

Plant-Touching Estate Planning

Katherine Proctor March 31, 2022



Burlingame estate planning attorney Laura Croft considers the way she works to be fairly unconventional for her practice area. Most of her clients are between the ages of 25 and 40, she does everything for a flat-rate fee, and she doesn't bill clients by the hour when they call her. Automatically, without their asking, she makes sure to check in with her clients every three years.

“It’s not ‘set it and forget it’ planning. I don’t do that type of planning at all,” Croft said. “I take a modern approach to estate planning. Typical estate planning is very antiquated -- it’s a very old-fashioned area of law.”

Her atypical style isn’t all she brings to the table. Before she went into estate planning, Croft worked as a criminal defense lawyer for clients charged with cannabis-related crimes prior to California’s legalization of that drug. After that, she did extensive work on regulations and permitting as California entered the new era of legalized cannabis manufacturing, sales, and use.

So Croft is perfectly positioned to speak on an emerging practice area overlap that only stands to grow in the coming years: estate planning for clients with cannabis assets.

As more states have legalized cannabis, plenty of legal attention has been paid to financial issues for members of the industry, particularly banking and federal tax deductions. Marijuana is still a Schedule I drug under the federal Controlled Substances Act, and many banks remain unwilling to absorb the risk of working with businesses whose assets could be seized at any time by the U.S. government. And tax deductions for businesses that sell Schedule I substances -- even ones legally licensed in the state where they operate -- remain illegal under section 280E of the federal tax code.

But there hasn’t been as much focus on how wealth legally accumulated in the cannabis industry at the state level can be successfully transferred when the holder of that wealth dies. Absent further legislation and guidance on the issue, those looking to pass on those assets run the risk that they’ll go up in smoke.

“Since cannabis remains illegal on the federal level and is restricted in every state, any transfer of assets is complicated and could put the recipient at risk,” said Robert Solomon, a law professor at UC Irvine and co-chair of the university’s Center for the Study of Cannabis. “At the same time, the IRS still expects relevant taxes to be paid, which is itself complicated by the various cannabis statutes.”

Licensing issues

In a 2021 [essay](#) published in the American College of Trust and Estate Counsel (ACTEC) Law Journal, Bridget J. Crawford and Jonathan G. Blattmachr note that

despite the \$17.5 billion value of America's legal cannabis business, estate planning for "plant-touching" cannabis business owners is "new and uncharted terrain." Furthermore, "there may be many lawyers who are apprehensive about the ethics of advising these types of clients, given that cannabis is a controlled substance for federal purposes," write Crawford, a law professor at Pace University, and Blattmachr, a well-known trusts and estates attorney who's currently a principal at Pioneer Wealth Partners.

But the market for lawyers, bankers, and accountants in the cannabis industry "will undoubtedly continue to expand," the authors write.

"In order to best meet the needs of current and future clients, estate planners must become conversant with all of the basic issues confronting cannabis clients while also advocating for clear statutory and regulatory guidance that will allow plant-touching cannabis business owners to engage in standard estate planning, including outright wealth transfers and transfers in trust," the essay observes.

For example, Crawford and Blattmachr note, states have "widely divergent" rules on whether and how legal cannabis licenses can be transferred upon the death of a license holder. In California, that license technically "attaches" to the entity to whom it was issued, and is non-transferable.

But practically speaking, "transfers can and do happen." For example, if an individual cannabis license holder dies, their successor in interest can notify the state agency that issued the license within 10 calendar days of the license holder's death. If the agency finds that the successor in interest qualifies as a license holder, that successor can likely continue operating the business.

Croft says that ensuring the smooth transfer of a cannabis license, from her point of view, "would be the most important thing" in estate planning for a client with cannabis assets. "If there's a license attached to a business entity and they haven't done it right and it goes through probate, I think they would just lose it," she said.

Another uncharted business licensing issue that Crawford and Blattmachr identify: whether a trust can be a cannabis industry licensee. "Trusts do not seem to have been at top of mind for drafters of licensing rules and regulations for any state's legal cannabis industry," the authors note.

California's Secretary of State, for example, [provides](#) detailed registration guidance for cannabis businesses that are corporations, LLCs, limited partnerships, and sole proprietorships -- but not for trusts.

Silence in this area may indicate this is a route not many plant-touching cannabis business owners are interested in, Crawford and Blattmachr point out. But "as the legal cannabis market continues to grow and these owners become wealthier," they write, "state regulators may want to provide clear guidance that addresses the role of trusts" as owners of those businesses so that clients can engage in "more sophisticated estate planning."

Tax considerations

The difficulties mentioned above for cannabis business owners regarding federal income taxes have received broad coverage in legal literature. But there is "virtually no commentary from practitioners or academics," Crawford and Blattmachr write, "on how the characterization of legal plant-touching cannabis businesses as trafficking in a controlled substance impacts federal gift and estate tax considerations."

The ordinary rules should make cannabis wealth transfers subject to tax, in the authors' view. "The tricky question is how a cannabis license or interest in a plant-touching cannabis business should be valued for wealth transfer tax purposes," they write. In a previous case assessing the value of illegal drugs for estate tax purposes, the IRS has applied the "street value" of those drugs. But that approach likely wouldn't make sense for legal cannabis businesses that keep detailed financial records.

Furthermore, Crawford and Blattmachr note, "it is not inconceivable that the federal government could invoke public policy in seeking to disallow the estate and gift tax marital or charitable deductions with respect to transfers of interest in cannabis businesses."

"If the IRS were to be successful, the taxpayer or a decedent's estate could be facing a large and unexpected tax bill," they write. "Estate planners should make sure to advise clients that there are many unresolved federal tax questions."

Planning for an uncertain future

All these questions are only relevant, of course, if a cannabis business owner decides to do any estate planning at all. And though this overlap in practice areas is bound to grow, Croft says that on a day-to-day basis she still senses reluctance from some members of the industry to make a traditional estate plan for their cannabis assets.

“My first hurdle, from a general place, is do people feel comfortable talking to a lawyer they just met about it?” Croft said. Most corporate industry players have “no reservations,” she said. But for individual proprietors and boutiques, there can still be some fear and stigma surrounding the idea of getting a lawyer involved.

There’s also the fact that, due to limitations on cannabis businesses’ access to banking, many of these business owners’ assets are in cash.

“If your assets are in cash, then as far as estate planning, you’re probably not going to do anything traditional anyways,” Croft said. “Are their assets at a place where we can even do estate planning that would be effective for them? That would be my first concern.”

And advising a client in a business that remains illegal under federal law can also create ethical concerns for attorneys -- especially given that there isn’t extensive guidance on how to navigate such terrain from bar associations in states where cannabis is legalized. In a 2020 [formal opinion](#), the State Bar of California advised that a lawyer can ethically advise clients about compliance with California cannabis laws even though the client’s conduct may violate federal law -- as long as that lawyer “informs the client of the conflict between state and federal law and does not advise or assist the client in concealing or evading prosecution for that conduct.”

“The fact that the client’s conduct is unlawful under federal law may give rise to other limitations on the lawyer’s representation of the client, which must be disclosed to the client consistent with the lawyer’s duty to communicate information relevant to the representation,” the opinion advises.

So there are plenty of practical obstacles. But the question of how cannabis business owners can best make their estate plans also presents a more philosophical question. How can estate planning -- by definition a future-oriented practice area -- be applied to an industry whose legal future, at the federal level, remains in limbo?

For Croft, her ongoing and proactive approach -- checking in with her clients on a regular basis, rather than making “set it and forget it” estate plans -- is a perfect fit for this exact situation.

“When I check in with my clients, I ask: have your assets changed, has your family changed, and have the laws changed?” she said. “Will this change on a federal level? Yes. When? Who knows. So that’s my answer. How do we deal with the evolving state of our lives, of the law, of the cannabis industry? It’s actually having a relationship with your lawyer.”

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