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Introducing Marijuana Law into the Legal Writing Curriculum

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Introducing Marijuana Law into the Legal Writing Curriculum

By Howard Bromberg and Mark K. Osbeck

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Interest in marijuana law continues to grow, due in large part to the complicated and rapidly evolving landscape of marijuana laws in the United States. Nearly every day, newspapers report on new or proposed legislation and the legal controversies that have arisen with regard to this evolving landscape. There are now several marijuana-law blogs on the Internet, Congress is considering sweeping legislation that would essentially grant significant deference to the individual states, and public opinion continues to move in favor of increased legalization. For the last two years, *Newsweek* magazine has published special editions devoted exclusively to marijuana law and the movement toward legalization, with cover captions “WEED NATION,” and featuring a large red, white, and blue cannabis leaf.¹

In light of this growing interest in marijuana law, we propose that the topic is ripe for the legal writing classroom. Not only is marijuana law a rapidly evolving area of law, and therefore a fertile source of new legal issues, it also is an area of significant interest for many students, and it raises many fascinating legal issues—civil, criminal, and constitutional. This article therefore proposes that legal writing professors consider incorporating marijuana law issues into their first-year courses, and it offers some ideas for how they might create marijuana-related legal writing problems.

¹ *Weed 2016: The Beginning of the End for Pot Prohibition*, *Newsweek* Special Issue, Feb 2016; *Weed Nation: is America Ready for a Legalized Future?*, *Newsweek* Special Issue, Feb/March 2015.

Despite this burgeoning interest in marijuana law, teaching about the changing landscape of marijuana regulation has been largely absent from the law school classroom.² There seem to be two reasons for this neglect. First, the subject has appeared a bit tawdry: not quite upstanding enough, in other words, for the law school classroom. Secondly, and perhaps most importantly, the debate over the pros and cons of legalization has tended to overshadow the fact that marijuana law raises a number of complex issues on topics such as constitutional law, federalism, criminal enforcement and civil rights, family law, taxation, professional responsibility of lawyers, racial discrimination, and civil liberties.³

How can this plethora of legal issues relating to marijuana be utilized in the legal writing class? There are two basic approaches to creating marijuana-related legal-writing problems. One approach is to situate a problem squarely within the complexities of marijuana legalization that raise interesting legal issues of first impression. The other approach is to use a marijuana-related hypothetical to situate a legal writing problem in a traditional area of law.

Both approaches take advantage of the inherent interest of students in the social and political controversies raised by marijuana use, as well as the constitutional and legal complexities raised by our bifurcated legal system. This paper discusses

² Only a handful of law schools have offered classes or seminars devoted to marijuana law. We offered an introductory seminar on the issue at the University of Michigan Law School in 2015, and we plan to lead another seminar on representing marijuana related businesses in the coming year.

³ For a good overview of current marijuana laws, see [Erwin Chemerinsky, Jolene Foran, Allen Hopper & Sam Kamin, Cooperative Federalism and Marijuana Regulation](#), 62 *UCLA L. REV.* 74, 84-90 (2015).

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each in turn. Part I highlights some possibilities of the first approach, and Part II outlines the manner in which we have constructed legal writing problems using the second approach.

I. Centering Problems Around Legal Issues of First Impression

The first approach situates the legal writing problem squarely within the context of evolving marijuana laws, thereby raising a variety of cutting-edge legal issues. Although a legal writing problem can be set in either the federal or a state jurisdiction, it will inevitably have aspects of both, given the strangely overlapping nature of our marijuana laws. Under the Controlled Substances Act of 1970,⁴ marijuana is classified as a Schedule I drug, the most stringent classification, and thus remains illegal under federal law. As a result, an ancillary question of jurisdiction is almost an inevitable aspect of such a problem, which provides instructors an opportunity to explain to beginning law students the dual sovereign nature of American laws, in which federal and state laws cooperate and conflict.

The instructor would also need to decide whether to situate the problem in a criminal or civil context. In a federal jurisdiction, or in one of the 26 states where marijuana is still completely prohibited, the problem will necessarily involve criminal law, since marijuana possession is inherently illegal. But in any one of the 24 states and the District of Columbia that has moved toward medical and/or recreational legalization,⁵ the problem may instead be set in the civil arena. However, even in those states where marijuana has been legalized for medical or recreational use, criminal issues lurk in the background, as prosecutions are brought both for acting outside the scope of permissible use, and for marijuana offenses that will always be criminal, such as driving while impaired. This bifurcation presents a unique opportunity for legal

writing instructors, as the intertwined nature of civil and criminal issues in marijuana law allows for an insightful discussion of the differences between criminal and civil laws and lawsuits.

As for traditional criminal-law problems, they raise some important new issues when examined in the context of marijuana law. For example, Fourth Amendment search-and-seizure law is one of the most developed areas in criminal procedure. But search-and-seizure law takes an entirely new twist with the question of whether marijuana odors alone give rise to probable cause. This is particularly troublesome for the courts in jurisdictions that have legalized medical marijuana use, since the odor may arise from legal use. Accordingly, at least one jurisdiction, the District of Columbia, has enacted a statute that specifically forbids police from basing a reasonable articulable suspicion that a crime is being committed on marijuana odor.⁶

Numerous civil issues can also give rise to interesting legal writing problems. In the area of employment law, for example, the courts have had to decide whether an employer can fire an employee who tests positive for marijuana use on a urine test, even if the use took place at home days earlier pursuant to a valid medical marijuana license, and the employee was not impaired while on the job.⁷ This raises real concerns because marijuana, unlike alcohol, can stay in the system for a significant time, and therefore an employee who uses marijuana during the weekend or while on vacation may test positive, even though they have not used the drug for days before returning to work.⁸ In the area of federal taxation, owners of marijuana-related businesses are concerned because the tax code treats marijuana-related businesses in states with legalized marijuana more harshly than any other businesses. For example, it denies these businesses deductions for all expenses paid or incurred in

⁴ Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 812 (2012)).

⁵ For an updated, online survey of state law see <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

⁶ See D.C. Code § 48-921.02a (2015).

⁷ See, e.g., *Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (upholding right of employer to terminate employee with medical marijuana license who used marijuana only at home).

⁸ See JONATHAN CAULKINS, *ET AL.*, MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 12-13 (2012).

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connection with their business enterprises.⁹ And in the area of landlord-tenant law, the courts will have to decide whether municipalities can pass ordinances allowing landlords to evict tenants who grow or smoke marijuana on the premises, even though the tenants have valid medical marijuana licenses that allow them to engage in these activities. This also raises the interesting legal issue whether a local law like this is invalid because it conflicts with state law authorizing medical marijuana use.¹⁰

Several of the most intriguing civil topics arise in the context of the lawyer's professional responsibility obligations. For example, there is an issue whether—and to what extent—lawyers can counsel marijuana businesses that are operating in conformance with state law. Professional responsibility boards have been dealing with this issue in states that have legalized medical marijuana use because such use is still illegal under federal law,¹¹ and Rule 1.2 of the Model Rules of Professional Conduct¹² prohibits lawyers from assisting clients in illegal and fraudulent activities. There is also an issue whether a lawyer possessing a medical marijuana license may use marijuana (outside of the workplace, of course), given that Rule 8.4(b) of the Model Rules of Professional Conduct¹³ prohibits engaging in

⁹ See 26 U.S. Code § 280E. See also Douglas A. Kahn & Howard Bromberg, *The Tax Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should Be Repealed*, 18 Fla. Tax Rev. 207 (2016).

¹⁰ See e.g. *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536-41 (Mich. 2014).

¹¹ See, e.g., Connecticut Bar Assn. Prof. Ethics Comm. Informal Op. 2013-02 (2013).

¹² Rule 1.2: *Scope of Representation & Allocation of Authority Between Client & Lawyer*—

(d) 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 discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

¹³ Rule 8.4: *Misconduct*—

It is professional misconduct for a lawyer to:
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

activity that reflects adversely upon the lawyer's "honestly, trustworthiness, or fitness as a lawyer." The few state bars that have considered the issue thus far have taken mixed approaches, but the majority rule seems to be that lawyers do not act unethically, at least not per se, if they partake of marijuana legally in a state that allows it.¹⁴

These professional responsibility issues make attractive legal writing problems for two reasons. First, they get students to think about ethical questions concerning the practice of law, which is critical for aspiring lawyers. Second, they expose students to the rules of professional responsibility, which are a little-used but important source of authority in first-year courses.

II. Situating Traditional Legal Problems in a Marijuana-Related Context

The second approach to creating legal writing problems situates the legal writing problem within traditional areas of law, adapting them to a factual context that makes them relevant to the marijuana debate. This is the approach we have taken thus far in our legal writing problems. We have used marijuana law as a background to enrich legal doctrine in a settled area. As with the first approach, the resulting problems are realistic, contemporary, and interesting to students. However, the law they deal with is settled, with tests and factors that have been well-established by the courts. The nuances of marijuana law therefore add complexity to the problem—both as to jurisdiction and as to the relation of criminal and civil law—but they don't dominate the doctrinal subject.

We have found First Amendment free-speech law involving marijuana advocacy to be a particularly fruitful source of problems. The U.S. Supreme Court has developed several significant tests over the last decade, which apply to speech in various settings. That the speech involves marijuana controversies raises a question of jurisdictional

¹⁴ See e.g. Colorado Bar Association Formal Opinion No. 124, 41 COLORADO LAWYER 28 (July, 2012).

“These professional responsibility issues make attractive legal writing problems ... they get students to think about ethical questions concerning the practice of law ... they expose students to the rules of professional responsibility ...”

overlap, and also a question whether the speech involves the promotion of criminal acts.

The two free speech areas that we have used to situate our problems thus far are (1) speech in schools and (2) speech by employees in public-employment spheres. The first problem involves a high school student who leads a chant and distributes wristbands at an off-campus pep rally for her high school football team. The chant was “Legalize and Get High as the Skies,” and the wristband was imprinted with a small marijuana leaf. After these actions create a minor ruckus the following school day, the high school principal demands that the student write a letter of apology and collect all of the wristbands, citing the school code of decorum which forbids inappropriate, graphic, or offensive clothing, as well as disruptive behavior. Instead, the student files a complaint with the federal district court, challenging the application of the decorum code to her chant and wristbands as a violation of the student’s First Amendment right to free speech.

The law is well-developed in this area, with many nuances. A trio of U.S. Supreme court cases, *Tinker v. Des Moines Independent Community School District*,¹⁵ *Bethel School District v. Fraser*,¹⁶ and *Hazelwood School District et al. v. Kuhlmeier*,¹⁷ have established basic rules for free speech in the school zone. *Tinker* allows restriction of disruptive speech in schools; *Hazelwood* allows restriction of student speech that bears the imprimatur of the school; and *Bethel* allows restriction of obscene student speech. Also, in 2007, the U.S. Supreme Court decided *Morse v. Frederick*,¹⁸ which allows schools to restrict speech that promotes illegal drug use, specifically marijuana.

This problem is attractive because students must make subtle choices about which of the four tests

to apply. The tests are extensively discussed law, but must be calibrated for the unique issues that arise in marijuana advocacy in school. The *Morse* test raises directly the question of whether advocating for legalization of marijuana counts as promoting the illegal use of drugs or protected political speech.¹⁹ It also raises the issue whether schools are allowed to prohibit students from promoting marijuana use in off-campus forums that have only a tenuous connection to the high school campus.

The second problem we have used relates to a parallel issue, but in the public workplace. In that problem, an administrative assistant in a federal agency placed a small sign that displayed a message advocating the use of medical marijuana on the outside of his office cubicle. The employer told the assistant that his sign violated office policy as it was inappropriate, disruptive and advocated drug use. The assistant was then instructed to remove the sign or face discipline. Analysis of public workplace free speech has traditionally required the application of two Supreme Court cases, *Pickering v. Board of Education*,²⁰ and *Connick v. Myers*,²¹ along with their progeny. First, to be protected, the employee’s speech must relate to a matter of public concern as to content, form, and context. Second, the court must balance the interests of both the employee and employer. On the employee side, the court must weigh the importance of the employee’s speech as political discourse. On the employer’s side, it must weigh whether the speech impairs discipline, interferes with working relationships, and disrupts normal operations of the office.

This is an ideal problem according to traditional criteria. It employs two issues: the first—public concern—is a threshold issue, which takes on directly the importance of marijuana discussion and debate in our public life. The second is a traditional balancing test. The problem makes use of analogical reasoning, comparing the fact scenario with other

¹⁵ 393 U.S. 503 (1969).

¹⁶ 478 U.S. 675 (1986).

¹⁷ 484 U.S. 260 (1988).

¹⁸ 551 U.S. 393 (2007).

¹⁹ *Id.* at 404; *see also id.* at 422 (Alito, J. concurring).

²⁰ 391 U.S. 563, 568 (1968).

²¹ 461 U.S. 138, 146 (1983).

public concern cases. It also makes use of deductive reasoning, applying the varying factors that weigh the employee's free speech interests against the employer's interest in efficient operations. Although these cases are fact-laden, the questions of free speech are matters of law. Thus, students are compelled to use all of their analytical skills in assessing this hypothetical, without resorting to the refuge that "it is a complex issue, let the jury decide." As with any marijuana problem, policy questions are paramount as well.

Conclusion

This paper has outlined two approaches to developing marijuana-related legal writing problems. No matter which approach the instructor chooses, marijuana law presents numerous difficult and interesting issues. And the fact scenarios are invariably realistic, cutting edge, and of significant interest to students. Thus, marijuana law provides an excellent source for new legal writing problems. Introduction

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Micro Essay: Practice Ready

A Moving Target

Memo to the new law school graduate:
Your skills are now obsolete!

Know what you know
Know what you don't know
Know the difference between the two
Know a law librarian

The world keeps on turning
Lawyers must keep on learning
Law, skills, technology: need to know now
Again and again
Consult the law librarian

Learn what you don't know
Practice what you learn

Repeat.

Donna Tuke, Chicago, Ill.