and products. Your client contact (the plant facility manager) discloses to you that the organization has recently received a shipment of hemp biomass from a farmer that tested "hot" (greater than 0.3% THC by dry weight). The contact also discloses that he intends to retain the biomass anyways and to process that material notwithstanding its illegal status. What do you do?

Example 2: Your client contact (the plant facility manager) discloses to you that they intend to use legally compliant hemp biomass to produce highly concentrated products that contain more than 0.3% THC by dry weight. You inform the client contact that this violates state and federal law, but he indicates that he intends to ignore your advice. What do you do? Do you tell his superiors at the organization you represent and counsel them against this course of conduct? What should you do if those superiors also ignore your advice?

B. Cross-Border Representation Issues.

The hemp and CBD industry regularly touches on interstate commerce. Rarely are operations wholly intrastate in nature. As such, there are always cross-border representation issues to consider.

Rule 5.5.

Rule 5.5 prohibits a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction. And, it prohibits a lawyer from assisting another person in the unauthorized practice of law. However, a lawyer is not prohibited from providing services limited to federal law.

Example: A prospective client calls your office. The client's operations are located in Arizona. The client is licensed to cultivate and produce hemp by the Arizona Department of Agriculture. The client would like your assistance with state and federal regulatory compliance and advisory matters. You are not licensed to practice law in Arizona. May you advise the client on Arizona state law and regulatory issues impacting the client's business? May you advise the client on Federal law and regulatory issues impacting the client's business?

C. Importance of Staying Informed and Abreast in the Law.

Marijuana is still very much illegal on the Federal level, and in North Carolina. And it can be difficult to discern between marijuana and hemp by sight or smell alone. The legal differentiation between marijuana and hemp boils down to whether or not the Plant contains 0.3% THC or less by dry weight.

Also, given the new state of the industry, and the continuous development and changes in federal and state laws and regulations, it is imperative that attorneys practicing in this field of law keep themselves well educated and abreast of legal updates and implications.

Rule 1.1

Rule 1.1 prohibits a lawyer from handling a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Example: You maintain a general practice of law. A client comes to you for assistance with an issue that requires specialized knowledge of FDA laws and regulations. Should you take on the representation? If so, do you need to associate in an attorney with greater experience in that field of law?

Rule 1.4

Rule 1.4 requires a lawyer to explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Example: You maintain a general practice of law. A client comes to you for assistance with an issue that requires specialized knowledge of FDA laws and regulations. Are you able to sufficiently explain the law and regulation (and how it

impacts that client's issue) in a way that will allow the client to make an informed decision? Do you have the necessary underlying knowledge to be able to fully understand and identify the risks and challenges that client may face?

Rule 8.4

Rule 8.4 outlines professional misconduct by lawyers. Among other things, it is professional misconduct for a lawyer to violate or attempt to violate the Rules, or knowingly assist or induce another to do so. It is also misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

D. Other Rules and Impact.

Rule 1.6

Rule 1.6 requires a lawyer to maintain as confidential information acquired during the professional relationship with a client unless the client gives informed consent. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or access to, information relating to the representation of a client.

Client confidentiality can be a challenge within this industry, and must remain at the top of your mind at all times. The industry is relatively small and there is often overlap between the people, companies, and operations of businesses within the hemp industry. One of your clients (or, the contact at your client organization) may be involved in different lines of business with different people. You must be careful not to disclose information or breach client confidences. Your clients may blur the lines between those efforts and operations, but it is our responsibility to maintain confidentiality at all times.

Rule 1.7

Rule 1.7 prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest. We must be mindful of conflicts involving our clients and their operations before we accept representation or agree to undertake work. Especially given the overlap that exists within this industry today. Some, but not all, conflicts and potential conflicts can be waived with informed written consent of the clients.

Rule 1.16

Rule 1.16 allows a lawyer to decline or terminate representation of a client in certain instances. A lawyer must decline or terminate representation where that representation will result in a violation of law or the Rules. Even upon withdrawal or termination of the representation, a lawyer must take steps (to the extent reasonably practicable) to protect the client's interests. If client insists on taking

actions that violate state or federal laws or regulations, you may have an obligation to decline representation or to withdraw from further representation of that client.

VIII. Closing Summary

Although hemp and hemp-derived CBD are no longer Schedule I controlled substances under the CSA, the decriminalization of those substances has subjected them to extensive regulation by Federal and state authorities. The legal landscape is fluid today, with major developments occurring at a rapid pace. Until the industry matures and final regulations are developed and implemented by the various governing agencies, it is imperative that attorneys and their industry-participant clients stay abreast of those developments.

ND: 4831-5301-3161, v. 2