Cannabis and Evidence: Budding Trends in Trial Advocacy

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Introduction

For as long as there have been rules of evidence and courtrooms, there have been products that can impair litigants or witnesses—and products whose use carries the potential to trigger certain stigmas in the eyes of the finders of fact. Cannabis, which has been around longer than nearly every judicial system in the world and the subject of political and popular debate in the United States for the past century, may be the paradigmatic product at the moment.

The United States cannabis industry has developed within the context of conflicting and evolving federal and state laws, and businesses in the

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cannabis industry must navigate a wide array of legal challenges. These challenges extend to those businesses that provide services or otherwise interact with cannabis companies. And the stakes are high. The total economic impact from cannabis sales in 2023 is anticipated to top $100 billion in the United States alone, an increase of more than twelve percent from 2022.[1] And by 2027? A whopping $160 billion.[2]

All of this means that people dealing with cannabis issues tend to have lots of questions. And disputes. The cannabis industry is ripe for litigation. It may be a surprise that there has not been *more* cannabis litigation to date. The reasons, we suspect, stem from (1) a hesitance on the part of cannabis businesses (which often run afoul of black-letter federal law) to invoke the judicial system and (2) a lack of resources to prosecute or defend a lawsuit.

In many ways, the question of how and when the use of cannabis should be admissible at trial is an age-old question. But that does not mean that the answers to these questions are straightforward. The dramatic rise in state-legal cannabis regimes in the United States over the past two decades portends a similar, if lagging, rise in the instances in which courts in the United States are asked to opine how and when cannabis-related evidence should be admitted.

This Article begins by examining the evolving legalization of cannabis in the United States over the past few decades, both at the federal and state levels. The balance of the Article examines specific trial advocacy issues arising in the cannabis context.

I. The Evolving Legalization of Cannabis in the United States

To fully appreciate budding trends at the intersection of cannabis and trial advocacy, it helps to understand the evolving legal status of cannabis over the past two decades. A brief history is provided below.

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[1] Andrew Long, *Cannabis Industry Will Add $100 Billion to US Economy in 2023, MJBiz Factbook Projects* (updated May 10, 2023), https://mjbizdaily.com/cannabis-industry-will-add-100-billion-to-us-economy-in-2023/#:~:text=The%20total%20U.S.%20economic%20impact,the%20newly%20published%20MJBiz%20Factbook.

[2] *Id.*

A. The Controlled Substances Act

Any serious discussion of the legal status of cannabis begins with the Controlled Substances Act (CSA). The CSA makes it "unlawful for any person knowingly or intentionally" to "possess a controlled substance" or "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" except as authorized by the CSA.[3] And, since the CSA's enactment in 1970, marijuana[4] has been listed as a Schedule I drug.[5] Despite the federal prohibition imposed by the CSA, thirty-eight states (and four United States territories) have legalized the use of cannabis for medical or adult use.[6]

B. Changes at the Federal and State Level with the 2018 Farm Bill

The year 2018 ushered in a significant shift in cannabis policy in the United States at the federal level. The Agriculture Improvement Act of 2018, commonly referred to as the 2018 Farm Bill, removed hemp from the CSA's definition of "marihuana."[7] That, in turn, removed hemp from its previous listing as a Schedule I narcotic.[8] Ultimately, the 2018 Farm Bill federally legalized hemp[9] and defined it as any product derived from

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[3] 21 U.S.C. §§ 841(a)(1), 844(a).

[4] Marijuana is sometimes spelled "marihuana," as it is in the CSA and certain other federal documents.

[5] 21 U.S.C. § 812(c)(c)(10).

[6] Dan Avery, *Where Is Marijuana Legal? Cannabis Laws in Every State*, CNET (May 31, 2023), https://www.cnet.com/news/politics/marijuana-laws-by-state-where-is-weed-legal.

[7] Agriculture Improvement Act of 2018, Pub. L. No. 115-334 § 12619(a)(B), 132 Stat. 44490 (2018).

[8] *See id.* § 12619(b) (stating the CSA shall include tetrahydrocannabinols in the list of Schedule I narcotics, with the exception of tetrahydrocannabinols in hemp).

[9] John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, Brookings (Dec. 14, 2018), https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer.

the Cannabis sativa L plant that contains no more than 0.3% of Delta-9 tetrahydrocannabinol (THC).[10]

The 2018 Farm Bill has been extremely consequential. In legalizing hemp's cultivation, manufacture, distribution, and sale, the 2018 Farm Bill paved the way for financial institutions to transact with the previously untapped cannabis industry.[11] Moreover, the 2018 Farm Bill expanded the commercial cultivation of hemp beyond the limited state-approved pilot programs in place circa 2018.[12] In addition, the 2018 Farm Bill gave states regulatory authority over the production of hemp.[13]

This Article focuses on marijuana, but the 2018 Farm Bill is notable here because of Delta-8. After the 2018 Farm Bill was enacted, there was a major increase in the supply of Cannabidiol (CBD) isolate from hemp, resulting in the price dropping exponentially.[14] Companies took advantage of the price drop to purchase the isolate and produce various Delta-8 products.[15] "Delta-8's proponents argued that so long as these hemp-derived Delta-8 THC products contain less than .3% Delta-9 THC, they are legal under the 2018 Farm Bill"—even if such products produce a "high" that can arguably cause impairment.[16] As such, Delta-8 products quickly soared in popularity and attracted attention from state and federal agencies, with approximately twenty states placing bans or restrictions on the sale of Delta-8 products.[17]

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[10] 7 U.S.C. § 1639o(1).

[11] *See* Hudak, *supra* note 9 (explaining that the 2018 Farm Bill extends Federal Crop Insurance Act protections to hemp farms, so they may receive assistance for crop losses).

[12] *Id.*

[13] *See id*. (noting states will have the opportunity to create their own hemp regulatory program that must be approved by the Secretary of the USDA, but federally run systems would be put in place for any states that do not draft regulations).

[14] Richard W. F. Swor et al., *The Delta-8 Debacle: Looking at Texas's (Temporarily) Failed Attempt to Make Delta-8 Products Illegal*, BRADLEY (Nov. 11, 2021), https://www.bradley.com/insights/publications/2021/11/the-delta8-debacle-looking-at-texas-temporarily-failed-attempt-to-make-delta8-products-illegal.

[15] *Id.*

[16] *Id*.

[17] *Id.*; Brandon Dunn, *Updated: Delta-8 Legality Map*, GREENWAY MAG. (Oct. 18, 2021), https://mogreenway.com/2021/10/18/delta-8-legality-map (last updated Jan. 1, 2022).

II. Trial Advocacy Issues Stemming from the Legalization of Cannabis

With more cannabis-related litigation almost certainly forthcoming, this Article takes a look at three issues that uniquely implicate cannabis and trial advocacy: (1) the admissibility of evidence of cannabis use under Federal Rule of Evidence 403, (2) the admissibility of cannabis use as habit evidence under Federal Rule of Evidence 406, and (3) the interplay of cannabis and the crime-fraud exception to the attorney-client privilege.[18]

A. Cannabis and Rule 403

1. The Issue

Is a party's use of cannabis more probative or prejudicial? Will the answer to that question change as state laws and popular opinion evolve? Pursuant to Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[19] Courts evaluating marijuana use under Rule 403 have most often weighed the probative value against the first listed consideration: unfair prejudice. The outcomes of these cases vary widely on a broad spectrum of fact-specific circumstances. Looking at the purposes for which the evidence of cannabis use is presented and how the evidence of cannabis use is presented illuminates certain trends.

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[18] *See* FED. R. EVID. 403 (providing the rule for excluding relevant evidence for unfair prejudice); *see also* FED. R. EVID. 406 (establishing the rule for admitting habit evidence). For ease of reference, this Article cites to the relevant Federal Rule(s) of Evidence except as expressly noted. When corresponding state evidentiary rules contain similar language, these interpretations of the federal rules may be instructive.

[19] FED. R. EVID. 403.

2. Specific Contexts and Usages

a. Impairment at the Time of the Incident

The probative value of evidence of cannabis use may outweigh any unfair prejudice when the user was impaired at the time of the incident in question.[20] This may seem straightforward (even obvious), but determining whether a user was "impaired" at the relevant time is a regularly disputed fact.[21] As with many Rule 403 issues, this determination is highly factual and scenario dependent. The relevant questions typically are whether the party was impaired at the time of the event and whether the impairment caused the injury. Without evidence that marijuana use impaired the user *during the incident*, admission of such evidence "could lead to the jury's deciding the case on an improper basis."[22]

For example, in *Batton v. Oak Investment Group Corp.*, a court found that a urinalysis showing the defendant had marijuana in his system during a collision had *little* probative value because it did not establish whether the defendant was *impaired* at the time of the accident.[23] Even so, the court found such evidence unfairly prejudicial because "it could mislead and confuse a jury given that it does not establish intoxication at a given point in time."[24] *Batton* is one of the numerous cases that have

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[20] Durham v. Cnty. of Maui, 742 F. Supp. 2d 1121, 1132 (D. Haw. 2010) ("[A] jury can infer from the positive test result for THC and corresponding finding of recent use that [the driver] was impaired while driving the vehicle . . . . [However] its prejudicial effect does not substantially outweigh its probative value of providing a plausible explanation of the accident."); Graham v. Hamilton, 872 F. Supp. 2d 529, 538-39 (W.D. La. 2012) (finding the probative value of marijuana use outweighed the danger of unfair prejudice where the toxicology report showed the decedent was under the influence of marijuana at the time of her accident).

[21] Expert opinions are important to this consideration in some cases and are discussed further in Section II.A.2.e, *infra*.

[22] *See* Pearce v. Estate of Day, No. 1200623, 2022 WL 1721578, at *12-13 (Ala. May 27, 2022) (stating there was no evidence of marijuana use twenty-four to forty-eight hours prior to the accident and the expert witness could not determine when the marijuana was consumed based on the sample he tested).

[23] 591 F. Supp. 3d 1076, 1083 (N.D. Ala. 2022).

[24] *Batton*, 591 F. Supp. 3d at 1083.

similarly rejected the evidence of cannabis use where there was no corresponding evidence of impairment *at the time of the incident*.[25]

The probative value may also be dependent on the cannabis user's actions at the time he consumed the drug. For example, in *Carter v. Haynes*, the defendant admitted he had used methadone and marijuana several hours before a collision.[26] However, the trial court excluded this testimony because there was no evidence that the defendant was driving erratically prior to the accident, and the responding officer did not observe signs of impairment or arrest the defendant for driving under the influence.[27] As exemplified by *Carter*, courts may look to circumstantial evidence to determine if an individual was impaired at the time of an incident.[28] Although some cases may require analysis of surrounding circumstances to determine impairment, others are easier to resolve, like where the individual had not used marijuana on the date of the incident.[29]

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[25] *Id.*; *see, e.g.*, Bryant v. Colorado, Dep't of Transp., No. 16-CV-01638-NYW, 2018 WL 2445831, at *4 (D. Colo. May 31, 2018) ("Without evidence that THC was in fact in [the driver's] blood stream at the time of the accident, or any instruction from an expert witness as to the timeline during which THC could have remained in [the driver's] system for the purpose of causing impairment," the court found that any probative value of evidence of marijuana use that morning was "substantially outweighed by the potential of unfair prejudice and possibility of confusing and/or misleading the jury."); Hawthorne v. Dravo Corp., Keystone Div., 508 A.2d 298, 303 (Pa. Super. Ct.1986) ("[W]here it cannot be established that the use of marijuana rendered a driver unfit to drive or impaired his or her ability to drive safely, the use of marijuana is inadmissible to prove recklessness or carelessness.").

[26] 267 So. 3d 861, 865 (Ala. Civ. App. 2018).

[27] *Carter*, 267 So. 3d at 865, 867 (affirming the trial court's determination that the evidence was unduly or unfairly prejudicial and noting the limited probative value based on the lack of causal relationship between the accident and the drug use); *see* Watts v. Hollock, No. 3:10-CV-92, 2011 WL 6026998, at *3 (M.D. Pa. Dec. 5, 2011) (determining that the probative value of admitting drug screens was substantially outweighed by the prejudicial effect of admitting such evidence without other evidence of intoxicated behavior).

[28] *See* Moody v. Walmart, Inc., No. 3:19-CV-537-DPJ-FKB, 2022 WL 602431, at *5 (S.D. Miss. Feb. 28, 2022) (finding the plaintiff's being at the store near midnight for cookie dough, staring at the cookie dough for "five to six minutes before the accident," and being unable to recall relevant details circumstantial evidence of impairment).

[29] Two Rivers Bank & Tr. v. Atanasova, 686 F.3d 554, 563 (8th Cir. 2012) (finding prior marijuana use prejudicial where there was no evidence suggesting marijuana use on the date of the incident at issue).

One area where the issue of impairment arises frequently is excessive force cases—specifically, whether evidence of cannabis use by the individual upon whom excessive force was allegedly used is admissible. Most courts analyzing this issue have found that such evidence is not admissible because it is minimally probative and highly prejudicial.[30] Indeed, as stated by the court in *Mason v. City of Chicago* and oft-quoted elsewhere, "[t]he question of whether Plaintiff smoked a marijuana cigarette three hours before the incident is no more probative than whether the officers drank coffee before the incident."[31]

But evidence of cannabis use is not always excluded under Rule 403. Similar to impairment cases in the accident context, some courts have looked at the plaintiff's behavior before an excessive force incident and have found that evidence of cannabis use should not be excluded entirely if used to show the "[p]laintiff's state of mind and behavior during Defendants' interaction with him."[32] For example, the court in *Hines v. Huff* did not exclude test results showing the plaintiff had used marijuana despite the danger of unfair prejudice.[33] Instead, the court found that the evidence was probative to the plaintiff's "suspicious and agitated" behavior and the defendants' perception of the plaintiff.[34]

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[30] *See, e.g.*, Mason v. City of Chicago, 631 F. Supp. 2d 1052, 1060-62 (N.D. Ill. 2009) (barring the expert witness from testifying about the plaintiff's marijuana use in an excessive force case because it would be more inappropriate than probative); Morgan v. City of Los Angeles, No. 2:17-CV-06693-VAP-JEMX, 2020 WL 6048831, at *2 (C.D. Cal. June 23, 2020) (determining that evidence of decedent's marijuana use in an excessive force case was inadmissible because its probative value did not outweigh the risk of unfair prejudice and the defendant did not provide evidence that he was aware of the decedent's marijuana use at the time of the shooting); Estate of Tasi by & through Taualo-Tasi v. Municipality of Anchorage, No. 3:13-CV-00234-SLG, 2016 WL 10648441, at *1 (D. Alaska Mar. 16, 2016) (permitting evidence of alcohol intoxication but excluding evidence of marijuana consumption, due to unfair prejudice, in an excessive force case).

[31] 631 F. Supp. 2d at 1060-61.

[32] *See* Gunter v. Cicero, No. 16-CV-30183-MGM, 2018 WL 10323630, at *2 (D. Mass. Oct. 22, 2018) (finding that, even though the plaintiff possessed a small amount of marijuana and the defendant was unaware of the marijuana when he arrested the plaintiff, the marijuana evidence was admissible as to the plaintiff's state of mind and behavior during the defendant's interaction with him, despite the possible prejudicial nature).

[33] No. 9:16-CV-00503 (BKS/DJS), 2019 WL 3574246, at *4 (N.D.N.Y. Aug. 6, 2019).

[34] *Hines*, 2019 WL 3574246, at *4.

Still, some courts have rejected the argument that the probative value of evidence of cannabis use as to the plaintiff's or the decedent's behavior outweighs the prejudicial nature, even when the cannabis user is impaired and behaving erratically. For example, in *Dominguez v. City of Los Angeles*, a post-mortem toxicology report indicated that the decedent had "trace amounts of marijuana in [his] system on the day he died."[35] The defendants argued that the evidence of marijuana use would not be used as character evidence against the decedent but was instead "directly relevant to his motives in acting the way he did during the incident."[36] The court disagreed and found that the probative value of the evidence did not outweigh the risk of unfair prejudice.[37]

There is yet another scenario where the probative value of an individual's impairment as a result of cannabis use might outweigh the risk of prejudice—when memory and the ability to recall facts is in question. When individuals either admit to using cannabis or there is circumstantial evidence related to cannabis use, courts regularly admit such evidence as probative of the user's ability to recall the events in question accurately.[38]

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[35] No. CV 17-4557-DMG (PLAx), 2018 WL 6164278, at *2 (C.D. Cal. Oct. 9, 2018).

[36] *Dominguez*, 2018 WL 6164278, at *2.

[37] *Id.* Relying on *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 595-601 (9th Cir. 2016), which nearly had the same set of facts, the court determined that the decedent's behavior was not so erratic that the probative value of the toxicology report outweighed the risk of undue prejudice. *Id*.

[38] *See* Alvia v. City of Waterbury, No. 3:15-CV-1162 (RNC), 2019 WL 5020736, at *1 (D. Conn. Mar. 18, 2019) (finding the probative value of marijuana use outweighed potential prejudice where the plaintiff admitted to smoking marijuana prior to the incident and the defendant argued such impairment impacted the plaintiff's ability to accurately recall the incident); Moody v. Walmart, Inc., No. 3:19-CV-537-DPJ-FKB, 2022 WL 602431, at *5 (S.D. Miss. Feb. 28, 2022) (determining that the probative value of evidence of the plaintiff's marijuana use on the night of the incident in question to show the plaintiff's inability to accurately recall events outweighed risk of unfair prejudice); Ferreira v. City of Binghamton, No. 3:13-CV-107, 2016 WL 4991600, at *11 (N.D.N.Y. Sept. 16, 2016) (noting that, although marijuana use is irrelevant to a number of issues, it may be relevant to the plaintiff's "ability to perceive or recall the events in question"); Amerson v. Stechly, No. 12-10375, 2015 WL 6436613, at *1 (E.D. Mich. Oct. 22, 2015) (excluding evidence of marijuana use with the exception of evidence that the plaintiff used marijuana "immediately before the incident or on the day of [his] testimony" as that evidence may go to the plaintiff's ability to accurately recall information); Edgerson v. Matatall, No. 10-14954, 2014 WL

It is important to distinguish an individual's ability to recall facts based on impairment at the time of an incident from arguments that long-term use has hindered the ability to recall facts. For example, in *Nibbs v. Goulart*, the court found that evidence of the plaintiff's long-term marijuana use or questions "about the effects of marijuana use on [the plaintiff's] memory or ability to recollect in general would be grossly prejudicial and of indeterminate relevance without scientific evidence of expert testimony."[39] However, the court still permitted the defendants to introduce evidence of and refer to the plaintiff's marijuana use on the day of the incident "for the limited purpose of impeaching his perceptions of that day's events."[40]

b. Cannabis Use and Health Issues

Another area where the probative value of cannabis use may outweigh the risk of prejudice is in relation to health issues. For example, the court in *Acree v. Watson Pharmaceuticals, Inc.* found evidence of marijuana use admissible where an expert determined pneumonia might have caused or contributed to the plaintiff's death and testified that marijuana usage could affect lung function.[41]

The analysis can become more complicated with questions of mental health. For example, the probative value of cannabis use can outweigh unfair prejudice when the cannabis user puts his mental state at issue.[42] In *Easton v. Asplundh Tree Experts, Co.*, the court declined to exclude evidence of the plaintiff's occasional marijuana use because the court determined that it "goes directly to her claim for damages and to her

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172258, at *8 (E.D. Mich. Jan. 15, 2014) (concluding that evidence of the "[p]laintiff's marijuana use is relevant as to his ability to accurately recall the events that transpired"; therefore, such evidence is admissible because it is more probative than prejudicial).

[39] 822 F. Supp. 2d 339, 346 (S.D.N.Y. 2011).

[40] *Nibbs*, 822 F. Supp. 2d at 346.

[41] No. 10 C 7812, 2012 WL 5878388, at *5 (N.D. Ill. Nov. 21, 2012) (noting that even though marijuana use has a potential for unfair prejudice, this did not outweigh the probative value).

[42] *See, e.g.*, Easton v. Asplundh Tree Experts, Co., No. C16-1694RSM, 2018 WL 1306456, at *3 (W.D. Wash. Mar. 13, 2018); Hines v. City of Columbus, 676 F. App'x 546, 553 (6th Cir. 2017).

mental health, which she has put in issue in the case" vis-à-vis her claim for intentional infliction of emotional distress.[43] Similarly, the court in *Hines* affirmed the trial court's admission of evidence of marijuana use in response to testimony about the plaintiff's cognitive and mood impairments allegedly caused by head trauma sustained during his arrest.[44]

Likewise, courts may not exclude cannabis use in the context of physical health when the plaintiff puts it at issue. For example, in *Ruiz v. Walmart Inc.*, the plaintiff sought to exclude evidence of her marijuana use to relieve her pain and anxiety pursuant to Rule 403.[45] The court found that the marijuana usage was relevant because the defendant argued there were other causes for some of the plaintiff's symptoms, and the plaintiff admitted she used marijuana daily.[46] The court did not believe it would be unduly prejudicial to introduce the evidence "because her use of marijuana is medicinal and appears to be legal."[47]

Alternatively, evidence of cannabis use has been excluded in some health-related contexts. One court excluded evidence of cannabis use when it was used to show a person's life expectancy as well as the person's post-accident physical and mental symptoms.[48] Similarly, another court found that the risk of unfair prejudice outweighed the probative value of evidence of marijuana use when the defendant did not contend that such use was the cause of a heart attack but wished instead to show the plaintiff's "penchant for taking risks, as well as the likelihood that [the plaintiff] lived a sedentary lifestyle, which is a risk for a heart

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[43] No. C16-1694RSM, 2018 WL 1306456, at *3 (W.D. Wash. Mar. 13, 2018).

[44] 676 F. App'x at 553; *see* Doe v. Bridges to Recovery, LLC, No. 2:20-CV-348-SVW, 2021 WL 4690830, at *3 (C.D. Cal. May 19, 2021) (denying a motion to exclude evidence about marijuana or alcohol use or abuse where such use or abuse could be the cause of the plaintiff's depression and anxiety instead of the defendants' conduct).

[45] No. CV 20-01129-RAO, 2021 WL 5759043, at *3 (C.D. Cal. Oct. 28, 2021).

[46] *Ruiz*, 2021 WL 5759043, at *3.

[47] *Id*.

[48] *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-CV-8176, 2016 WL 4410008, at *5-6 (S.D.N.Y. Aug. 18, 2016) (finding evidence of marijuana use minimally probative and substantially prejudicial to show life expectancy and post-accident physical and mental symptoms, but finding evidence of tobacco use relevant to life expectancy).

attack."[49] Yet another court conditionally excluded evidence of marijuana use as prejudicial where the defendant argued it was relevant to the mitigation of damages—that is, marijuana use contributed to the plaintiff's failure to return to work after an accident.[50]

Even so, attorneys should be cautious about relying too heavily on evidence of cannabis use for purposes of proving issues related to medicine and health. In *Shaw v. Jain*, the appellate court granted a new trial in the medical malpractice case after the defendant's counsel continually referenced the plaintiff's marijuana use.[51] The court determined that the plaintiff's marijuana use had no "impact whatsoever on the magnitude of her injuries, the treatment for those injuries, or her recovery."[52] The court found that, although the evidence may have been relevant, the risk of unfair prejudice far outweighed the probative value because it "became a feature of the trial."[53]

c. Past and Peripheral Cannabis Use

Unlike impairment at the time of use and its effect on health, the probative value of prior cannabis use rarely outweighs any prejudicial value. Minimal instances of prior use are rarely, if ever, admissible.[54] At least one court, however, found that an admission of regular marijuana

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[49] *In re* Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceeding, No. 14 C 1748, 2017 WL 2313201, at *11 (N.D. Ill. May 29, 2017).

[50] Kelham v. CSX Transp., Inc., No. 2:12-CV-316, 2015 WL 4525489, at *6 (N.D. Ind. July 27, 2015), *aff'd sub nom.* Kelham v. CSX Transp., Inc., 840 F.3d 469 (7th Cir. 2016).

[51] 914 So. 2d 458, 461 (Fla. Dist. Ct. App. 2005).

[52] *Shaw*, 914 So. 2d at 460.

[53] *Id.* at 461.

[54] *See* Harless v. Boyle-Midway Div., Am. Home Prod., 594 F.2d 1051, 1058 (5th Cir. 1979) ("Accordingly, we conclude that the evidence that [the decedent] had smoked marijuana on one occasion was precisely the type of highly prejudicial evidence that should be excluded under Federal Rule of Evidence 403."); *see also* Goines v. Lee Mem'l Health Sys., No. 2:17-CV-656-FtM-29UAM, 2019 WL 2211058, at *3 (M.D. Fla. May 22, 2019) ("The Court finds that plaintiff's single use of marijuana in the three years before the alleged assault is not relevant and would be unfairly prejudicial if admitted."); Edwards v. Urban League of Nebraska, Inc., No. 8:17CV266, 2019 WL 3006967, at *4 (D. Neb. July 10, 2019) ("[T]he single 2016 mention of some cannabis use, though closer temporally, is not of sufficient probative value to override the prejudice attendant to an admission of illicit drug use.").

use for the eight years preceding an incident was more probative than prejudicial.[55]

Additionally, courts have rejected evidence of cannabis use that is unrelated or peripheral to the incident, even if the use may have been contemporaneous.[56]

d. Cannabis Use Admissible in Part

The above subsections outline some of the factual scenarios where cannabis use may or may not be excluded under Rule 403. There may also be a middle ground where evidence of cannabis use is more probative than prejudicial for some purposes but not for others.

For example, in *Moody v. Walmart*, the plaintiff alleged she was injured when boxes fell off a pallet onto her at Walmart.[57] The plaintiff admitted she had smoked marijuana before the incident, and "other evidence circumstantially suggest[ed] she was impaired at the time of the incident."[58] Accordingly, the court determined that plaintiff's marijuana use was more probative than prejudicial because "[t]here is at least a jury question whether she was impaired. If so, it would speak directly to her credibility as a witness to the disputed events and whether she contributed to cause them."[59] However, the defendants also sought

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[55] *See* Badger v. Wal-Mart Stores, Inc., No. 2:11-CV-1609-KJD-CWH, 2013 WL 3297084, at *8 (D. Nev. June 28, 2013) ("[T]he [eight years] of drug use is relevant as evidence of an alternative theory of causation and is more probative than prejudicial.").

[56] *See* Quinn v. Everett Safe & Lock, Inc., 53 F. Supp. 3d 1335, 1341 (W.D. Wash. 2014) (excluding marijuana use as irrelevant and substantially more prejudicial than probative in a termination action where the defendant did not show that most other employers knew about the marijuana use); *see also* Nobles v. Sushi Sake NMB, Inc., No. 17-21828-Civ-O'Sullivan, 2018 WL 3235534, at *1-2 (S.D. Fla. July 2, 2018) (finding the plaintiff's marijuana use "unduly prejudicial and its probative value . . . de minimis," where the defendant sought to introduce "after-acquired evidence to show plaintiff's employment would have been terminated for violating company policy"); Emerald City Mgmt., LLC v. Kahn, No. 4:14-CV-00358, 2016 WL 3770960, at *5 (E.D. Tex. Jan. 14, 2016) (determining the defendant's past drug use was irrelevant to the fraudulent inducement claim, regardless of whether the defendant used marijuana while he was associated with the plaintiffs).

[57] No. 3:19-CV-537-DPJ-FKB, 2022 WL 602431, at *1 (S.D. Miss. Feb. 28, 2022).

[58] *Moody*, 2022 WL 602431, at *5.

[59] *Id.*

to introduce medical records showing the plaintiff's marijuana use.[60] In considering the admissibility of the medical records, the court noted that "[i]f [the plaintiff's] marijuana use altered her proper course of medical treatment, then it would be probative of her damages and mitigation."[61] The court found that the probative value of the medical records was outweighed by the risk of unfair prejudice regarding her fitness as a mother because the records also revealed that the plaintiff used marijuana while breastfeeding.[62]

Relatedly, courts may exclude evidence of cannabis use for one phase of a trial but not another phase.[63] This approach may be useful in situations where the evidence of cannabis use carries a risk of unfair prejudice when assessing liability, but the risk of unfair prejudice is outweighed by its probative value when assessing damages.[64]

e. Proving Cannabis Use Through Expert Testimony

In some cases, particularly when impairment is at issue, the probative value of evidence related to cannabis use turns on expert testimony in support thereof. As such, it is important to discuss expert testimony in the cannabis use context.

Celaya v. Hankook Tire America Corp., for example, illustrates the importance of expert testimony when determining probative value.[65] There, the court found the expert testimony regarding impairment at the time of the accident to be unreliable and, therefore, inadmissible.[66] Because the "[d]efendants ha[d] not offered any admissible evidence that

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[60] *Id.*

[61] *Id.*

[62] *See id.* ("That added information is not probative of any issue in this case and could instead suggest that [the plaintiff] is a bad mother."); *see also* Amerson v. Stechly, No. 12-10375, 2015 WL 6436613, at *1 (E.D. Mich. Oct. 22, 2015) (excluding evidence of the plaintiff's marijuana use, except to show such usage directly before the events in question or on the day he testifies).

[63] *See* Holder v. Interlake Steamship Co., No. 16-CV-343-wmc, 2018 WL 1725694, at *2 (W.D. Wis. Apr. 10, 2018) (finding evidence of substance use, including marijuana use, inadmissible until the damages phase of the trial).

[64] *Id.* (noting the plaintiff's cannabis use may be probative in showing the cause of the plaintiff's neurocognitive complaints).

[65] No. CV-11-00429-TUC-RM, 2016 WL 10611188, at *1 (D. Ariz. Mar. 30, 2016).

[66] *Celaya*, 2016 WL 10611188, at *1, 3.

[the plaintiff] was impaired at the time of the car accident," the court weighed the probative value of the existence of THC in the plaintiff's blood against the probative value of marijuana use "independent from any evidence of impairment."[67] Because the case hinged on potential tire defects, the presence of THC in the driver's blood was only slightly probative without any admissible evidence of the plaintiff's marijuana use and impairment.[68]

Testimony regarding impairment as a result of cannabis use typically must be supported through an expert witness.[69] In *Durham v. County of Maui*, the court found the expert witness's methodology, used to determine "recent use" of marijuana, to be both reliable[70] and relevant.[71] Thus, in analyzing the evidence under Rule 403, the court held that the expert testimony regarding the plaintiff's marijuana use prior to the accident was admissible as such evidence was more probative than prejudicial.[72]

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[67] *Id.* at *3.

[68] *See id.* ("The limited probative value is countered by the high likelihood that evidence of an illegal drug would cause the jury to decide the case based on unfair prejudices rather than the evidence presented.").

[69] *See, e.g.*, Hernandez v. Cnty. of Los Angeles, 173 Cal. Rptr. 3d 226, 238, 240 (Ct. App. 2014) (collecting cases) ("Because the experts could not identify any manner in which marijuana use contributed to the accident that injured [the plaintiff] or his decision to exit the Land Rover, the evidence was not relevant to the issue and had no probative value."); Bryant v. Colorado Dep't of Transp., No. 16-CV-01638-NYW, 2018 WL 2445831, at *3 (D. Colo. May 31, 2018) ("Nevertheless, I find that evidence of [the plaintiff's] marijuana use should be precluded because expert testimony is necessary to establish the inference the Reams Defendants seek i.e., that [the plaintiff's] use of marijuana rendered him impaired, resulting in the negligent operation of his motor vehicle.").

[70] 742 F. Supp. 2d 1121, 1127, 1129-30 (D. Haw. 2010) (In order to meet the reliability standard of the *Daubert* analysis, the expert made his determination based on a generally accepted methodology while also noting that he "did not need to perform the actual calculation under this methodology because the amounts of THC detected were 'well within' [a result evidencing] recent use."). *But see Celaya*, 2016 WL 10611188, at *3 (finding that expert opinions based on the same methodology, known as the "Huestis methodology," are inadmissible due to unreliability).

[71] *Durham*, 742 F. Supp. 2d at 1130 ("Evidence of drug consumption, when combined with other evidence attributing fault, may be 'highly relevant to the issue of the causal relationship between [a party's conduct] and [the] . . . injuries.'" (quoting Loevsky v. Carter, 773 P.2d 1120, 1127 (Haw. 1989)).

[72] *Id.* at 1132 (acknowledging that the testimony would prejudice the plaintiff, but it is admissible because it may be used to show that the plaintiff was contributorily negligent in causing the car accident).

The manner in which an expert supports her opinion is important in attempting to admit evidence of cannabis use. In *Indemnity Insurance Co. of North America v. Pettit*, the expert determined that the defendant was more likely than not to be impaired by marijuana at the time of the accident based on the defendant's "failure to avoid the accident, the positive tests for cannabinoids in [his] blood and urine, and the documented relationship between impairment and driving performance."[73] The court concluded that "[t]he first and last facts are irrelevant without evidence of marijuana impairment at the time of the accident, and the test results alone are insufficient to reliably demonstrate such impairment."[74] Unsurprisingly, the court held that the evidence of the defendant's marijuana use was inadmissible because the risk of prejudice outweighed its relevance and probative value.[75]

A recurring issue in this context is experts failing to analyze in their reports the amount of cannabis that would impair a person of a particular size or how quickly the effects of the cannabis used would wear off.[76] This may be an interesting issue concerning the type of cannabis

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[73] No. 04-CV-23-B, 2006 WL 8432396, at *4 (D. Wyo. Apr. 11, 2006).

[74] *Indem. Ins. Co. of N. Am.*, 2006 WL 8432396, at *4.

[75] *Id.* at *2 (noting the evidence would encourage jury speculation that would be prejudicial to the defendant); *see* Malik v. Cooper Tire & Rubber Co., No. 2:10-CV-06371 (WHW-CLW), 2015 WL 3440856, at *7 (D.N.J. May 27, 2015) (excluding evidence of marijuana use as prejudicial where two doctors analyzed a laboratory test taken three hours after the crash at issue, but neither could "estimate with a high degree of scientific certainty what impact" the use of marijuana had on the plaintiff's driving). *But see Durham*, 742 F. Supp. 2d at 1130 ("That [the expert] did not provide an opinion regarding impairment does not affect the analysis—a jury could reasonably infer from the CLH Report that marijuana did in fact impair [the plaintiff's] ability to operate the subject vehicle in a safe manner.").

[76] *See* Pennington v. King, No. 07-4016, 2009 WL 415718, at *6 (E.D. Pa. Feb. 19, 2009) (excluding evidence of prior marijuana use where the expert report failed to analyze the amount of marijuana that would be required to impair a person of the defendant's size and the time it would take for the defendant to no longer be impaired); *see also* Batton v. Oak Inv. Group Corp., 591 F. Supp. 3d 1076, 1083 (N.D. Ala. 2022) ("The urinalysis does not reflect the presence of any specific marijuana metabolite, such as THC, the known psychoactive parent drug, nor does it reflect a specific quantity of metabolites."); *Malik*, 2015 WL 3440856, at *7 (deciding to exclude evidence of marijuana use because of a lack of information regarding the amount of marijuana consumed, among other factors). *But see* Buchanan v. Mattingly, No. 1:10-CV-856, 2012 WL 1580777, at *3 (S.D. Ohio May 4, 2012) (finding that the probative value of marijuana use on the day of the accident outweighed the prejudicial effect despite a lack of information about the amount of marijuana in the operator's body).

consumption going forward. Indeed, with the popularity of cannabis extracts such as Delta-8, it may become even more difficult for experts to opine about the amount (of Delta-8 or just THC generally) that would cause impairment and how long such impairment lasts.

3. The Impact of Liberalized Cannabis Policies on the Potential for Prejudice

Recent history suggests that the general public has become more accepting of cannabis use—particularly for medical purposes—over the past decade, and poll after poll shows a liberalizing public view on the issue.[77] Assuming that trend holds, what does it mean for the Rule 403 analysis when it comes to cannabis issues? On the one hand, perhaps courts will conclude that the threat of undue prejudice is reduced as more people are accepting of cannabis use.[78] On the other hand, perhaps it is equally true that, as the science develops, courts will conclude that evidence of cannabis use is less probative on more issues than once thought.[79]

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[77] *See, e.g.*, Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Medical or Recreational Use*, PEW RESEARCH CENTER (Nov. 22, 2022), https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use (noting 59% of American adults say that medical and recreational marijuana use should be legal and 30% say that only medical marijuana use should be legal); *Support for Legal Marijuana Holds at Record High of 68%*, GALLUP (Nov. 4, 2021), https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx ("More than two in three Americans (68%) support legalizing marijuana, maintaining the record-high level reached last year.").

[78] *See, e.g.*, Ruiz v. Walmart, No. CV-20-01129-RAO, 2021 WL 5759043, at *3 (C.D. Cal. Nov. 28, 2021) ("Defendant argues that the probative value is not substantially outweighed by any undue prejudice because marijuana use has minimal negative connotations in California, especially for medicinal purposes."); Brown v. Paladino, No. 617-CV-1190 (BKS/ATB), 2021 WL 1585177, at *2 (N.D.N.Y. Apr. 19, 2021) (refraining from excluding evidence of marijuana possession and noting the defendant's argument that "the stigma Plaintiff is afraid of the jury drawing from possessing marihuana is not even prejudicial as recreational use of marihuana has been approved in many states"); Sanchez v. Chicago, No. 12 C 06347, 2016 WL 4905672, at *8 (N.D. Ill. Sept. 15, 2016), *aff'd sub nom.* 880 F.3d 349 (7th Cir. 2018) (finding marijuana possession not prejudicial "especially given the changing societal views on marijuana possession for personal use").

[79] *See, e.g.*, *Batton*, 591 F. Supp. 3d at 1083 (excluding evidence of the defendant's use of marijuana six hours before the accident stating although "the urinalysis reflects

B. Cannabis and Rule 406

1. The Issue

Is cannabis usage admissible habit evidence? The reggae rock and ska punk band Sublime sure made smoking marijuana sound like a habit in the 1992 hit "Smoke Two Joints":

> She was living in a single room with three other individuals
> One of them was male and the other two
> Well, the other two were females
> God only knows what they were up to in there
> And furthermore Susan, I wouldn't be the least bit surprised to learn
> That all four of them habitually smoked marijuana cigarettes, reefers
> I smoke two joints in the morning
> I smoke two joints at night
> I smoke two joints in the afternoon
> It makes me feel all right
> I smoke two joints in time of peace
> And two in time of war
> I smoke two joints before I smoke two joints
> And then I smoke two more.[80]

Putting aside Sublime (there certainly is no accounting for taste) and looking to the Federal Rules of Evidence, the Advisory Committee Notes to Rule 406 define "habit" as:

> the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving.[81]

Rule 406 provides that "[e]vidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular

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a positive result for the presence of marijuana metabolites . . . it does not establish any probability that Estime was impaired at the time of the collision, nor that he used marijuana on the day of the collision").

[80] Sublime, SMOKE TWO JOINTS (Skunk Records 1992).

[81] FED. R. EVID. 406 advisory committee's note (1972).

occasion the person or organization acted in accordance with the habit or routine practice."[82]

Although cannabis usage as habit evidence has not yet been litigated regularly enough to make reliable predictions as to its admissibility,[83] that might change soon, and the importance of the issue cannot be understated. As a whole, the judiciary has been critiqued for "fail[ing] to define admissible habit evidence and distinguish it from inadmissible character evidence[,] [which] has nurtured a plethora of incoherent and unpredictable judicial rulings."[84] Cannabis usage as habit evidence is especially ripe for judicial inconsistency given the ever-changing cannabis landscape in the United States.

2. Cannabis as Habit Evidence

One of the earliest cases to consider whether cannabis usage constitutes admissible habit evidence was *State v. Maxwell*.[85] There, the Oregon Court of Appeals, applying Oregon's state analog to Rule 406, considered whether testimony that a victim's mother was seen smoking marijuana on fifty different visits to the defendant's residence and was intoxicated on the day the alleged incident occurred was admissible habit evidence.[86] In considering the issue, the court looked to a common habit evidence routinely deemed admissible: "evidence that [a person] habitually and invariably crossed the street" by using a specific crosswalk.[87] In comparison to the habitual and invariable usage of a crosswalk, the court held that marijuana usage on fifty or more occasions at the defendant's home was not proper habit evidence.[88] As such, the court

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[82] FED. R. EVID. 406.

[83] *See* Teneille Brown, *How Addiction Exposes the Flaws in Character Evidence*, UNIVERSITY OF UTAH AALS CONFERENCE, (Jan. 5, 2020), https://am.aals.org/wp-content/uploads/sites/4/2020/01/AM20EvidenceLawMedicineHealthBrownPresentation.pdf (recognizing addiction as character or habit evidence has been addressed by the courts, but the application of Rule 404 has been inconsistent).

[84] Kevin S. Marshall et al., *The Habit Evidence Rule and Its Misguided Judicial Legacy: A Statistical and Psychological Primer*, 36 L. & PSYCH. REV. 1, 4-5 (2012).

[85] 18 P.3d 438, 442 (Or. App. 2001).

[86] *Maxwell*, 18 P.3d at 442.

[87] *Id.*

[88] *Id.*

affirmed that marijuana usage—even marijuana usage occurring fifty or more times—did not constitute properly admissible habit evidence.[89]

Another early case reaching a similar result, albeit under slightly different circumstances, is *Burchett v. Kentucky*.[90] There, the Kentucky Supreme Court considered whether evidence that a defendant smoked marijuana on a daily basis,[91] in a case prosecuting the defendant for reckless homicide, was admissible to prove that the defendant smoked marijuana on the day of the fatal accident.[92] In considering the defendant's motion in limine to suppress such habit evidence, the trial court deemed the evidence of daily marijuana usage admissible.[93] On appeal, the Kentucky Supreme Court made note that Kentucky's rules of evidence—unlike the federal rules and the rules of other states—did not (at that time) permit habit evidence.[94] In reversing the trial court's decision to deem such habit evidence admissible, the court warned that deeming such evidence admissible would brand the defendant with a "scarlet letter."[95] The court further noted that evidence of the defendant's

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[89] *Id.*

[90] 98 S.W.3d 492 (Ky. 2003).

[91] *Burchett*, 98 S.W.3d at 494.

> This evidence was first introduced during the prosecution's direct examination of the emergency room nurse, who read the notes she took after assessing Appellant in the ER: "Patient states I smoke one joint in the morning and one at night." The nurse later read the physician's notes: "[Patient a]dmits to one joint this morning. Two joints daily." Later, Appellant admitted on direct examination that he told a hospital employee that he usually smoked a "joint" at night and in the morning. Appellant also admitted smoking marijuana the day before the collision and taking Tylenol 3 and Valium the day before, and the day of, the collision.

Id. Moreover, on cross-examination, the prosecutor "explored Appellant's marijuana use in depth, asking questions like: '[At what age] did you start smoking?' 'What's your normal consumption?' The prosecutor finally concluded: 'You're just pretty much a one joint morning [sic] and one joint at night, that's just your habit." *Id.*

[92] *Id.* at 493.

[93] *Id.* at 494.

[94] *Id.* at 496 ("Most states have adopted a version of [Federal Rule of Evidence] 406, either by rule or by statute. Kentucky is one of the few jurisdictions in the United States that does not currently admit [habit] evidence."). After this ruling, Kentucky adopted its evidence rule, which became effective July 1, 2006. KY. R. EVID. 406.

[95] *Burchett*, 98 S.W.3d at 496.

daily marijuana usage was nothing more than "inflammatory" and, accordingly, was properly deemed inadmissible.[96]

But *Maxwell* and *Burchett* were decided in the early-2000s when society's (and the law's) views on cannabis were markedly different. Is cannabis usage more likely to be deemed an admissible habit today than it was twenty years ago?

A look at more modern case law indicates the answer to that question might be "yes." One of the first cases to hint that evidence of cannabis usage *could* potentially be admissible habit evidence is *Bloxam v. Berg*.[97] There, the Kentucky Court of Appeals considered whether a nurse's testimony that a doctor "smokes pot every night" was admissible to prove that a doctor was under the influence of marijuana during the medical procedure in question for a medical malpractice case.[98] The court ultimately held that such evidence was inadmissible on Rule 403 grounds, as any probative value the testimony may have provided "was substantially outweighed by the 'danger of undue prejudice, confusion of the issues, or misleading the jury.'"[99] Although the court indicated that such evidence was also inadmissible habit evidence under Kentucky's then-prohibition on habit evidence, the court seemed to indicate that if Kentucky's amended Rule 406 was in place, the ruling might be different—such evidence may be admissible habit evidence.[100] *Bloxam* in no way was a wholesale recognition that evidence of marijuana usage would be permissible habit evidence under a state analog to Rule 406, but it did leave the door open to such a conclusion.[101]

Dooley v. United States,[102] a more recent case out of the Southern District of New York, gives a more pronounced answer to the question.

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[96] *Id.*

[97] 230 S.W.3d 592, 592 (Ky. Ct. App. 2007).

[98] *Bloxam*, 230 S.W.3d at 593-94.

[99] *Id.* at 596.

[100] *See id.* at 595 (noting Kentucky Rule of Evidence 406, which became effective while the case was ongoing, provided that "[e]vidence of the habit of a person . . . is relevant to prove that the conduct . . . on a particular occasion was in conformity with the habit or routine").

[101] *See id.* (hypothesizing that the evidence would likely have been excluded under Rule 403 regardless of which habit evidence rule was in effect).

[102] 577 F. Supp. 3d 229 (S.D.N.Y. 2021).

There, an injured bicyclist brought a Federal Tort Claims Act action against the United States arising out of a collision between the plaintiff-bicyclist and a United States Marine operating a vehicle owned by the military.[103] At trial, the plaintiff filed a motion in limine to exclude evidence that he used marijuana every day, which was being used to establish intoxication at the time of the collision.[104] In considering whether daily marijuana usage constituted a "habit," the court emphasized that establishing "habit" is not an easy feat—indeed, "the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature."[105] Even with this weighty burden in mind, the court held that evidence showing the plaintiff used marijuana every day for a multi-year period before the collision was "sufficient to show the regularity of habit and the likelihood that it took place on the day of the accident."[106]

So, is cannabis usage admissible habit evidence? *Dooley*, one of the most recent cases to address the issue, indicates that it might be. Although this question certainly poses a fact-specific inquiry that will be handled variably jurisdiction-to-jurisdiction, it is an important issue that bears keeping in mind as the law and society's understanding of cannabis continue to evolve.

C. Cannabis and the Crime-Fraud Exception to Privilege

1. The Issue

A bedrock principle of the American legal system is that confidential communications between a client and lawyer are privileged;[107] however,

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[103] *Dooley*, 577 F. Supp. 3d at 232.

[104] *Id.* at 232, 235.

[105] *Id.* at 235 (quoting Zubulake v. UBS Warburg LLC, 382 F. Supp. 2d 536, 542 (S.D.N.Y. 2005)).

[106] *Id.* at 236.

[107] *E.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.").

this sacred privilege is not without exception. The crime-fraud exception, for example, states that communications with a lawyer in furtherance of illegal activity are not privileged, even if the lawyer is not complicit in the crime.[108] As long as marijuana remains illegal on a federal level,[109] an adverse party (either the government or a private litigant) could assert that all attorney-client communications about the operations and transactions of the marijuana business—although legal under state law—are not privileged and therefore discoverable in litigation. This subsection analyzes how courts have approached such questions.

2. Litigating Privilege, the Crime-Fraud Exception, and Cannabis

Although the scope and application of the attorney-client privilege varies somewhat between jurisdictions, one widely recognized exception to otherwise-privileged communications is the crime-fraud exception. The core of this exception is that the attorney-client privilege does not apply to: (1) an attorney-client communication, (2) used for the purpose of advancing, (3) a crime or a fraud.[110] The test contained in the *Restatement of the Law Governing Lawyers* illustrates this core principle:

> The attorney-client privilege does not apply to a communication occurring when a client: (a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or (b) regardless of the client's purpose at the time of consultation,

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[108] *E.g.*, United States v. Zolin, 491 U.S. 554, 563 (1989) ("It is the purpose of the crime-fraud exception . . . to assure that the 'seal of secrecy,' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime.").

[109] It is important to remember that the 2018 Farm Bill removed *hemp* from the Controlled Substances Act's definition of "marihuana," which in turn removed hemp from its previous listing as a Schedule I narcotic. Marijuana still remains illegal at the federal level.

[110] United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997); *see* United States v. Williams, 720 F.3d 674, 688 (8th Cir. 2013) ("[The] attorney-client relationship dissolves when . . . [client] asked [attorney] to, *inter alia*, (1) smuggle a cell phone and other contraband into the detention center for him . . . in furtherance of the marijuana conspiracy; (2) launder money for him; (3) receive money from various members of the marijuana conspiracy for the purpose of laundering; and (4) transport money for him in furtherance of the marijuana conspiracy.").

> uses the lawyer's advice or other services to engage in or assist a crime or fraud.[111]

Complicating matters, what exactly constitutes a "crime or fraud" varies widely across jurisdictions. Some courts have taken an expansive approach, applying the exception to communications advancing activities similar to crimes or frauds, such as intentional torts,[112] flagrant bad faith,[113] bad-faith litigation,[114] and even torts like breach of fiduciary duty.[115]

So what about cannabis? The manufacture, distribution, dispensation, and possession of marijuana remains a federal crime under the CSA. Accordingly, the CSA's classification of marijuana could bring all of a lawyer's advice to and communications with clients in the marijuana industry within the ambit of the crime-fraud exception, potentially eviscerating the attorney-client privilege in the cannabis industry.

The situation is further complicated by the dearth of concrete guidance available to attorneys. California addressed the conflict between state and federal law directly and amended its state statute governing the

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[111] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 82 (2000).

[112] *See* Sackman v. Liggett Group, Inc., 173 F.R.D. 358, 364 (E.D.N.Y. 1997) ("[T]he crime-fraud exception applies to 'intentional torts moored in fraud.'" (quoting Cooksey v. Hilton Int'l Co., 863 F. Supp. 150, 151 (S.D.N.Y. 1994))); Irving Trust Co. v. Gomez, 100 F.R.D. 273, 276 (S.D.N.Y. 1983) (finding evidence of "intentional or reckless tortious behavior," which warranted the crime-fraud exception).

[113] Central Constr. Co. v. Home Indem. Co., 794 P.2d 595, 598 (Alaska 1990) ("'[C]rime or fraud' should be narrowly defined, and hold that services sought by a client from an attorney in aid of any crime or a *bad faith breach* of a duty are not protected by the attorney-client privilege.").

[114] Parrott v. Wilson, 707 F.2d 1262, 1271 (11th Cir. 1983) (holding that the attorney's work product was not protected where he unethically recorded witnesses' conversations); Rambus, Inc. v. Infineon Tech. AG, 220 F.R.D. 264, 283 (E.D. Va.), *subsequent determination*, 222 F.R.D. 280 (E.D. Va. 2004) (determining that spoliation of evidence triggers the crime/fraud exception); *In re* Sealed Case, 754 F.2d 395, 400, 402 (D.C. Cir. 1985) (stating that the "willful, systematic, and extensive" destruction of documents was not protected by the attorney-client privilege); *In re* St. Johnsbury Trucking Co., No. 93-B-43136 (FGC), 93-1073, 1995 WL 547805, at *3 (Bankr. D. Vt. Sept. 7, 1995) (filing of a "bogus" counterclaim to force settlement is a fraud that is not protected by the attorney-client privilege).

[115] *See* Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 488 (Ky. 1991) (holding attorney-client privilege does not apply where there is a "showing of a breach of fiduciary duty").

crime-fraud exception, effective 2018.[116] The amendment clarified that the crime-fraud exception "shall not apply to legal services rendered in compliance with state and local laws on medicinal cannabis or adult-use cannabis."[117] Under the new statutory subsection, "confidential communications provided for the purpose of rendering those services are confidential communications between a client and lawyer . . . provided the lawyer also advises the client on conflicts with respect to federal law."[118]

A Colorado bankruptcy court analyzed marijuana in the context of the crime-fraud exception.[119] The court relied on *In re B Fischer Industries*,[120] a case where the "debtor manufactured allegedly knowingly sold butane for use in manufacturing marijuana concentrates."[121] The case was dismissed and a creditor filed a motion for sanctions.[122] When considering the motion for sanctions, the court "analyze[d] the applicability of the crime-fraud exception to the attorney-client privilege where the alleged crime involves a marijuana-related offense."[123]

Although the court in *B Fischer Industries* held that the crime-fraud exception did not apply, the court appeared to rely heavily on the fact that sale of butane, even to marijuana concentrate manufacturers, did not on its face violate the CSA.[124] This arguably implies that the creditor's argument could have succeeded if B Fischer had directly been involved in the manufacture or production of marijuana; in other words, the privilege remained intact because the debtor was one step removed from the process. The *In re Way to Grow* court relied on this holding to determine that the bankruptcy court cannot be responsible for the distribution of assets that may be prohibited by the CSA.[125]

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[116] *See* CAL. EVID. CODE § 956(b).

[117] *Id.*

[118] *Id.*

[119] *See In re* Way to Grow, Inc., 597 B.R. 111, 119 (Bankr. D. Colo. 2018) (stating the court addressed this issue once before in *In re* B Fischer Indus., No. 16-20863-MER, ECF No. 147 (Bankr. D. Colo. Sept. 27, 2017)).

[120] No. 16-20863-MER, ECF No. 147 (Bankr. D. Colo. Sept. 27, 2017).

[121] *Way to Grow, Inc.*, 597 B.R. at 119.

[122] *Id.*

[123] *Id.*

[124] *Id.* at 119-20.

[125] 597 B.R. 111, 120 (Bankr. D. Colo. 2018).

Challenges to privilege based on the crime-fraud exception typically are treated like any other privilege challenges. The party asserting the challenge must make a prima facie showing that the privilege does not apply, and the court will then conduct an *in camera* review of the challenged documents. Given these variations in the scope of the crime-fraud exception, it is essential for counsel confronted with this issue in the marijuana context to carefully examine every element of the exception and look to all sources of authority, including case law, ethics opinions, and policy statements in the jurisdiction where a case is pending.

As a practical matter, any engagement letter from an attorney to a client involved in the cannabis industry should advise the client not only of the federal illegality of marijuana but also the possibility that the privilege may not apply to some or all conversations with the attorney.

Conclusion

The admissibility of cannabis use in trial implicates a variety of public policy considerations that are becoming more prevalent as the state-legal cannabis markets continue to grow. This Article shows several ways in which the law is evolving on this point—an evolution that largely mirrors the general public's acceptance of cannabis through the years. But as with most evidentiary questions, admissibility is often fact-specific, and it will usually be critical to demonstrate how the alleged cannabis use relates to the alleged wrongdoing in question in a way that is both relevant and not unduly prejudicial. Regardless of the circumstances, any practitioner faced with a cannabis issue would do well to become familiar with the plant, its effects, and its growing importance in trial advocacy.