

Canna We Talk Cannabis? Emerging Topics in Cannabis Law

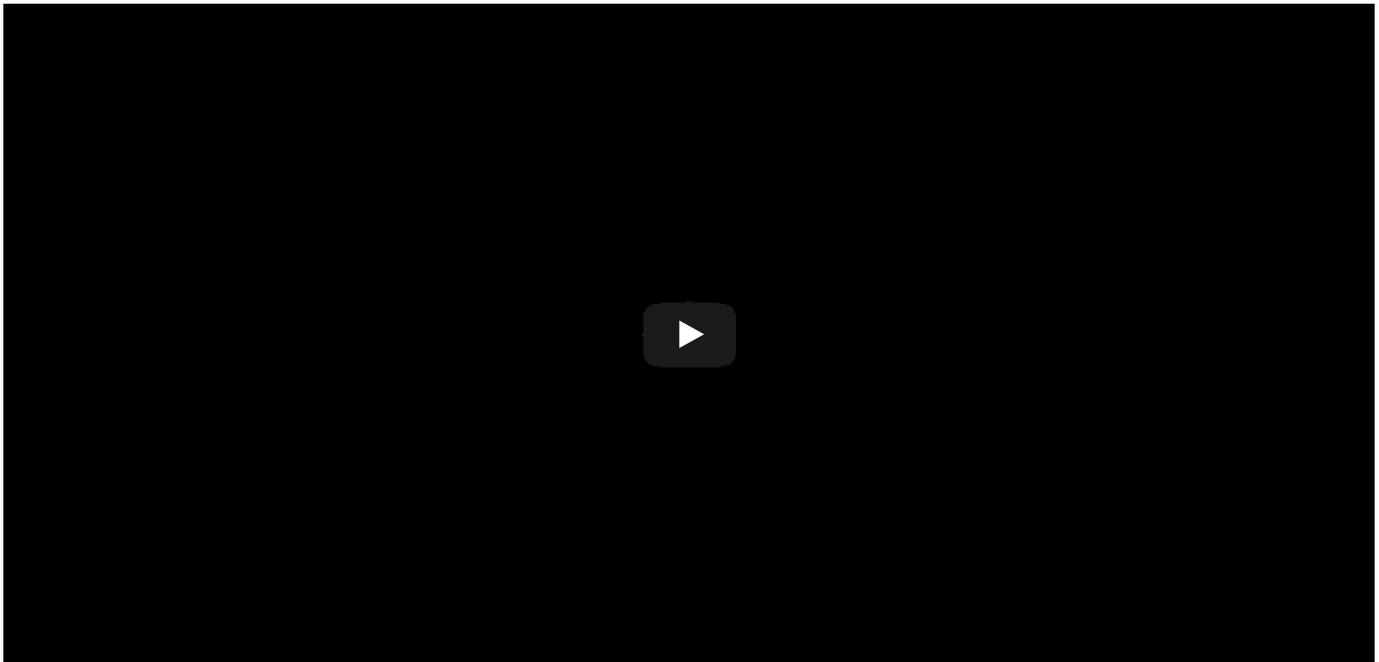
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The cannabis industry is rapidly expanding in the United States, with multiple jurisdictions and corporations seeking to accommodate the evolving cannabis market. Carlton Fields attorneys Kevin McCoy and Jennifer Tschetter discuss the emergence of cannabis as a billion-dollar, mainstream industry; explore its impact on corporate clients; and analyze the ever-evolving legal landscape in this space.

Transcript:

Kevin: It's an exciting day here at Carlton Fields. My name is Kevin McCoy. I am a trial lawyer here in the Tampa office of Carlton Fields with a background in commercial litigation, and today I'm going to be speaking with Jennifer Tschetter out of our Tallahassee office, who is the co-chair of our Cannabis taskforce, which is a very exciting area of the law and one that we are happy to be working in and learning about and helping clients with. So without further ado, welcome, Jennifer.

Jennifer: Thanks, Kevin.

Kevin: Thanks for making the time today. First of all, why don't you give us a little background about you?

Jennifer: Sure. I've been practicing law about 18 years and during that time I spent 10 of them in public service, primarily at the Department of Health here in Florida.

Kevin: Wonderful. In the Department of Health, what were some of the areas that you touched upon in particular with respect to health issues, or have you been involved in the medical marijuana and the marijuana push here in Florida?

Jennifer: Yes, in fact, I was general counsel at the department when medical marijuana first came to this state. So, since the inception of the regulatory structure, I've either been intimately involved as a regulator, or since my move to private practice

just a couple of years ago became more involved on the private side.

Kevin: Wow, so you've been in the front lines?

Jennifer: Yes.

Kevin: You've been in the front lines as the government has wrangled with this, I won't say with the forbidden fruit anymore, because I don't know that we're in that land, but you've been fighting the fight for a while on both sides of the isle, I suppose?

Jennifer: Yes.

Kevin: So, you know, I use that term, the forbidden fruit, and it's amazing to me, literally, that we are sitting here at a firm like Carlton Fields and we're talking about Cannabis law, which, when I started here, I couldn't have contemplated that that would be an area that we are growing and we are developing experience in and counseling clients on. But, it's here. And, why don't you talk to us a little bit about how here it is? I mean, in reality that this is no longer, you know, we don't think of this anymore like this is two guys doing a drug deal in a parking lot, this is billion dollar industry. Is that fair to say?

Jennifer: Fair to say. So some of the things that I think are most interesting is to watch the evolution of this industry. If you've seen, I'm sure everybody has seen those maps, you know, that have varying colors of green based on, you know, are you a recreational state or a medical marijuana state, a low THC state and if you think about that 20 years ago there was one green state on that map and that was California and now you look at the states and there are only 3 that don't have any color anymore. At least, in some form, 47 states have said you can use this on some level. Might be low THC. Might be full spectrum. Could be recreational. But, those types of statistics are interesting to me. The other ones that come to mind are 1 in 4 Americans right now live somewhere where purchasing recreational cannabis is legal. The farm bill's delisting of hemp has opened another huge industry and they're all derivatives of the cannabis plant which used to be forbidden.

Kevin: Let's talk for a minute for those who are maybe new to this space, new to this industry, about that real distinction. Because that's one that maybe I didn't appreciate until recently. When we talk about cannabis, it's easy to confuse some of the aspects of cannabis as it, as between marijuana or between CBD, which is all the rage of late. Can you just briefly give us an overview of the differences that happen between cannabis, between marijuana, between CBD? How does all that break down for somebody who's really not deep in this space?

Jennifer: I'll try. So, our definition in the United States of what constitutes the difference between hemp and marijuana, and they are both species of the same plant, cannabis. So they're both cannabis, but what distinguishes them is their THC level and THC is the thing that most people think about as creating the euphoria typically associated with marijuana. In hemp, the THC level is .3% or less. If the cannabis plant, as it's growing, has a THC level higher than .3%, it's marijuana. So, that's the distinction is the THC level in each.

Kevin: So, we've talked a little bit about some of the aspects that are happening and you talk about the delisting of hemp from the Controlled Substances Act. What has that or what have you observed the impact of that having as impacting some of the clients that we deal with in terms of, you know, these are corporate clients. These are big. They're pharmaceutical. They are manufacturers. They are real businesses who are now looking at this. Can you just talk about what you've seen in industry as, for example, you mentioned CBD, as that has been delisted, or hemp I should say, has been delisted from a controlled substance.

Jennifer: So, CBD, I think there's a place to start. So, hemp has opened the opportunity, not only for industrial uses for hemp, but it has created another potentially billion dollar industry in this country with the passage of the farm bill in 2018. So, those billion dollar industries don't come around very often and one aspect of it is the CBD industry. Because hemp is low in THC, one of the other cannabinoids that's very popular is CBD, which has been documented to relieve stress, anxiety, improve depression and can also alleviate some joint aches when applied topically. So, CBD is in high demand around the country and when it is extracted from the hemp plant, it can be infused in a variety of products: shampoos, lotions, gummy bears, drops. So, that created an enormous industry, but for every business in this country, the potential to at least contemplate whether a CBD additive would be helpful for their product and understanding how to navigate this new regulatory structure that's kind of emerging, if you do chose to that, has been challenging.

Kevin: You mentioned the word challenging. What are some of the challenges that you are seeing as clients are coming to you for guidance as they're entering, let's just call it, the broad umbrella of cannabis without getting into whether it's marijuana or CBD based on the .3% that you just described. But, what are some of the top, if you had to give us the top five challenges

that people are coming to you, businesses, I mean we're not talking little players here, we're talking about real corporate clients, they need help, what are the areas that are the hottest right now that you are seeing?

Jennifer: So, compliance is one and the unfortunate part about that, and the challenge that goes with that, is the shifting sand that is the regulatory structure. When hemp was, when cannabis, I'm sorry, was put on the controlled substance act in the 70's, it stopped all research, it stopped all production of both hemp and marijuana in this country. Because of that, everyone is just now putting brand new regulatory structures in place and research is ongoing and that continued compliance, I think that that is the number one challenge for a business trying to get in this market right now is that you can get a snapshot from a law firm as to whether your business is in compliance today, but the law in North Carolina can change tomorrow. The law in California can change next week and it's that ongoing uneasiness and being willing to move in that space aggressively despite the potential for the bottom dropping out at any given moment.

Kevin: It sounds like on the compliance piece then, what folks are facing in this industry is right now, it's you know, technology as I've seen it on, in any number of areas, whether it's a plant, whether it's a new gadget, a widget, whatever it may be, technology always moves faster than the law and the law is slow to catch up and that's not necessarily a bad thing because we rely on law. But right now, what we're dealing with is a regulatory patchwork, if you will, where step over the line from state X to state Y, you could be facing very different types of regulations, whether it's labeling, whether it's requirements and sourcing. Can you just talk about some of the things you're seeing in that regard? I mean, for example, you know I think to the bill that we just passed here in Florida, the hemp bill, and some of the things that, for example, you would see here in terms of a Florida based hemp business that stick out to you that maybe could differ from other states around the country.

Jennifer: So, I think every state is going to have, and this will be a challenging piece of it, different rules on how you can bring that product into the state. And so, the USDA has issued some guidance that said everybody get ready, the farm bill said you can move this from state to state. It's now a legal agricultural commodity. That's great, except it does have an impact on agriculture and so, every agriculture department around the country right now is trying to figure out how to protect its farmers. And so the rules on how you bring product into this state, I think, will be one of the first challenges. That's a patchwork where if you don't know the law, you might not know that you need to be escorted into the state by our department of agriculture after you have an inspection, and when you get here, your truck needs to be a closed truck...

Kevin: Mm-hmm.

Jennifer: ...in order to move about the state of Florida. Those are the proposed regulations.

Kevin: Sure.

Jennifer: We'll see where they end up. Those will vary by state and part of it is that, I know here in Florida, it's a perfect example. We're so sensitive to invasive species. When you look at the cannabis plant, what the plant researchers have told you is that it's a more invasive species, hemp, cannabis that would include hemp. It's a more invasive species on their scale from 1 to 25, then Kudzu.

Kevin: Mm-hmm.

Jennifer: So, that should give us all pause as to whether we should be too quick to move so quickly in a space and eager, because it can have lasting implications.

Kevin: You know, it's funny that you bring up this patchwork and states putting in place these kind of regulations to, maybe, protect their own, if you will. I think the last time I had ever thought about the commerce clause of the constitution was about a week ago when you and I were comparing notes on, I'm not so sure if this particular regulation doesn't cut too close on protecting, you know, interfering with that. So, what are some of the legal issues that businesses are looking at as cannabis the plant impacts them? I mean, I would have to imagine, you're dealing now, not only as a business dealing in cannabis, but, I mean, it's gotta impact employment policies. It's gotta be impacting, I mean, it's actually, not to overstate it, but it's almost like, what is this not going to impact, you know, in terms of policies, in terms of industry? Talk to us about some of the things that businesses have to be looking out for in terms of regulatory patchwork and you can interpret that or answer that in whatever way you want, because it's a very broad question. But, based on what you're seeing and what people are coming to you with, what are some of those top items outside of, maybe, compliance or regulatory?

Jennifer: There isn't an item.

Kevin: Yeah.

Jennifer: This industry will touch almost all practice groups in law firms. When you think about it, because it's both medicine and something that people want to use for recreational pleasure, it's different than other things. That'll make its impact on schools and Girl Scout troops. I mean, they're gonna have to deal with issues related to cannabis and figure out what they can and can't do for people that either have a prescription to take this medication, or CBD products limited, they're not high in THC, so those are, there's not an industry that I can think of that won't be impacted by this.

Kevin: I tell you what, I have to agree and I am not anywhere near as versed in this space as you are. Admittedly, I'm a newcomer to understanding this as an industry. But, in the short time that I've been working with clients in this space, I mean, I have seen this touch land use. I have seen it touch rewriting employee handbooks which we've had to do, you've got tax issues. You've got money transmitter issues. You've got, how, where's... great your business is doing well, but where are you going to put all that money? You know, US banks are slowly coming around. I think, part of that is because they're pushing Congress to give them the clearance that they want to be able to touch some of this money.

You mentioned the USDA. You've got ongoing issues with the FDA and what are they going to do? And I think they, you know, they have been studying this and rightly so, which is, which is their task to do but, industry is crying out for them to make a move, to take a stand or at least a position and I think that will help industry in terms of knowing the rules of the road because right now, tell me if you disagree but, it's almost like we are in the wild West in some regard because people are trying to predict what the regulatory framework will be and they're not going to stop business while they're waiting on government. So, they're trying to do the best they can. Is that consistent with what you're seeing?

Jennifer: Yes, and also a lot of innovation. So, the sky is the limit. You know, I was telling someone the other day, think about how different this industry is than some other highly regulated industries. And I think part of that is the federal prohibition on it, which makes it confusing to talk about. There's not that federal overlay that you see in some other industries which is why, for example, we maybe don't see nicotine gummy bears and we don't see other products that are innovative. I think that they can be helpful, enjoyable. Those are all good things and they're all possible in this cannabis space.

Kevin: What other areas, you know, we talk, we think about this in terms of somebody who's directly in this space in terms of you're cultivating, in terms of you're manufacturing or you're distributing whatever that product may be, whether it's biomass, whatever you're doing, maybe textile, but, it seems like they're, this is going to touch a lot of ancillary businesses too. So, for example, you know, you look at the Florida farm bill, you have to have an approved third party independent lab testing your batches of product. So, talk about some of the ancillary industries that you've been working with in that regard, and just, setting aside not actually being in directly in the space but maybe a secondary player and areas where you've been giving counsel and people have been coming to you for your knowledge.

Jennifer: Sure. The ancillary businesses that we work with most often are those that are directly related. I mean, they're driven by the cannabis space. And you're right; the independent testing labs are one of them. And so we work with them and, you know, try to set high standards for those labs whether it be through accreditation and then work with the regulators to put appropriate regulations in place. And I think that's where when clients can be introduced as an asset, a subject matter expert. Who knows better how to test and what's possible to test for in a parts per million or parts per billion than the lab folks? And that's why it's been a pleasure to represent them and learn a lot about that space.

Other ancillary businesses are the seed to sale tracker. So what some people might not know is that virtually every state that has put in place a medical marijuana program puts in a seed to sale tracking system, and that literally tags plants from the time that they are growing in a cultivation room and you track them with bar codes all the way through the production process so that when you're all done you know exactly what product was made with that plant. And those type of tracking mechanisms are essential to prevent against diversion in states that don't want to have a legal recreational adult use market yet. So, that's another ancillary business that is all unto itself but, the technology and information technology that goes into that is highly complicated and sophisticated. I think you will see that on the hemp side as well. In that most, one of the greatest concerns in the hemp industry is, where are we growing this? And part of that is to understand just how far the reach will be. Can you cross pollinate an orange field 10 miles away or is it 5 miles away? We're gonna just all learn together. I think it's an orange grove, candidly. But, those are the things that I think will be interesting and those ancillary businesses are creatively looking for solutions.

There are also drone manufacturers that will be essential in the GIS mapping of hemp cultivation plots all over this country that will help us understand the impact on other crops and also be a tool for law enforcement because I think what can be confusing for people – we were talking about it before in interstate shipments – is that if you were to cut up, you know, grind

up a batch of hemp and a batch of marijuana or you drive by a field of hemp the terpenes are the same and it will smell a lot like that smell that we all associate with adult use or recreational marijuana. And so, when you see a load of it coming over state lines, that's confusing to law enforcement, and rightfully so. Rightfully so. I think that there's a lot of entrepreneurs looking for innovative solutions to help regulators to help the industry do it better, do it faster. And this is an industry that seems receptive to all those things.

Kevin: You know, you touch on a really interesting point. I went to one of the recent rule-making sessions here in Tampa that the Department of Agriculture put on. And there was a lot of discussion over the disposal requirement and the rule. And it actually surprisingly got a lot of pushback from the audience and a lot of questions about why would you impose these costs. And I actually thought the response from the folks from the Department of Agriculture sitting on the panels was encouraging because their response was, "Listen, there's two paths here. If you get a crop of hemp that, we come out and we test it and it's above .3% because of whatever factor happened, inadvertently it was too hot, who knows, you got bad seed. We can make that a law enforcement issue and now you have an entire acre or acreage of plant that is technically now illegal because of something that was out of your control. Or, what we have done is come up with this disposal plan that we're still trying to flesh out but we can have a plan where we go, 'This is no good. We're going to give you the opportunity to dispose of it in the appropriate way.' And then we don't need to call law enforcement." But, your comments trigger to me, what are you seeing in terms of the give and take of what's happening or the receptiveness of regulators whether it's federal or state to take input and be receptive to the idea that we're going to work together on this. It's not us versus you. It's imperative to have relationships there and to be part of that discussion and sitting at that table having those conversations.

Jennifer: Both the Department of Health and the Department of Agriculture and Consumer Services are very partner oriented. They're looking for solutions. I think you find that the law enforcement community as well, and everyone is trying their best to disseminate information. So State Attorney Dave Aronberg this week released some guidance that things that smell like marijuana anymore aren't necessary probable cause for a search of a vehicle.

Kevin: Sure, yeah.

Jennifer: It might not be, because there is smokeable hemp on the streets in Florida. So, you can't just smell a car and think you can search it. That was distributed widely. Generous of the law enforcement community to not limit it to one particular jurisdiction but instead to share it more broadly. They're also looking for solutions that work for everyone. Everybody wants the bad actors out of the space, but everybody knows that most of the actors that are coming here are looking for an opportunity and mean to do it the right way. And I think the state of Florida has had a position for a long time – and I have not seen it change – that the goal is always compliance. It's not punishment, but instead compliance is our goal.

So, that didn't surprise me. I, too, was very pleased to hear that Ag had taken the position that even though it's .5% THC, it's still hemp. You're just going to destroy it in accordance with your waste management plan.

Kevin: Right.

Jennifer: And that is a very generous interpretation and one that is very farmer-friendly.

Kevin: Well, you touch on an interesting topic. And I don't think us sitting here talking about this topic in Florida we could get through this first podcast without talking about the situation of the grandmother over at Disney. But, to me what was encouraging out of that entire issue was somebody made a law enforcement decision on the street, but after, maybe there was some talking and some education back in the State Attorney's office, about the direction. We were on the verge at that time of the hemp bill passing, which would, that same instance right now, assuming that bottle was oil that was .3% or less, that would have been a no probable cause. That would have been a no arrest. And, so it was encouraging, while probably maybe the lady who was arrested could disagree about the experience there, it was encouraging to see that law enforcement with, given a little more time, was already thinking about this. And I think that's maybe part of the education component that's gonna come across the board. It's not just industry, but it's law enforcement, it's government, and it's, let's, let's not consume resources here unnecessarily, unless, as you say, we're focusing on some of the bad actors who may be ruining it for the rest of us, so to speak.

So, the next thing I want to talk about today, Jennifer, is where do you think the opportunity is? We've talked about some of the regulatory headwinds and we've talked about how businesses might be facing some of those, which can be bad or good depending on what side you're on. As lawyers, we love, that's where we make our money, navigating that for folks. But, talk about the opportunities that are there, the opportunities for those who want to get in the space and are new to the space or

contemplating getting in the space, whether they're investors, they're business, they're start-ups. What are you seeing based upon the practice that you've built around cannabis?

Jennifer: The farm bill definitely changed the field in that when clients call now and they want to get into this space, they want to do something because these are two new burgeoning billion dollar industries that don't come along very often. How do I get in is usually the question. And what I've been telling everyone since passage of the farm bill, and in Florida specifically the passage of our state hemp bill, is hemp is the way to go. It's an unlimited number of licenses as opposed to marijuana which is a very limited number of licenses. We started with five total in the entire state of Florida. Five licenses would be given out for 20 million people. That's slowly growing, but still there's only 22 companies that get to participate in that space. Contrast that with hemp where you can pick just a part of it and as many people as want to participate can. So, I think if there's opportunities right now, it's in the hemp space.

And there are corollaries between the two industries that if ever, if marijuana ever turns out to be a space where there are more opportunities – they either remove the vertical integration requirement from the license so that you could have one person licensed to grow and one person licensed to sell and another person licensed to process. That may happen in this state and that would create more opportunities. But until it does, there's only a few licenses out there and you have to do everything in that chain.

The nice part about these two industries is that those overlaps both require processing to get finished product that patients want to use. Both require retail sales and how to market that product in compliance with FDA regulations on, you know, making sure that you don't claim they have significant health effects. So there are a lot of overlaps that I think for someone that wants to get involved in the industry right now, what I'm counseling them is that start in the hemp space. That's the place to be. There are no opportunities in Florida right now in the medical marijuana space unless you want to buy one of those licenses for a significant amount of money. And, that's the only way to get in that space right now and probably the only way to be there for the foreseeable future. With the state of litigation on the medical marijuana side of the industry, I don't anticipate that we'll see any new licensees. Certainly not in 2019 and it will be a long way into 2020 before we get to that place. So, for folks that want to get in right now and do something, they should look at hemp as that opportunity.

On the investment side, that can vary. I think that depends upon the quality of the company.

And, I think, one of the things we haven't touched on today but I think will root itself out eventually in these industries are things like pretenders and frauds and burgeoning industries can attract those kinds of people. So, I think that's where due diligence is really important on the investment side: understanding the regulatory structures, understanding whether they are scaled up. They can tell you they want to put 100 dispensaries in a state, but if they have a 100,000 square foot cultivation facility, that's probably not even possible. You could never stock the shelves. So, those are the things that I think due diligence will help investors, and that's why they're consulting people like you and me to talk through those issues. But, for investment, I think both spaces are good. For people that want to work, make money, and be a part of something new, I'd take a good look at hemp.

Kevin: That's a fantastic insight. You know, and from what I've seen and just some of the market research and then in some of the other things that you can just find on the Internet, you know, you go back to where we started in the medical marijuana versus the hemp side, and then in terms of CBD, that whole dichotomy that's happening there in terms of people who hear the word "cannabis" have always associated it with marijuana. And it's, you know, I may or may not be interested in that, but the whole concept of the CBD space now is coming out where essentially, at least from the marketing standpoint, you can have the benefits of marijuana without the THC and without the high. And the market that I'm seeing in terms of opportunity – I think this is what you're talking about, too, with hemp – is that this market's gonna explode. I mean, because more people who would never even contemplate for whatever reason that they would ever touch a cannabis product are now saying, "What's so bad about this one?" You know, "I can still function, I'm not gonna be a pothead, if you will. I'm just gonna take the benefits from this plant that have been forbidden maybe for no good reason, we're coming to find out, for such a long time." So, I'm glad to hear you talk about that as an opportunity because even beyond, you know, the CBD and the ingestible space or the topicals, you get into textiles, you get into manufacturing of ropes, and everything else that goes with it. And so...

Jennifer: Drywall, concrete, I mean, all those hemp-based products. I heard Ag say the other day there are 25,000 known hemp-based products ready to go as soon as we have enough hemp in this country. And when you talk about drywall that is mold and fire resistant and I think about that in beach houses, that'd be perfect, right? So, I'm really excited about the

opportunities that this space presents. And hemp, I think, is the future.

Kevin: I tell you what. This entire industry, to me, is just so exciting because it's new, it's fresh, it's one of those opportunities that in the law, to have something that is just so untamed come along, you don't see that very often. And I don't know about you, I had a great time today. I hope you would join me again because next time I would really like to get into some of the Florida-specific stuff we're seeing, including you've talked about some of the appellate issues maybe that the Florida Supreme Court will be asked to weigh in on some stuff. So, will you join me again? Maybe we can try a next session?

Jennifer: Absolutely. And if it's after August 8th, we should know more answers. So.

Kevin: Fantastic. And thank you, again. You are definitely very, very deep in this industry and I've learned a lot today, so thank you so much for joining us.

Jennifer: It was a pleasure. Thanks, Kevin.

Kevin: I also want to thank our audience for joining us today. We had a great time. We hope you did, too. We hope you will check out more about our practice at carltonfields.com. There you can find the landing page for the cannabis taskforce that Jennifer is the co-chair of and you can learn more about what we are doing in this space as it impacts businesses that are running throughout this industry.

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