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## A 'Trying Time' for Lawyers Serving Cannabis Clients

The Recorder catches up with Brad Johnson of Sacramento's Harrison, Temblador, Hungerford & Johnson. "This has been a trying time for us as attorneys because there's not a great deal of assurance in some of the guidance we're providing our clients," he says. "And the best that we can do is continually refer back to and rely on the actual statutory text and the text of the emergency regulations as support for what we're saying."

By Cheryl Miller | February 05, 2018

California's recreational marijuana market only opened a month ago, but the state has already issued more than 2,000 licenses to growers, manufacturers and dispensaries under **emergency regulations** (<https://static.cdfa.ca.gov/MCCP/document>



***Brad Johnson, Harrison Temblador Hungerford & Johnson partner. Credit: Jason Doiy / The Recorder***

**/Proposed%20Emergency%20Regulations%20Final\_12.12.17.pdf**). Some of the most prolific license-holders are clients of Harrison, Temblador, Hungerford & Johnson, a Sacramento boutique that caters to larger and more sophisticated cannabis operations in the state.

Partner Bradley “Brad” Johnson said his firm had no qualms a few years ago when it decided to add cannabis businesses to its existing client base.

“California has made it clear that cannabis is going to be a heavily regulated industry, and we are comfortable advising our clients in compliance with California laws,” Johnson said in a recent interview with The Recorder.

“The work we’re doing for those clients is really no different than the work we do for any other land-use client—it’s environmental compliance, it’s CEQA [California Environmental Quality Act], it’s land-use permitting, it’s planning and zoning, it’s local regulatory compliance.”

The interview that follows was edited for length and clarity.

**The Recorder: What was the workload like at the end of 2017 as your clients raced to get licensed for 2018?**

**Johnson:** It was intense. There was a huge rush to get local permits in place prior to Jan. 1 and then a huge rush to prepare applications for both the temporary state licenses and the permanent state licenses. There were so many questions and gray areas yet to be defined and requirements that needed to be fleshed out for this all to make sense. And while we think the state has done a good job of trying to make sense of this all in a comprehensive regulatory scheme, there are, as we’re seeing this play out now, many areas that need to be clarified, that need further development, that need more attention than they were given in the first round in emergency regulations.

**Given that this is new territory for everybody, where do you go for answers?**

In many cases the answers we would get from the state agencies would be just as much of a guess as our own guesses. And sometimes even the responses we received from state agencies weren't consistent with what was actually in statute—and in the worst cases, sometimes not consistent with what was in their own regulations.

And so this has been a trying time for us as attorneys because there's not a great deal of assurance in some of the guidance we're providing our clients. And the best that we can do is continually refer back to and rely on the actual statutory text and the text of the emergency regulations as support for what we're saying. And where there are gray areas we work to make sure the interpretations that we're providing are well-reasoned and founded in the text. Because there just isn't much else to rely on at this point.

### **So how does that play out? In the final regulations? In court?**

I'm hopeful that a lot of the questions and gray areas we deal with will be clarified in the final regulations. There is the possibility that some of these questions will be answered in court. But the regulations in state law were written in such a way that they provide for relatively limited review of these regulations. And so the extent to which we will see resolutions come from the court I think is an open question.

### **What is the biggest issue on your plate right now?**

Taxation is a major concern. There are really three functional categories of taxation on cannabis products and those three categories don't cover all the potential product categories. And so counseling our clients on the correct taxation structure is a challenge.

The market structure itself is a major challenge. There seem to be more cultivation licenses issued than dispensary licenses, as well as the other supporting licenses like laboratories and manufacturing licenses. There seems to be an unequal distribution of market connections in the overall industry. So it looks like there's more cultivation coming online than outlets for that cultivation. That's a concern right now but one that

we think is probably going to be remedied as the state works through the number of applications it's dealing with.

### **Is that just a question of market dynamics?**

That's our hope and expectation.

### **Is that realistic?**

One of the concerns that I've heard and encountered is that the regulatory structure that the state and local governments have put into place is overly complicated. And as a result it has disincentivized some participants in the industry from following through on the regulatory path.

Of course, I think on the long-term basis that's a poor choice. But it's one that I have seen some members of the industry make. And it's one that I think that is slowing down the full development of the industry under the new regulatory scheme.

### **What's more challenging: Learning about and complying with state regulations or local ordinances?**

I would say the local ordinances are more challenging for the reason that there are more of them to keep track of. Local politics play a role in how those ordinances are interpreted and applied. So maintaining a connection and an eye on the various localities in which we're working is a big part of being able to provide good advice to clients.

The state system is new and complicated in some ways as well, but it is a single system and the inputs are well understood and just don't demand as much attention as the local ordinances.

### **What do you see changing in the regulations as they move into their final form?**

One of the hot issues right now is this seeming [conflict \(https://www.law.com](https://www.law.com)

</therecorder/sites/therecorder/2018/01/24/sacramento-boutique-in-new-suit-confronts-loophole-in-cannabis-regs/>) on the number of Type 3 ([http://www.calgrowersassociation.org/what\\_license\\_types\\_were\\_created](http://www.calgrowersassociation.org/what_license_types_were_created)) [medium-sized cultivation] licenses that are available versus the number of Type 2 ([http://www.calgrowersassociation.org/what\\_license\\_types\\_were\\_created](http://www.calgrowersassociation.org/what_license_types_were_created)) licenses [small grows] that are available. And the way the law is written currently is that the state regulators are required to limit the number of Type 3 licenses they issue but there is no limit on the number of Type 2 licenses that they issue.

And so larger cultivators have been complying with this limitation and this structure by seeking the maximum number of Type 3 licenses and then making up the bulk of their cultivation through a larger number of Type 2 licenses. And that is consistent with the law. That is how the law was written. That's how Prop. 64 ([https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)\\_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf)) was written.

But there are some in the industry who believe there should be more of a limit on the number of licensees or persons can hold. And so that is going to be an area where I would expect to see further discussion.

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