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Welcome to this presentation. This is the ethics of cannabis legal representation. I'm Jeff guard. I'm a lawyer practicing out of Boulder, Colorado. I've been practicing in this space for about 11 years, as many people know, Colorado was on the very front line of legalized and regulated cannabis both first with medical and later with recreational. This has given me a unique perspective of being a cannabis lawyer because I had the luxury of the first 18 years or so of my career of not being a cannabis lawyer and then bringing that experience to bear once cannabis was becoming legalized here in Colorado. And I've been with this since the development of cannabis legal representation. And again, there was a time and we'll talk about this here in a few minutes, where there was nothing like this and we had to cut, cut this kind of area of practice out of whole cloth. And, you know, how do you find basis and grounding in the rules? How do you how do you, you know, find an ethical path forward where part of what you're dealing with is something that's federally illegal. And this is something that me and other attorneys have struggled with. But when I first started out, there were only four attorneys or two attorneys actually, at this time, practicing in the cannabis space, there was one guy who came from California, trying to bring the California Medical Marijuana caregiver model like we see at Harbor side, and other early medical marijuana dispensaries operating primarily without a net and what they refer to kind of as a gray area. And he brought that experience to bear here in Colorado. And we'll talk about sort of how that turned out. And then there was a firebrand of an attorney who just really wanted to practice what he called impact litigation, which was using a client's legal situation, to try to advance his own theories about the legalization of cannabis. So he would try to approach these things by goading law enforcement into prosecuting his clients, and then trying to free them and make a name for himself. And this was quite a popular way of doing things because it really appealed to people who felt that cannabis should be legalized entirely, and should not be subject to any control whatsoever. So his brand was quite popular at first, the other attorney practicing in quote, unquote, the gray area, his brand was, well, this is what they're

doing in California. And we're going to do it here. And I know how to do that and nobody's going to get in trouble if they follow my model. He was trying to layer on a level of security and perceived responsibility to that area of practice. Now, when I was this is this is all occurring in 2008. With the campaign for presidency by President vino democrat democrat nominee, Barack Obama, who was talking about and signaling I relaxation on enforcement of marijuana laws, and that there was going to be greater tolerance than we had seen under the prior republican and Clinton administration's. As far as the war on drugs, the just say no movement and things like that, that Obama was, was talking more about regulation and as opposed to prohibition, and for people that were cannabis enthusiasts, cannabis entrepreneurs, this seemed to them to be something that was signaling what would be a total legalization of cannabis and the federal and the federal system and in the state system. Now that turned out to be untrue. And in eight years as president, nothing like that ever occurred. Cannabis was not legalized at the federal level. It was, in fact, treated as an illegal drug from the federal tax perspective. There was no movement to permit proper banking or other protections for the businesses and essentially, the idea of cannabis regulation at the federal level failed completely so that it man I don't even want to lay that at President Obama's feet because he did what he could do with what he had, but his focus At that time was on repairing the economy, reining in the bank misconduct, and passing the the health care bill. And by the time the midterms came along, President Obama lost control of both the House and the Senate, leaving him, you know, a president that that was simply unable to advance any significant progressive legislation, including with regard to cannabis. Now, that remains true to this day, with the election of President Trump, who,

05:38

on the one hand, threatened and promised to return to a prohibition style of law enforcement, as opposed to the permissive attitudes of the Obama administration. There was the appointment of Mike Pence as the attorney or not my husband, Jeff, sorry, Jeff Sessions, as the US Attorney. And it was he repealed all of the progressive policies of Obama as far as tolerance of state legal rake written state legal regulation programs. And there was a lot of talk and saber rattling about sort of enforcing the laws as written and shutting these programs down. Now. Here we are coming close to the end of the first term, with President Trump and we haven't seen the kind of crackdown that people were worried about. And and that becomes a sort of question in everyone's mind. Why Why is it that you said you were going to crack down, you're going to force the laws as written, you appoint Jeff Sessions, who's a vigorous anti marijuana person, and in his political career has, has done many things in that regard. Why didn't it happen? And the answer is that I think the politicians behind closed doors believe that a head on challenge with a state legal marijuana programs with a return to those policies about the war on drugs, would be politically ill advised. And that is because at this point, there are 33 states that have legalized medical marijuana, there are 12 states that have legalized recreational marijuana. And we're looking at states like California, or like New York, New Jersey, Florida, all moving in the direction of

recreational marijuana as well. So what we're seeing is that marijuana itself, and access to marijuana by medical and recreational folks is very popular and very, you know, kind of across the aisle type of stuff that this is a bipartisan movement. And when marijuana is placed on the ballot somewhere, it passes usually by a landslide. It's very, very rare that cannabis is defeated. And I think that the politicians themselves have rightly recognized that cannabis is more potent, more popular than then Congress, people and senators and folks like that. And so it's the kind of thing that they don't want to necessarily attack. The other reason is that there's a strong states rights movement, internal to the Republican Party, that is challenged where the states have taken it upon themselves to pass laws about legalizing regulating cannabis that would, you know, again, is the sort of incubators that that state laws and state programs are and again, if if the federal government is going to crack down, that's bad. That's bad for business at the federal level, because again, the federal government, under the Republican Party is supposed to be small and unobtrusive and allow states to be free to decide for themselves matters of state concern. And when you have states like Arkansas, Oklahoma, and a lot of the a lot of the blue states that are in fact moving towards legalized cannabis it becomes and the red states as well, it becomes a political liability. Because again, you know, Arkansas the the the state of mitch mcconnell is legalizing hemp they've legalized medical marijuana they're talking about recreational So again, it's not something that you can

09:45

you know, sort of go to your base and say, Okay, we're gonna we're gonna do this. There's a lot of political liability that go with a with a head on attack on the state and recreational and medical programs. But where does that leave us? It leaves us with the fact that cannabis is 100% illegal, that all things cannabis, including legal representation are federally illegal, and to engage in that conduct to distribute, manufacture, cultivate. Cannabis or to be the attorneys who support and assist these people is all seen under the federal system to be violations of the Controlled Substances Act punishable by multiple, multiple, multiple years in prison. And there's no defense whatsoever that cannabis happens to be legal in your state. So that is the framework and the the the overarching umbrella, if you will, for discussing the ethics of cannabis legal representation. Because, again, what you're doing violates federal law and subjects you to potential accessory to crime, criminal prosecution. So this is not an area of practice for the faint of heart. This is not an area of practice, for people who just think it's neat and like to smoke weed or, or something like that, or whatever. This is something that comes with risk, which is why a lot of the big firms, particularly when you're looking at Colorado, and again, that's my experience, although I have taught legal ethics to all 50 states on many, many, many occasions. It is a situation where, again, the big firms rightly recognize that practicing cannabis law is a liability for them. In terms of potential criminal prosecution at some point, there, it's very, very, very difficult to get anyone to ensure give you malpractice insurance. The banks, if you're dealing with a lot of marijuana clients are closing accounts and cold tap accounts for for attorneys who practice in this space. So it is

not simply like any other area of practice, it is like an area of practice where the underlying topic is at least federally illegal. And when you say federally illegal again, you need to understand that a little bit because again, it's legal under the Controlled Substances Act to schedule one controlled substance treated just like heroin or PCP or whatever. That's that's part one. Then Part two is the Supremacy Clause of the US Constitution that gives federal preemption over over this any state law. And again, the Commerce Clause, which effectuates and sort of is the enabling peace that allows the federal government to actually impose its will upon the states. And so there is no, it's legal on the state and the states have states rights or the 10th amendment or anything like that. That's a bunch of hooey. And that has gone all the way up to the US Supreme Court, in the case of

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Gonzales v rage, and so the Supreme Court has already smacked that argument down and again, there is no way to to have a state legal challenge to federal cannabis, illegality or to the preemption that those laws impose upon the state. So we're just simply have operating in a dual system of have a lack of enforcement, no enforcement at the federal level, which is, is what is allowing this to happen. And while that trend of non enforcement that's going on now, you know, going on 12 years is is in place with the stroke of a pen it could go away and a lot of people don't believe that but we'll get to a section here in a couple of minutes where we will discuss that now. Looking at you know, becoming a cannabis lawyer is is is a bold choice. That is something that again, as I said comes with risk. It comes with you know a lot of the same aspersions and and disdain that come with marijuana in general, your mom and your grandma and and folks are not going to be proud of you for being a pot attorney or a weed attorney or whatever else they're going to call it. They're going to think that is sort of a sub a substandard area of practice that not quite as good as being a tax lawyer or a corporate lawyer or something like that. It's it's something sort of prurient and, and distant, you know, and deserving of disdain. And I know that because I do it and I know what people say about cannabis attorneys and a lot of cannabis attorneys deserve the reputation that they get for being enthusiasts more than they are attorneys, or for being greedy and wanting to feather their own nests or be involved in the businesses with their clients. Then then being considered a proper attorneys, but,

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you know,

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it's like being a personal injury attorney or a criminal defense attorney. You're gonna have to suffer some slings and arrows along the way to do what it is you do. And again, you're gonna

have to have a pretty thick skin about it. Now, the way I got into cannabis, cannabis law was inadvertent, I had been practicing criminal defense and civil litigation in Boulder here for roughly 15 1617 I don't know a lot of years. before I'd even you know, before this, this world of cannabis and cannabis business came to me. And it came to me in the usual route. When you're a criminal defense attorney in Boulder, it comes with a phone call from a client who's being investigated by the police and I was getting a call by a client I had done some work for he was a business contractor. And he was being the cops were over at his, what he called a dispensary. I didn't know what a dispensary was. But he called it a dispensary. And he had just been the victim of a strong armed robbery, where some guys and some black SUVs came up, put everybody on the floor at gunpoint, took the took the weed and took the took the money. And you know, we're headed back down to Denver, when the call came in. And when the police investigated this course they're trying to find the bad guys. But when they got to the dispensary, all of a sudden my client was in the frame for being a bad guy with you know, cops see a guy selling weed from from a, you know, little shabby office in an old rundown office park. You know, eyebrows were raised. And they confiscated everything. They took everything under advisement because my guy was insisting that he was legal. And he was showing them all this paperwork that he had gathered and collected, and that they really didn't know what to do with it. And this was the nature of this dispensary was set up by the California lawyer who was peddling the California caregiver model. And I'd learned all this after the fact. But what what what what this is, is that under California, California law, and under Colorado constitution, we have a very limited right to use a possess, cultivate and consume medical marijuana in neither the California or the Colorado model is distribution of that cannabis permitted. Okay, there's nothing that says I can grow marijuana as a medical patient and sell my marijuana to another medical patient. There's nothing like that any distribution of cannabis under state law. And that is true to this day is a felony, okay, you can't sell weed. And legally unless you fall now under the complete regulatory framework of the created by the state government. And I will, again walk you through that and how that occurs, because that's what's going to be happening at your state level. But anyway, so my guy was operating on this caregiver model. And what happens is the patient would, my guy would go to California or gather medical marijuana from people growing it in the mountains here in Colorado, we'd go out to California and buy it from medical cultivation places out there and he would come back and he put the pot on its shelves. And then he was a patient himself. And all of his employees were patients themselves, medical marijuana patients. And then he had this form created by this lawyer that essentially nominated the employee or my client, as the caregiver primary caregiver for a medical patient who comes into the store. Now primary caregiver is somebody who has significant responsibility for the management of the well being of a patient with a chronic debilitating medical condition. And what that means in lay terms is you are taking care of a sick person that sub that that if you're at moved in and she was unable to care for herself provide, you know bathing issues or medic medical issues or you know, basic housekeeping or meals or whatever that you would take this on, and that's what a primary caregiver was contemplated to be. But what had happened in California is there was basically a cottage industry this broker

sprung up in which these dispensaries were operating as quote unquote primary caregivers for marijuana patients. Now, it doesn't take you know, the legal experience of Have 25 years of practice to figure out that you can't buy marijuana from people in the mountains or California, drive it back in a paneled van, and then sell it on the shelves of your store to people you've never met before all because you have a piece of paper that nominate you to be a primary caregiver because a primary caregiver, somebody with significant responsibility for a patient and a one off sale of cannabis between a person you've never met and a person you'll never see again or maybe you will, is not exercising significant responsibility. And so, this was the legal fiction that was created by the California guy. And this the and the impact litigator the the the firebrand. He was he he did his litigating in the criminal courts in a case called people vs clendenen. And this was a person who was selling marijuana to a dispensary. And his argument was that anything that is involving medical marijuana is in the Colorado constitution. Therefore, it's constitutional. Therefore, the government doesn't have a right to limit or regulated it in any way. Now, that is the biggest bunch of legal nonsense I ever heard, except for the caregiver for the day or caregiver while you're in my store model. Both of this is legal trash, it's legal garbage. And it was being peddled by these two attorneys as, as as legality. Okay. And so what I had to do is I had to meet with the district attorney's office to explain to them what my client was doing, why he was there, what a dispensary is, who this lawyer was, what the documentation was, what the theory was what California was doing. And I was very candid with the DEA as I was with you Just now, I recognized it as legal garbage as a not proper defense, to the criminal prosecution for the possession and unlawful distribution of lots and lots of cannabis. But what I did point out was that they could not establish the mens rea are for the crime. Because again, this guy was fed this line of bullcrap that said everything that he was doing was legal and right and just and so I was successful in convincing the DEA to drop charges in that case, but I realized that with these two attorneys out there running wild, and all of these true believers believing every word that they say, because they're lawyers, people, we're going to see a lot of trouble, they're going to get into a lot of trouble. And one of the things that I had to do, because I'm a lawyer, I can't just peddle garbage for for as though it were legal advice. I knew that at that point that we had to draft lobby and pass legislation that would legalize the practice of the manufacturer cultivation and distribution of marijuana to medical patients, there was good arguments for it, shutting down the black market, providing tax revenue, and making it safe for patients to purchase cannabis so that they didn't have to do it. And, you know, in trailer parks and shoddy old office parks and sketchy circumstances where people might come in with guns and try to rob everybody. And all this, we needed to we needed a level of safety. So I met together with the entrepreneurs, the District Attorney's Office, accountants, people like this, and we crafted what became the car to state regulations. Okay, so part of the ethical responsibility that I had was to create laws to protect my clients where there were none rather than tell them everything's gonna be okay and got Fingers crossed, maybe, because they might not be successful with the next da, I might not, you know, some of the client might not have me for a lawyer that has connections that can meet with the DA and has that sort of relationship where they have confidence in what I'm trying to do. So

short, long story short, we were Pat, we pass legislation in 2009,

24:07

about six months after this case, and from there, we were off and running. So at this point, now we're looking at the ethical rules and the ethical rules are limited. What do you do with something particularly in 2009, early 2009, before this law had passed, or after 2009 when the laws and regulations themselves had been passed, and that is something that you know, everyone that is encountering new cannabis regulations and laws in their state is going to have to wrestle with and we wrestle with this back 11 years ago. And the scope of representation in the in their model rules, which is adopted pretty much in every state except probably Louisiana, which has its own particular brand of everything due to the Napoleonic code down there. But it's 1.2 D and 1.2 D says a lawyer shall not counsel a client to engage or assist a client in clot and conduct the lawyer knows is criminal. Okay, so if cannabis is federally illegal, and the state laws are not sufficiently developed or their new, is what you're doing counseling a client to engage in insistent conduct, I know to be criminal. Well, there's a pretty good argument for that. Okay. And in early 2009, I was asked to debate the state attorney general here in Colorado on this very subject. And the idea was that he was a longtime opponent of the legalization of marijuana. He was an advisor to the Bush administration. And he had spent his life and career under the just say, no prohibition era, drug enforcement. And he felt that that marijuana was a gateway drug. He felt that the legalization of marijuana was irresponsible. He vehemently oppose the regulations I talked about lobbying for and eventually passing. And we were asked to debate before the end of court in Denver, and I was asked by then Colorado Supreme Court Justice Hobbs, to be his guest to debate john suthers, the Attorney General. And this is what we debated he he told me and told the audience that what I was doing as a lawyer was unethical because my clients conduct is knowingly criminal, it's federally illegal. And I said, Wait a minute, can a lawyer discuss the legal consequences of any proposed course of conduct with a client? And can I counsel and assist the client and making a good faith effort to determine the validity scope and meaning and application of the Colorado Constitution and the medical marijuana laws that were passed here, and the recently passed regulations? Am I not allowed to do that. And that's where we, we went back and forth for a while and it wasn't, you know, there wasn't sufficient clarity at that time to know whether he was right or whether I was right. But one thing I will tell you was, when I was debating him on this issue, he would whisper in my ear, when it was my time to talk that he was going to get me he was going to get my license, he was going to prosecute me and my clients that he was coming for me. And this wasn't some, you know, debate tactic. I mean, this guy really truly in his heart of hearts as a true believer in what he was saying. And he really believed that I was a criminal, no different than any of the guys that he'd been putting away for the last 30 years of his career. And so, again, now comes a moment of truth. So at this point in time, I'm now one of three and then a fourth lawyer joins in, representing clients in this space. And I handicapped myself, because everybody else was all in they were drafting leases, and operating agreements

and purchase agreements. And they were helping everybody fill out their applications for the state licensure. And they were doing everything that they could do to assist the client at this point. But there is now a debate and I did not, I continued to limit my practice,

28:24

to advising and discussing the legal consequences of this proposed course of conduct to become a legalized actor in the cannabis space, which set me back, okay. Didn't really set me back, though. Because my my sort of, you know, claim to fame is that I'm everyone's second lawyer, because the lawyer that you went to, that promised you everything that promised you a rose garden, millions of dollars, that it's a gray area that you could do whatever, that that advice turned out to be sorely wanting. And in many people got convicted. Many people did not get their business licenses, and a lot of messes involved. And so people would come to me because I had already established myself as the most conservative voice in legalized cannabis, you know, as my job not to make my clients at the point of a spear and try to advance law that way, but to remain behind the line and try to advance the line through such efforts as I'd already done in terms of legalizing the distribution and codifying into law. The regulated market that we now see today in both medical and recreational cannabis. That was what I thought was the right thing to do, and I still believe it to this day. And but now we got it. I got I got to think about me, I got to think about myself and other lawyers. And so we went to our conference, Supreme Court, the rule and the rules, the rule makers for professional conduct. And we told them what our dilemma was. I told them about what john suthers has said to me and this was crafted for rule 1.2, which we discussed. Now under Colorado law, we may counsel a client about the Colorado constitution, right amendment 20 now amendment 64 and assist the client with conduct permitted by the Colorado constitution and laws. But my I must also advise the client about federal illegality. One of the reasons I start this program about federal illegality is not just so that you understand the framework under which our practice lies. But so you also get a primer in how to advise clients about federally legality, you can't just say, well, it's illegal, or whatever you should know about the Gonzalez case, you should know about the supremacy clause, you should know about how the supremacy clause is affected through the Commerce Clause, you need to know about the Controlled Substances Act, you should be aware of the IRS tax policy to declare the businesses illegal, and that's called scheduled to add, which does not allow ordinary business deductions, you should know about the banking problems, because federally legality is a major major issue here. And again, it's your ethical obligation to advise them about that. So again, now, at this point in my career, now that we've lobbied for and gotten comment 14 past, now I can assist the clients and I can draft things and I can handle transactional work and I can do corporate stuff. And this is when I begin to expand in this area in a big way. Now Oregon again, one of our fellow partners in legalization of medical and also early recreational, says that the lawyer may counsel and assist the client regarding Oregon, Oregon's medical marijuana related laws, but again, must also advise about federal law. Hawaii, although they had legalized medical marijuana initially

prohibited lawyers from practicing in this space, they actually said said that you can't do it. This is also true of Ohio, who had legalized medical cannabis, but prohibited lawyers from representing clients in that space. So you will find that this is true. You know, across the board, where you're going to have pushback from the powers that be the established old guard. You know, it takes the cops a long time to realize that legalized cannabis, the sky didn't fall in. And that gave them the resources and time to work on other more serious issues, like heroin, you know, opioid issues and cocaine and the influx of these things that has occurred now that cannabis has been regulated, and is no longer part of that black market. With the with the black market folks done in the drug cartels, DOD has moved into other drugs and gotten those drugs out. So heroin was almost unheard of, you know, mostly through the early 90s. But now it's it's a mainstream drug, you know, all across I have clients all the time for this. So again, these these folks, it come around that thinking and again, are taking Colorado's lead. And looking at that now, if you're looking at your own state, again, if you're if your state is back here, and 1.2 D, saying that you you cannot counsel or assist a client and conduct you know, to be criminal and doesn't talk about the freedom to practice it within your own state. This is something that you I think, ought to be really, really earnest about getting in front of your rulemaking committee so that you can enjoy some ethical freedom under your own state's rules, where you're licensed to practice. Now, Nevada, similar, and it does expand on a little bit may provide legal advice about the state medical marijuana laws, and state marijuana businesses and must advise clients about the possible consequences under federal law. So you not only to tell them, it's about federally legality, but you should know about, you know how many years of prison you get for how many pounds of marijuana you possess, or sell or distribute things like that. Now, Washington is probably the most liberal. They you may provide legal advice may operate marijuana businesses and may consume marijuana. So let the good times roll in good old Washington as far as being an attorney, there is pretty much Open Season with regard to cannabis there. And I will talk about a CLE. I taught with another lawyer from Washington who was in fact, a very large cannabis entrepreneur, but also one of the few attorneys in that state that was practicing law and I'll let you know some of the concerns I had about that. Now

34:47

let's move on to some of the other issues that you're going to encounter as a cannabis lawyer and one of the most important one is conflicts of interest. Conflicts of interest are really bounded by Three Worlds, obviously 1.7. And, again, there's also hang on, there's duty to former clients. And then there's duty to prospective clients, okay. And then these three rules form really the basis for how to deal with conflicts of interest. Because, again, we all know that you can't represent one client in a matter directly adverse to another client, right? I can't be the plaintiff, plaintiff's lawyer and the defense lawyer in a lawsuit. I mean, that's not going to work, right. But that's only a very, you know, simplistic way of looking at conflicts of interest. I think the most important aspect of it is where that representation materially limits the lawyers responsibilities, and somebody else.

Okay. That means that, you know, we're all supposed to be zealous advocates, right. But if I got two clients, who are who are, again, not directly adverse, but maybe competitive, or maybe involved in a business transaction together, whatever. Again, you don't want to be in a situation where you are pulling your punches, where you are not being all that you can be for that client, where you are not, you know, providing information that might be helpful to one client against the other client, me, you don't want to be a be handcuffed, okay? You've got to be free to be the best lawyer, you can be at all times that I think these these conflict situations, these dual representation situations are very problematic for that reason. Now, most lawyers in this space, you know, will it assuming that they don't take as conservative of view, I guess, I would say, of conflicts of interest as I do, I just, you know, I just very, very much erring on the side of caution. They, they do this by use of conflict waivers. So despite a conflict of interest, the lawyer can represent a client and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation. Well, sure I can and I can be the most fair guy that ever lived. Wow, nobody's more fair than me. I'm gonna do my best for both of these clients, no worries, you know, it, you know, they don't believe that there's any kind of unconscious bias for clients you like, there's clients, you don't like clients, you've been with a long time clients you just met, they don't think that's going to creep in the representation not being prohibited by law. And of course, it doesn't involve, you know, again, a directly adverse claim, and each client gives informed consent. Now, this is a dangerous situation, because a lot of these things arise because the clients want to save money. Hey, we were I want to buy his dispensary from him. And we want to save legal fees. Can you draft the documents? That seems simple enough, right? conflict of interest waiver, no problem, boom, boom. But the language that you include, the way that the document is drafted, is not neutral, okay? Non refundable escrow deposits, you know, allowing one client to get out from any responsibility Under the agreement, during the entire time of the agreement, as opposed to at the end of the due diligence period. For instance. There's a lot of things that get built into an agreement or if I'm doing a lease for the landlord that I represent and the tenant that I represent, am I making the Am I protecting the landlord to the best of my ability? Or am I protecting the tenant? by splitting the baby? Again, it can be done. But this this informed consent

38:53

is an ongoing task. So I I did do, I've had two long term clients, they know each other one wants to buy the dispensary off the other. And so when we sat down, we always sit down together. I never have I never talked to either one of them outside of each other's presence. Okay, I don't think that's right. And two, I talk about, hey, if this term, if I put this term in here, that's going to give you the ability to you know, really go after this guy, if I leave this term out, then that really is going to favor you. And then I say guys, knowing that that that term favors one guy or the other, what do you want to do about that term? I'm fine with it. Okay, we leave it and I'm not fine with it, we take it out. That's how it goes. And so it's a very difficult water to traverse. Now, the second part of the

rule is is duty to former clients, and duty to former clients is one that is also problematic because again, what were you're allowed to do represent that is as long as the new client is not again, directly adverse to the former client. And, you know, it goes through the same analysis. Now, my problem with that, and I think I almost never ever do it is that I don't like the limitation that, that in the escape clause, if you will, that the representation for client a is not the same as the representation of client B. So if I represent this guy in a lawsuit, over a roofing deal, right, something went bad knees, I, we get through it, we go through trial, and I went and everything's great, or I lose, or whatever, doesn't matter. This client over here, I represented him and I was his attorney. Now these guys want to do a business deal has nothing to do with the roof. Okay, but now I'm representing this guy in this business deal. And I gotta go as hard as I possibly can, in this business deal against my good old client, my old pal, the guy, we were thick and thin went to trial together, and never sat right with me,

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you

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can parse it based on that, that that that same or substantially similar related matter clause in the in duty to former clients. I don't think that feels very good. I never have taken a case directly adverse against my other client, regardless of whether I represented him on a roof, or a business deal, or a DUI or whatever. It just doesn't seem to me to be the right thing to do. Now. Lawyers as business partners, this is a very sketchy territory. And now almost every week, when I meet with a new client, they want to cut me in for a piece of their business, they want to offer me points, they want to offer me 2% 3%, whatever 5% 10%. The reason they want to do this is a lawyers are expensive, and they're usually a startup, they don't have a lot of money. And this is a very common thing that happens with a lot of startups, particularly in the you know, in the.com and the in the tech field. Now, this is, can be okay, in some circumstances, but I will tell you that I have declined it every time. And here's why is that? Again, here's what the rule says, I cannot enter into a business transaction with the client. nor can I own interest adverse to the client unless the Tran transaction in terms of which lawyer question answered or fair and reasonable and fully disclosed in writing to the client. The client has arised of desirability of seeking and, and the advice of independent counsel and gives informed consent, right? It the the the cannot enter into a business transaction is swallowed up by the rule, okay. And there is a the largest law firm in the country is based out of primarily out of Denver, Colorado, and they have offices pretty much in all of the legalized states at this point. They have been on the front line of the advocacy of the legalization of marijuana and not necessarily the law of marijuana there, they've been more on that side. And that has attracted them that become a very attractive to people who are cannabis enthusiasts. And so, and over time, these young guys have built a big firm, made a big name for

themselves. And they they have used that to acquire a business interest in any new client that signs up with them, they take 5% of the net of any client, any new client that is seeking to apply for a license in any of the states in either 33 states that are offering licenses. So they get 5%. And they do this. fair and reasonable. Okay, that's that's in the eye of the beholder. It is fully disclosed. It's in the fee agreement. Here's the 5%. They say in that paragraph, you should seek the advice of independent counsel. And then once the client signs off on it, it's in writing, it's consented to has two problems with this. I think there is great risk for the lawyer when things don't go well. Or even when things do go well. You have long since done your job. You got them this license seven years ago, and yet here you are still making 5% that's going to be seen as pretty resentful. You're not in there selling marijuana, growing marijuana, manufacturing marijuana, you're doing nothing. You are there and helped out at the beginning. But now every single month, they're writing you a check every single month.

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And,

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again,

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you can be questioned about whether that's fair and reasonable. Okay, And again, what they're going to call into question is, well, what was so special about you helping me apply for that license? Lots of attorneys do that. All you had to do is help me do this. And it only took that and you've spent four hours doing this, that the other thing, you know, you put in a total of six hours on the case, doing something any medical marijuana attorney can do. That's not we're 5% for a perpetuity. And you know, what? The judge who's making his state pay and getting a state pension, you might just agree with that statement, you could find yourself in some serious trouble. The second part is favoritism. If you take 5% of rinky dinky Joe's, you know, half a million dollars a year, you know, little manufacturing. And then you take 5% of the world's biggest manufacturing edibles company in the world. Every year, you're making $5 million off that 5%. And here, you're only making $50,000. And they come into a situation are you going to spend your time and your effort and your love and your money and your your expertise on your $5 million around you $50,000? Because a law requires that you would be spreading an equal amount of time, but are you going to do that? Well, you think you would.

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other issue is about owning these cannabis businesses. Okay. It is my belief. And I will tell you now that if you want to be a cannabis business owner, the Don't be a cannabis business attorney, okay, do one thing, or the other, but don't do both. Don't be in competition with your own clients. Because that is going to be something that eventually will come home to roost for you. So again, I told you, I would tell you, I was teaching a CLE been right around 2011 2012 with a guy who was owned several dispensaries and a big grow and all this stuff in Washington State, he was also a big name in cannabis law. So when a client comes to you, comes to this guy, and has the greatest idea of all time as to how to maximize production, or a point of sale system, or a way to do cashless transactions that nobody's ever thought of before. And you represent that client? What do you think the temptation is, is to build that into your own business, to take those techniques and, you know, apply them to your own cultivation to your own point of sale system to your own cashless transaction guide and have a patent on it? Right? Because you're not giving out patents for cannabis related stuff, unless it's truly just process. So you know, I think it becomes a problem. When you know, that there is a client comes to you and says, Hey, man, I got the inside track, this county over here, that's never done anything before it's going to open up for licensing. And I want to be in there. Are you going to deliberately withhold your own application? Once you get that information?

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Or let's say, you don't, but you you find out about it in another way, and you apply

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and you get the license, and he does. You think that guy's gonna say the only reason he knew about that license was because I told him about it. And you want to spend the next two years fighting a grievance or a professional negligence case. You know, over whether you learned it from this independent source, you learned it from your client and what day you learned what and what email you receive, and blah, blah, blah. It's gonna be a long road. So like I said, Be a be a cannabis guy, sell marijuana, grow marijuana, do whatever you want to do. Your your business will have a great corporate counsel you on staff cheap because you're there. And that will be a strategic advantage for you. But don't be in competition with your clients. I mean, I just think that's going to be something that's going to end up grievance after grievance suit after suit. Every time every time you have a success, their failure is going to be your fault. corporations, his clients is another issue because a lot of these these these guys are young, and they don't know what they're doing. And they've never had a corporation before and they think, well, I'll just form an

LLC and then I'll apply and then I'll go about my merry way. And again, these unseasoned you know entrepreneurs need to understand that the value of an LLC the value of Corporate protection is only as good as your respect for the corporate form. Otherwise, you get the corporate veil pierced and you don't have any person, you don't have any liability protection, personally. And because they're amateurs, you got to treat them like amateurs. So one of the things that I do is always send out here, our corporate form best practices, if you make a decision, write down the minutes, adopt the minutes, have a vote, do all the things that you're supposed to do, keep good track of records, always have separate bank accounts, never spend that never take yourself out to lunch. And put that on the corporate card. unless you happen to be doing corporate business and can defend that. Don't don't treat this thing as your personal piggy bank. So right now I am suing a guy. My client was a minority shareholder, this guy was the managing member and managing shareholder. And the managing shareholder, managed to create a serious, serious, serious regulatory violation, resulting in the license being denied entirely and revoked. There was an administrative action that happened now we're suing that guy for breach of fiduciary duty, etc, etc. And he is going to try to claim corporate protection for his decisions, in addition to that, but when you look at the bank statements, unfortunately, he was buying himself by Agra, he was on a swingers website that he pre subscribed to, he was taking vacations, he was making car payments, when you start using the bank account as your own personal candy store, you don't have corporate protection. So I'm going to go right through that corporations veil boom, and right to him and everything that he's got, and it's going to happen quickly. So, again, working with these guys, and making sure that they know what they're doing is part one, part two of this speech is make sure that you, yourself, are respecting the corporate form, make sure that you are including all of the voting members on decisions on your emails, make sure that you don't just fall in love with the fact that your point of contact is your point of contact all the time and lose sight of the fact that you are actually representing the corporation and your duty is to that and all of the shareholders, not just the guys you deal with all the time. So when they take on a minority investor, you know, make sure that they're not you're not making decisions that that adversely impact or if there's a unanimous decision to be made, that you yourself are mindful of these things that you are respecting the corporate form, because, again, when the corporate form is respected, that minority shareholder comes out of the woodwork to say, Hey, you guys didn't go a good job, the deep pocket he's going to look for is you. Okay? And he's gonna say, Well, you know, he was supposed to represent the corporation is supposed to be looking out for me and didn't. And you won't even be thinking that that that, that that possibility of that liability might come up. Now. This is part one of what I call the rule of No, the most important legal advice you can give to a client often is the word no, or the phrase do not do that. Okay. Too many lawyers spend their careers being Yes, men trying to find clever ways to solve problems. Like my good friend from California who came out and came up with his hokey dokie caregiver for the day form instead of saying, guys is not there yet. Let's work on some regulations. I think we got a good argument. Let's get some stuff passed.

53:41

He made up a hokey dokey legal form because he didn't know how to say no. Okay, he didn't know how to say you shouldn't be doing that. He called it a gray area. No, those gray areas should be never a phrase that comes out of any lawyers mouth. Okay, if it's not black or white, it doesn't. It's a new area of law that needs to be advanced. You cannot be advising clients in the gray area. But the only reason he did that is we're well meaning we want to help we want to try we want to, to do our best. We want to find answers. were clever, we're smart, we want to help. And it's our instinct, it's our gut. It's our training to try to do that. But you can't he can't be everything to everybody. So, again, a lawyer should consult with a client about any relevant limitation on the lawyers conduct when the lawyer knows that client expects assistance not permitted by the rules of Professional Conduct

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or other law. So when you know that distribution of marijuana is a felony, you do not advise and provide your conduct that allows people to get into felonious trouble by using okie dokie legal forms. Second, this is the second rule of no this is 2.1 and representing a client a lawyer shall exercise independent professional judgment and render candid advice when rendering this advice. A lawyer should refer to the law but can also consider other aspects such as the moral, economic, social,

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and political factors that may be relevant to the client's situation. It is not always just finding the legal answer. We are trusted professional advisors to people, they count on us to be knowledgeable and wise. And part of that wisdom doesn't come from the law. It comes from your experience your morals, okay? If you know it is the wrong thing to do. But you know that the law can be crafted and interpreted in such a way as to get away with it. But it's still the wrong thing to do. Rule 2.1 says, tell them not to do it. And if it's against what you believe to be a moral course of conduct, then you should tell them to find another lawyer. There's plenty of them out there that will do whatever anybody wants them to do. But I'm hoping that you folks that are listening to this are also you know, the kind of people like I am, that doing the right thing is more important than your own bottom line. Do doing the right thing is more important than than being the most popular lawyer in town. Colorado's edition is really to keep lawyers from gaslighting their clients cases, it's easy when a client comes in mad as a hornet wanting to sue anybody and everybody and they will pay pay and pay and pay and pay. Right. And I know a lot of lawyers, who stock in trade is talking about how tough they are, what bad asses they are, how they they are so tough, they're the Bulldog, they're gonna do this, they're strong on their, their whatever. And the client loves hearing that stuff. Okay, they love hearing about how tough you are, how you're going to stick it to somebody. But if you know that the right thing to do is to avoid litigation. If you know

that there is no money to be had, at the end of this rainbow, that you are going after somebody without any assets, then you should be telling them don't do this, you can do this. It's just economically stupid. Or you can do this. But I think we ought to sit down and mediate first see if we can work something out. That's what they're requiring us to do. Now. I will leave you with this. The unauthorized practice of law is something I encounter every single day of my career. Because some lawyer somewhere reaches out to me from Timbuktu and everywhere in between. And he's representing some guy or he's advising some client about some investment in some marijuana business out here. Or he's trying to collect a debt from some marijuana business out here or whatever. You are authorized to practice law only in the state where you are licensed period. Anything you are doing in which you invoke your lawyer, notice your letterhead, your your power, your persuasion, you are practicing law, don't kid yourself. My staff right now while I'm taping this is drafting a letter that I can pose this morning to a lawyer who is threatening collection against one of my marijuana clients. He's from Maine. And the letter goes like this. Dear Maine lawyer, thank you for reaching out. As a professional courtesy, I will treat your first correspondence as a well meaning Overture to inquire about a debt from my client. However, you are practicing law in Colorado without a license, I always look it up first. Accordingly, I will not respond further to any correspondence from you. Lest I unwittingly assist you in violating the this rule about the unauthorized practice further, if I hear from you again, in any type of legal capacity, I will refer the matter to the disciplinary committee for both of our states for the unauthorized practice of law, I suggest your client retain qualified counsel, licensed in the state of Colorado, and we will respond accordingly. It's mean, but it's true. And I have no tolerance for people who are greedy. I have no tolerance for people who are unethical. And if if you don't know that you can't practice law in Colorado, you can't shake down my client as a Maine lawyer. You know this. I know this. But you didn't tell your client that before you build them for that letter. So now I'm telling your client that you just he just got billed for a letter that should have never been written.

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And again, I made good on that thread. I'm not grieving lawyers for things very often, but I will report on authorized practice all the time, because everybody wants to be everywhere. All of my colleagues want to help live, Mike their car declines licenses in Oklahoma and North Dakota and South Dakota. And part of my practice is professional misconduct, professional negligence malpractice cases against lawyers in the cannabis space, because I see such terrible, terrible, unethical lawyers all the time. The lawyers that are in the firm that takes 5% signed on to help somebody with a license in North Dakota. The the application was, they did so by associating with a lawyer, North Dakota, the lawyer in North Dakota, never looked at anything, never saw anything, didn't review any of the work. He was just put his name on a couple of things. When the time came. The application was rejected by that licensing authority as being substandard, incomplete, the job was terrible. And again, you can't be everything to everybody. So what they did was they practice law without a license not knowing what they were doing. And the client lost

a million dollar opportunity as a result of it. And that case, I'll be acting as an expert witness. But these are the kinds of things that happen all the time. So

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I'll sum up.

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Cannabis law is not for the timorous cannabis law is not for the lazy, it is not for the greedy, it is not for the unethical. You have to be the most ethical, most conscious, most responsible attorney that you can possibly be in order to effectively represent cat clients in this space. The laws in this area change every day, you need to be on top of those laws. laws in this area need to be made every day. You need to be making those laws if that's something that your clients need to cover their thing. For instance, my clients want to have delivery services, Colorado, we had to pass that law to do deliveries. Now we have to lobby for local local governments to permit deliveries but many attorneys have set up delivery businesses that just illegally buy cannabis and resell it so again, be the best lawyer you can be this is not a business this is a profession. And with that I thank you Jeff guard if you guys have any questions for me, my contact information is in the materials. You can reach me at Jeff at guard law firm comm ga rd law firm comm I'd be happy to help you with any legal or ethical situation that arises. Thank you