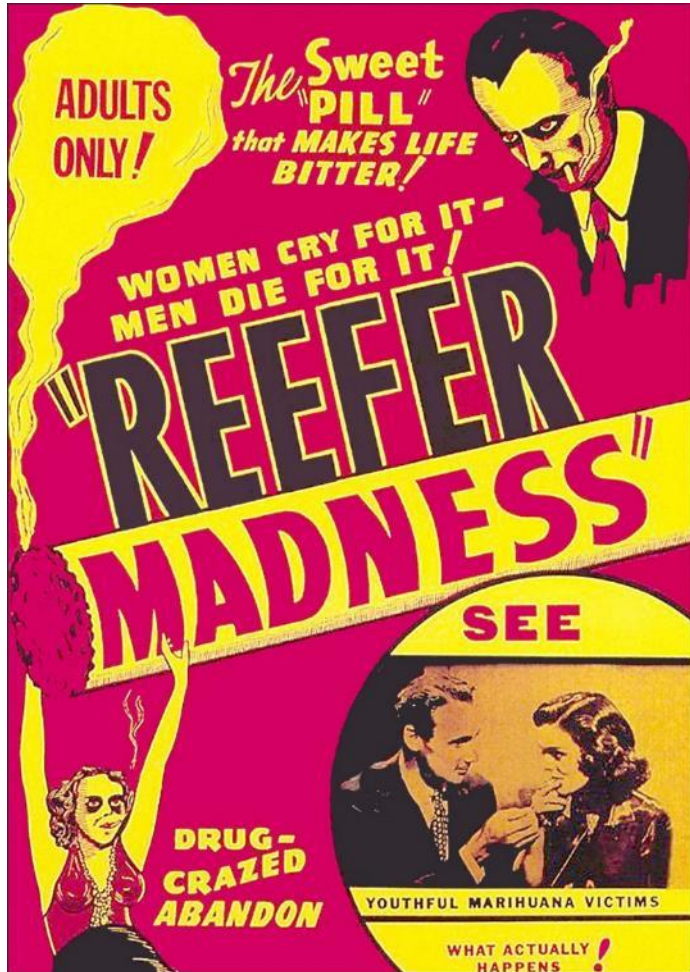


# **FPA of Greater Indiana**

## **YOUR PLEASURE OR BUSINESS CANNABIS CLIENT: IT'S HIGH TIME ESTATE PLANNERS KNOW WHAT TO DO**

**Dr. Gerry W. Beyer**  
**Governor Preston E. Smith Regents Professor of Law**  
**Texas Tech University School of Law**

# Which one of these most represents your thoughts on marijuana?



# Medical Marijuana Legalized

1. Alaska
2. Arizona
3. Arkansas
4. California
5. Colorado
6. Connecticut
7. Delaware
8. DC
9. Florida
10. Guam
11. Hawaii
12. Illinois
13. Louisiana
14. Maine
15. Maryland
16. Massachusetts
17. Michigan
18. Minnesota
19. Mississippi
20. Missouri
21. Montana
22. Nevada
23. New Hampshire
24. New Jersey
25. New Mexico
26. New York
27. North Dakota
28. Ohio
29. Oklahoma
30. Oregon
31. Pennsylvania
32. Puerto Rico
33. Rhode Island
34. South Dakota
35. Utah
36. Vermont
37. Virginia
38. Virgin Islands
39. Washington
40. West Virginia

# Recreational Marijuana Legalized

1. Alaska
2. Arizona
3. California
4. Colorado
5. DC
6. Illinois
7. Maine
8. Massachusetts
9. Michigan
10. Montana
11. Nevada
12. New Jersey
13. New Mexico
14. New York
15. Oregon
16. South Dakota  
(judicially declared unconstitutional;  
appealed)
17. Vermont
18. Virginia
19. Washington

# Indiana

- **Recreational = No!**
- **Medical = No!**
- **CBD products with low THC = Yes, but only for treatment resistant epilepsy.**



# Marijuana Highs and Lows: A short quiz - -Question 1

**1. What jurisdiction has the highest marijuana use per capita?**



# Marijuana Highs and Lows: A short quiz - -Question 2

2. What city has the highest marijuana use?
- By quantity?
  - By percentage of population who regularly use?



# Marijuana Highs and Lows: A short quiz - -Question 3

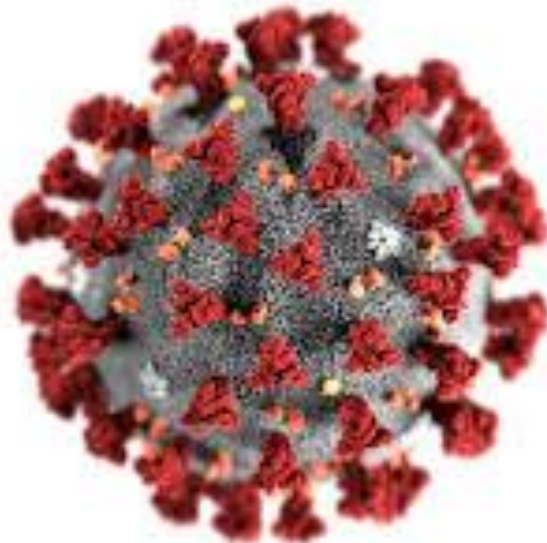
3. What jurisdiction has the lowest marijuana use per capita?





# Side Note – COVID-19

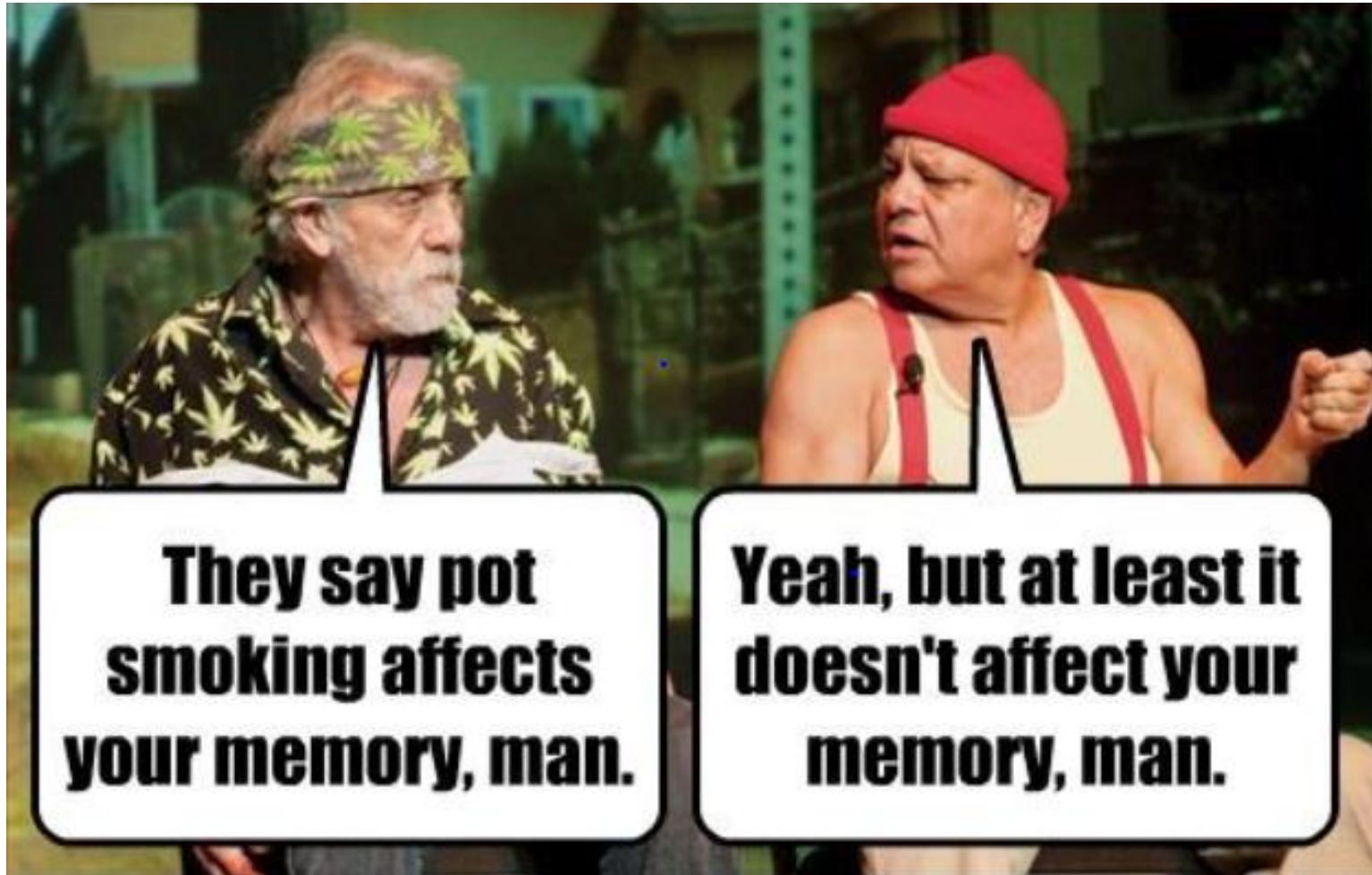
- **Smoking marijuana increases the user's susceptibility to COVID-19 which increases probability of a hastened death.**



# Presentation Overview

- **Impact on testamentary capacity.**
- **Provisions in wills and trusts conditioning benefits on non-use of “illegal” drugs.**
- **Impact on life insurance.**
- **Marijuana-based estate or trust assets.**
- **Business issues that may interface with estate planning issues.**
- **Taxation issues.**

# Testamentary Capacity



# 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.

# Testamentary Capacity

- Marijuana can impact a user for many days or even weeks after use.
- Long term use enhances impact on capacity.

MARIJUANA

BEFORE:



AFTER:



# 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.

# Will and 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?

# Will and trust clauses restricting drug use

- **Temporal issues**
  - **When will court determine the legality of marijuana?**
    - When trust written?
    - When settlor dies?
    - When beneficiary accept the trust?
    - Now?





# Will and trust clauses restricting drug use

- Applicable law issues
  - What law will the court apply?
  - State
    - Medical
    - Recreational
  - Federal
    - Always illegal



# Will and trust clauses restricting drug use

- **Applicable law issues**
  - **If court applies state law, which state?**
    - Where settlor lived when trust written?
    - Where settlor lived when died?
    - Where beneficiary lived when accepted trust?
    - Where beneficiary lives now?



# Will and trust clauses restricting drug use

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



# 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.

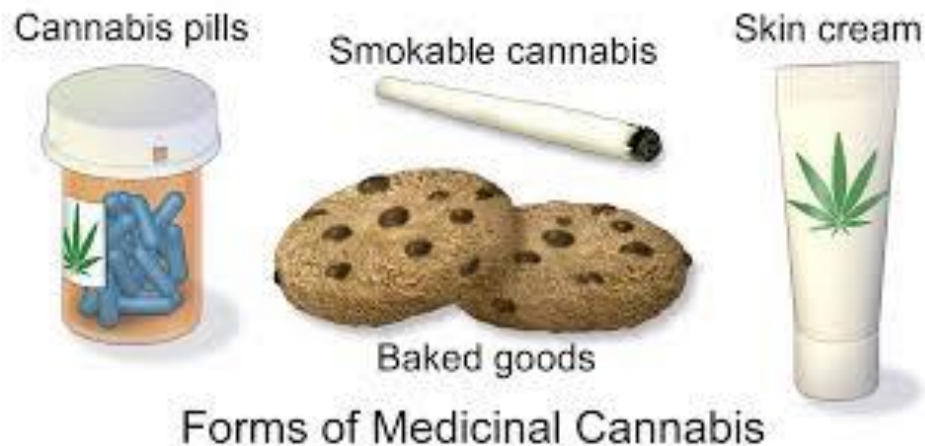
# Life Insurance

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



# 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.



# Life Insurance

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



# Advising clients with marijuana assets

- **Client owns marijuana-based assets in a state where such ownership is legal such as:**
  - Stash,
  - Dispensary business, or
  - Cultivation business.
- **Even though these assets are illegal under federal law, may the lawyer:**
  - Draft a will or trust dealing with these assets, or
  - Give marijuana business advice?



# Advising clients with marijuana assets

- No uniform rule in the United States



# Example of rules

- **Arizona – Ethics Opinion 11-01**
  - Allowed.
- **Connecticut – Ethics Opinion 2013-02**
  - Lawyer may not assist client in criminal conduct.
- **Illinois – PR 1.2(d)(3)**
  - Allowed, as long as warn about federal law issues.

# Trust investment in marijuana business

- Assuming trust is silent, may/should a trustee invest in a cannabis business?



# Standard = Prudent Investor Rule

- Investment decisions made “in the context of the trust portfolio as a whole and as part of an overall investment strategy having *risk* and return objectives reasonably suited to the trust.
- Thus, no clear answer and decisions need to be based on a case by case basis.
- Best discussion is in Melanie Fein’s paper
  - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3326205](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326205)

# Investment factors

- **Factors to consider**
  - Marijuana is illegal under federal law.
  - Thus, “Don’t touch the plant.”
    - Not growing or selling businesses.
  - Instead, invest in companies that supply growers and dispensaries:
    - fertilizer
    - pesticides
    - growing systems (hydroponics)
    - lights
    - software

# Bankruptcy issues

- If a dispensary owner, grower, or farmer has financial issues, bankruptcy issues may arise.
  - If bankruptcy trustee administers the property, the trustee violates federal law.
  - If bankruptcy trustee abandons the property, the creditors are deprived of a recovery but the debtor retains the valuable property and receives a discharge.



# Banking issues

- **Marijuana businesses cannot use federal banks because of federal prohibition of marijuana.**
- **Thus, cash is used bring along its problems (theft, robberies, taking cash to pay taxes, etc.).**
- **Risk that ancillary businesses will be deemed in marijuana trade.**
- **Perhaps use state banks, credit unions, cryptocurrency, etc.**

# Income tax

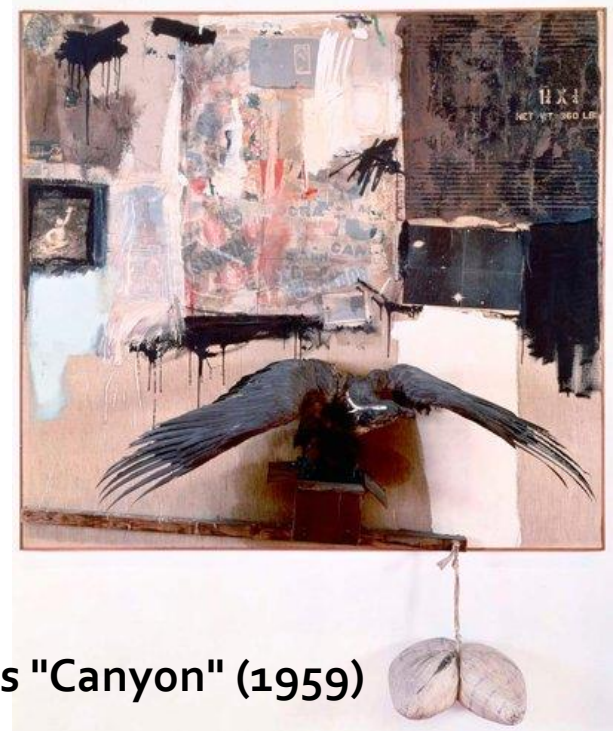
- Cannot deduct expenses of a business that “consists of trafficking in controlled substances.”
- However, a 2018 Tax Court case did permit the subtraction of cost of goods sold from gross receipts.





# Estate Tax – Gross Estate

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



Rauschenberg's "Canyon" (1959)

# Estate Tax – Valuation

- **“Fair Market Value”**
- **How determine retail price?**
  - Price sold?
  - Price purchased?
  - Street value?

# Criminal record expungement

- **Some states have procedures to have a person's criminal record expunged if the amount of marijuana that caused the conviction would now be legal.**

# International Church of Cannabis



# International Church of Cannabis



# International Church of Cannabis



# Questions?

