

# AIMING HIGH AND GETTING HIGH: ESTATE PLANNING FOR GUNS AND MARIJUANA



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**CHICAGO ESTATE PLANNING COUNCIL**

**CHICAGO, ILLINOIS**

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## EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)  
J.D., Summa Cum Laude, Ohio State University (1979)  
LL.M., University of Illinois (1983)  
J.S.D., University of Illinois (1990)

## SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)  
Member: American Law Institute; American College of Trust and Estate Counsel (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; Texas State Bar Association  
Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)  
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

## CAREER HISTORY

Private Practice, Columbus, Ohio (1980)  
Instructor of Law, University of Illinois (1980-81)  
Professor, St. Mary's University School of Law (1981-2005)  
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)  
Visiting Professor, Boston College Law School (1992-93)  
Visiting Professor, University of New Mexico School of Law (1995)  
Visiting Professor, Southern Methodist University School of Law (1997)  
Visiting Professor, Santa Clara University School of Law (1999-2000)  
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)  
Visiting Professor, The Ohio State University Moritz College of Law (2012)  
Visiting Professor, Boston University School of Law (2014)

## SELECTED HONORS

Order of the Coif  
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)  
President's Academic Achievement Award, Texas Tech University (2015)  
Outstanding Researcher from the School of Law, Texas Tech University (2013)  
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)  
Outstanding Professor Award – Phi Alpha Delta (Texas Tech University) (2015) (2013) (2010) (2009) (2007) (2006)  
President's Excellence in Teaching Award (Texas Tech University) (2007)  
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)  
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)  
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)  
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)  
Most Outstanding Third Year Class Professor – St. Mary's University (1982)  
State Bar College – Member since 1986

## SELECTED PUBLICATIONS

Author and co-author of numerous law review articles, books, and book supplements including WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (6<sup>th</sup> ed. 2015); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4<sup>th</sup> ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (7<sup>th</sup> ed. 2015); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3<sup>rd</sup> ed. 2007); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990); *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).



## AIMING HIGH AND GETTING HIGH: ESTATE PLANNING FOR GUNS AND MARIJUANA

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### Overview of Presentation

- Firearms
  - Planning for traditional weapons
  - Planning for NFA weapons
  - The Gun Trust
- Marijuana
  - Impact on testamentary capacity
  - Life insurance policy applications
  - Trust clauses concerning "illegal" drug use
  - Marijuana and related paraphernalia as estate assets.

## FIREARMS



## Prevalence of Weapon Ownership

- 43% of Americans keep a gun in their home.
- Over 250,000 machine guns and other NFA weapons are registered.
- About 26% of Illinois citizens owns guns.

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## What are "Regular" Weapons?

### ■ Non-NFA Weapons

- Revolvers
- Pistols
- Rifles
- Shotguns



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## Planning Advice for Non-NFA Weapons

1. Beneficiary must be able to possess under state law where beneficiary lives.  
For example:
  - Beneficiary is not under 18.
  - Beneficiary not convicted of felony or certain misdemeanors.

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### Planning Advice for Non-NFA Weapons

- 2. Conduct background check of intended beneficiary to be certain beneficiary could possess the weapon.



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### Planning Advice for Non-NFA Weapons

- 3. Name alternate beneficiary if intended beneficiary is ineligible.



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### What are NFA weapons?



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NFA ("Title II") Weapons

1. Machine Guns

Weapon that can automatically fire more than one shot without manual reloading by a single pull of the trigger.



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NFA ("Title II") Weapons

1. Machine Guns

Includes parts that convert weapon into a machine gun such as a sear.



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NFA ("Title II") Weapons

2. Short-Barreled Shotguns and Rifles

barrel less than 18" (shotgun) or 16" (rifle) in length or total length less than 26"



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NFA ("Title II") Weapons

3. Silencers



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NFA ("Title II") Weapons

4. Any other weapon

Concealed and  
gadget weapons



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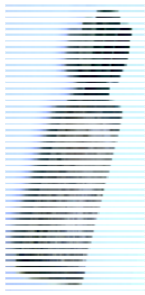
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NFA ("Title II") Weapons

5. Destructive devices



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## National Firearms Act of 1934

- Enacted in response to violence that accompanied Prohibition.
- Governs:
  - Purchase
  - Sale
  - Transfer
  - Ownership
  - Use
  - Possession



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## National Firearms Act of 1934

- Allows NFA weapons and items to be lawfully owned by “persons” who register and pay the tax including: individuals, business entities, and trusts.



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## Other Relevant Laws

- Gun Control Act of 1968
- Firearm Owners' Protection Act of 1986
  - Transfer of machine guns lawfully possessed as of May 19, 1986 still allowed.
- However, some states like Illinois and local governments impose additional legal restrictions, or prohibit ownership of NFA items altogether.
- We will look at the special problems in Illinois and potential solutions after we look at the normal planning suggestions.

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## Transfer of NFA Weapons

- Long and tedious process
  - Complete ATF Form 4
  - Pay \$200 tax
  - Obtained signed law enforcement certificate
    - Chief law enforcement officer (e.g., sheriff)
    - Judge
  - Duplicate set of forms with original signatures
  - Photos of applicant
  - Two FBI Forms FD-258 (fingerprints)

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## Transfer of NFA Weapons

- Result if transfer not properly done
  - Up to 10 years in prison
  - Up to \$250,000 in fines
  - Forfeiture of weapon
  - Forfeiture of any vehicle used to convey or conceal the weapon

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## Possession of NFA Weapons

- Only the owner may possess.
- Innocent possession is in violation of federal law.
- Constructive possession is in violation of federal law.

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### Upon Owner's Death if No Planning

- Determine if weapon was registered
  - Locate registration document.
  - If cannot, contact ATF to see if it was registered.

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### Upon Owner Death if No Planning

- Unregistered NFA weapon discovered
  - Turn over to law enforcement immediately
  - Estate cannot register the weapon retroactively
  - If not act quickly, family members could be deemed in possession and in violation of federal law.

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### Upon Owner Death if No Planning

- Registered NFA weapon discovered
  - Personal representative responsible for transferring to beneficiary, assuming beneficiary is capable of owning the weapon.
  - Has reasonable time to transfer.
  - The \$200 tax is not levied on this transfer.
  - Transfer process is very burdensome on PR.

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## Gun Trusts



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## Gun Trusts

- The NFA allows NFA weapons to be registered in the name of a trust.



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## Transfer of Weapon to Gun Trust

- Gun owner may apply directly to ATF for transfer of weapon to a gun trust.

This means the following formalities are not needed:

- Signature of a law enforcement officer or judge
- Photos
- Fingerprints

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## Key provisions of gun trust

- 1. Effective for both regular weapons and NFA weapons.

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## Key provisions of gun trust

- 2. Trustee cannot be a "prohibited person."
  - Any person convicted of a crime punishable by imprisonment for greater than one year;
  - Any fugitive from justice;
  - Any unlawful user of or any person who is addicted to a controlled substance;
  - Any person adjudicated as having a mental defect or has been committed to a mental institution;
  - Any alien who is illegally or unlawfully in the United States;
  - Any person discharged from the Armed Forces under dishonorable conditions;
  - Any person who has renounced his or her U.S. citizenship;
  - Any person who is subject to a restraining order; and
  - Any person who has been convicted of a crime of domestic violence.

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## Key provisions of gun trust

- 3. Useful for previously owned and newly acquired weapons
  - Settlor can transfer currently owned weapons to the trust.
  - The trust can purchase additional weapons.

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### Key provisions of gun trust

- 4. Trustee determines if ultimate beneficiary is a proper owner
  - If person can own weapon, is the beneficiary sufficiently mature and responsible?
  - If not, settlor provides instructions on what trustee should do with the weapon.

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### Key provisions of gun trust

- 5. Reduces constructive possession risks
  - The settlor gives the trustee the ability to add and remove authorized users (trustees).

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### Key provisions of gun trust

- 6. Multiple-generation protection possible
  - If the gun owner wishes to keep the weapons in the family, consider forming trust in a state that has abolished the Rule Against Perpetuities.

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## Key provisions of gun trust

- 7. Possible protection from future transfer restrictions
  - Federal laws may be changed to restrict transfer.
  - Because the trust is the owner, no transfer occurs even though trustees and beneficiaries may change.

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## ATF 41P – The “death” of gun trusts?

- Proposed rule would require anyone using an NFA Trust to submit fingerprints, be photographed, supply proof of citizenship, and obtain local Chief Law Enforcement Officer approval of every NFA item purchased or transferred.
- Could act as a de facto ban because many CLEOs refuse to sign.
- Final action currently delayed to an undetermined time, most likely not until late 2015 or beyond.

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## Options to Avoid

- 1. Ownership by business (corp., LLC, FLP, etc.)
  - Not private so much information on public record.
  - Additional hassles and expenses to create and administer.

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## Options to Avoid

- 2. Folding guns into trusts holding other assets
  - NFA weapons have unique rules so trustees need specialized knowledge.
  - Traditional trusts may provide for disposition of assets in a way that would be improper for NFA weapons.

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## Options to Avoid

- 3. "Internet" and "gun shop" trusts
  - Not prepared with sufficient expertise.
  - No personalized advice to carry out the client's intent.

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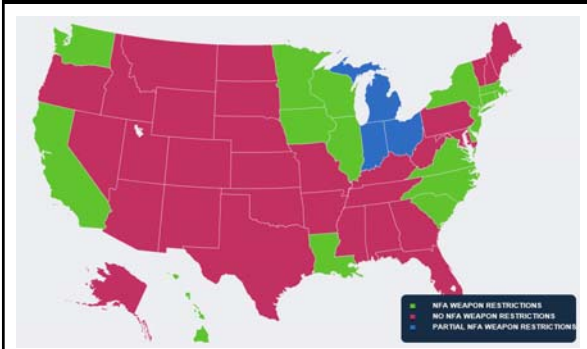
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## Overview of State Restrictions



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## Illinois Law

- Illinois has some of the most restrictive laws in the nation which prohibit citizens from owning the following weapons which are allowed under the NFA:
  - Machine guns
  - Silencers
  - Short barreled shotguns
  - Short barreled rifle unless part of a recognized reenactment group, or if person has a curios and relics license

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## The Illinois Problems

- Estate Planning Client:
  - "I have a machine gun my granddad pried out of the hands of dead Nazi. It is family heirloom and is properly registered under the NFA."
- Estate Administration Client:
  - "In going through [Decedent's] property, I found a machine gun properly registered under the NFA."

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## What you can't say

- "Move the weapon to a state where possession is allowed and where you have a friend, relative, storage unit. It's true that you cannot legally move the weapon across state lines but the risk is very low someone will search your trunk unless you speed or are in an accident."

UNETHICAL

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## Can you do this?

- "Looks like you may have to turn that gun over to the authorities under Illinois law. Too bad the gun was not in a state like X (state where attorney knows Client has a family member, friend, etc. and where possession is legal). If it were there, we could do some excellent and legal planning for your weapon."
- Client then illegally transports the weapon to state X and returns to Attorney to complete the estate plan or probate.
- Did Attorney violate ethical duties? Could Attorney now do the estate plan or probate?

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## Can you do this?

- Estate planning practitioners consulted:
  - It is permissible to explain the law and discuss the legal consequences any proposed course of conduct as long as no recommendation is made to violate the law.
  - If client does nonetheless takes an illegal action, attorney may deal with the situation as it now stands and plan the estate or conduct the probate.



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## Can you do this?

- Professional responsibility experts consulted:
  - Attorney planted the idea that the gun should be taken into another state illegally.
  - Thus, Attorney knowingly counseled the client in criminal conduct.
  - Attorney is not allowed to tacitly suggest that Client should break the law by transporting the machine gun across state lines.



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# MARIJUANA



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Which of these most represents your thoughts on marijuana?



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## States where legal

### RECREATIONAL

1. Alaska
2. Colorado
3. DC
4. Oregon
5. Washington

### MEDICAL

- |                   |                   |
|-------------------|-------------------|
| 1. Alaska         | 13. Michigan      |
| 2. Arizona        | 14. Minnesota     |
| 3. California     | 15. Montana       |
| 4. Colorado       | 16. Nevada        |
| 5. Connecticut    | 17. New Hampshire |
| 6. DC             | 18. New Jersey    |
| 7. Delaware       | 19. New Mexico    |
| 8. Hawaii         | 20. New York      |
| 9. Illinois       | 21. Oregon        |
| 10. Maine         | 22. Rhode Island  |
| 11. Maryland      | 23. Vermont       |
| 12. Massachusetts | 24. Washington    |

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### The Compassionate Use of Medical Cannabis Pilot Program Act

- Patient must have debilitating medical condition such as cancer, HIV, MS, or glaucoma
  - Statute lists approximately 40 conditions
- Allowed possession = 2.5 ounces of usable cannabis during a period of 14 days and that is derived solely from an intrastate source.
- Only cultivation centers can grow; not patients or caregivers.

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### The Compassionate Use of Medical Cannabis Pilot Program Act

- Sales of medical marijuana started in Illinois on November 9, 2015.
- One-half of the authorized locations in Illinois are in Chicago.

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### Marijuana use in Illinois

- Medical
  - 3,300 applications already approved
  - Numbers anticipated to grow significantly
- Recreational use per month
  - Ages 18-25 = 20.27%
  - Over 25 = 4.79%

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## Testamentary Capacity



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## Testamentary Capacity

- Mental impact of marijuana use
  - Cognitive decline, especially with long-term use
  - Memory impairment
  - Panic & anxiety feelings
  - Reduced ability to learn
  - Inability to understand things clearly
  - Paranoia, suspicion, and distrust or fear of other people.

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## Testamentary Capacity

- Marijuana can impact a user for many days or even weeks after use.



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## Testamentary Capacity

- Advice, especially if contest anticipated
  - Ask client the last time he/she used marijuana.
  - If within the past few months, document carefully that client:
    - Understood what a will does (dispose of property at death).
    - Knew what property the client owned.
    - Knew the client's family members.
  - Be sure client has not used marijuana for at least a week prior to will execution.

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## Life Insurance

- 1. Insurability
  - Some companies may refuse to issue life insurance to any user (medical or recreational) of marijuana because it is illegal under federal law.



- Many companies will insure a marijuana user.

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## Life Insurance

- 2. Rates – recreational user
  - Smoking regularly is likely to disqualify insured from preferred non-smoker rates.



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## Life Insurance

- 3. Rates – medical user
  - Using for medical reasons may or may not impact premiums.
  - It is likely the underlying medical reason will be the reason for increased premiums.



Forms of Medicinal Cannabis

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## Life Insurance

- 4. Failure to disclose
  - Failure to disclose marijuana use on the life insurance application is fraud.
  - If you die within the contestability period (typically two years) and the company discovers marijuana use, company may deny payment.



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## Trust clauses restricting drug use

- Assume Settlor includes a provision which in some way limits or restricts distributions to Beneficiary if Beneficiary uses illegal drugs.
- How is the clause to be interpreted or applied?

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## Trust clauses restricting drug use

- Temporal issues
  - When trust written?
  - When settlor dies?
  - When beneficiary accept the trust?
  - Now?



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## Trust clauses restricting drug use

- Applicable law issues – what law?
  - State
    - Medical
    - Recreational
  - Federal



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## Trust clauses restricting drug use

- Applicable law – which state?
  - Where settlor lived when trust written?
  - Where settlor lived when died?
  - Where beneficiary lived when accepted trust?
  - Where beneficiary lives now?



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## Impact even if no trust provision

- A representative from California, Linda Sanchez, believes that drug-testing should be imposed on children who want to inherit from their parents, even if the parent's will or trust does not contain this condition.
- She thinks it is unfair that a single parent who wants governmental assistance to purchase food needs to be drug-tested but that a child who may inherit a million dollars or more does not need to be drug-tested.

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## Trust clauses restricting drug use

- Recommendation
  - Have Settlor be very specific about these issues and address each one in the trust.



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## Drafting estate planning documents dealing with marijuana-based assets

- Client owns marijuana-based assets in a state where such ownership is legal such as:
  - Stash,
  - Dispensary business, or
  - Cultivation business.
- May the lawyer draft a will or trust dealing with these assets which are illegal under federal law?

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### Drafting estate planning documents dealing with marijuana-based assets

- No uniform rule in the United States



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### Drafting estate planning documents dealing with marijuana-based assets

- For example:
  - Arizona -- Permissible for lawyer to assist clients wishing to start businesses or engage in other actions permitted under Arizona Medical Marijuana Act. Ethics Op. 11-01 (2011).
  - Connecticut -- Lawyer may advise and represent client concerning state requirements for licensing and regulation of marijuana businesses but must inform client that such businesses violate federal criminal statutes. Lawyer may not assist client in criminal conduct. Ethics Op. 2013-02 (2013).

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### Illinois PR Rule 1.2(d)(3)

- A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may . . .
  - counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences."

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## Valuing Marijuana-related assets on the 706

- A decedent may have a taxable estate and also marijuana-based assets.
- The IRS might require the asset to be valued even though asset is illegal.



Rauschenberg's "Canyon" (1959)

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## Questions?



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