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Addendum B:

The Dilemma of Marijuana Legality

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An increasing number of states have legalized marijuana for medical and recreational use. The demand for high-tech grow facilities is spreading across the country, creating new and unique opportunities for architects and engineers.

However, marijuana remains a Class I narcotic under the federal Controlled Substance Act. The CSA makes it unlawful to "knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances." Participating in state-legal marijuana economies, even in ancillary ways, remains a felony crime under federal law. Thus, providing design services for a grow facility, while legal under state law, could result in criminal charges under federal law.

Not only could a design professional be criminally liable but providing design services for marijuana facilities could also result disciplinary action against the professional. Under the AIA Ethics Code Rule 2.101, architects can be disciplined for knowingly violating the law in their professional practice. As per the rule's commentary, the violation of *any* law, local, state or federal, is the basis for discipline under this rule. Similarly, under Rule 2.106, members are not to counsel or assist a client in conduct that the architect knows, or reasonably should know, is fraudulent or illegal.

A review of AIA disciplinary proceedings demonstrate that the AIA strictly enforces its rules upon architects who violate the proscription on committing violations of the law.

On the other hand, as states have legalized marijuana, it has become crucial for states to regulate marijuana facilities to ensure the safety of the public. For example, Colorado retail marijuana regulations require a Professional Engineer to certify that applicable local and state building codes for solvent-based retail marijuana content were met (ref. 1 CCR 212-2).

Similarly, the Denver Fire Code has a separate section governing all types of marijuana facilities, including that grow facilities meet F-1 occupancy requirements. The code requires a review of design plans, which plans are to bear the seal and signature of the responsible design professional. Engineering is also crucial to ensure product safety and purity.

Performing these necessary services would arguably fall within the instructions of Canon II of the AIA Code, which states members should promote and serve the public interest in their personal and professional activities. Given the risks that would be potentially inflicted upon the public by refusing or failing to perform these services, an argument can be made that the design professional has an obligation to perform the required services to protect the public.

Another wrinkle has further complicated the issue. In some jurisdictions, unlicensed individuals have served as design professionals for marijuana facilities, a practice vigorously punished by administrative judges. In one instance, the ALJ fined the individual $5,000 per day for a period of 40 days.

It should be noted, however, that the federal government has generally and traditionally relied on state and local authorities to address marijuana. Further, instances of federal action against legal facilities are limited in number, for a variety of legislative and legal reasons. But what is a design professional to do?

There is no clear and 'safe' answer. The AIA has not addressed and interpreted its rules on the issue. However, recently the United States 10th Circuit Court of Appeals provided a possible solution to the issue.

In Kenney v. Helix TCS, Inc., (No. 18-1105, Sept. 20, 2019). the Plaintiff was an employee of a state-sanctioned marijuana facility. Kenney filed suit, claiming his employer violated the Fair Labor Standards Act. The employer denied any obligation to comply with the FLSA, arguing the Controlled Substances Act (CSA) 'repealed' the FLSA for employers of the marijuana industry. The district court agreed, but the 10th Circuit reversed.

In its opinion, the Court found that the CSA did not directly conflict with the FLSA. It noted that this holding would allow the employer to reap the benefit from its own CSA violation. It noted that employers are not excused from complying with federal laws just because their business practices are federally prohibited. Thus, it held, the focus of regulatory statutes like the FLSA is on the employees' well-being, and not their activities.

Applying this rationale to the requirements imposed by regulatory agencies on the marijuana industry, any disciplinary action by the AIA [or state regulatory board] would be improper. The purpose of the regulations is not to violate the Controlled Substances Act, but rather to ensure that construction practices are safe and that the public is protected from activities that would otherwise put the public at risk. The higher purpose of protecting the public is the focus of all the regulations, and any conflict between them should be decided with this purpose in mind.

A design professional is advised that engaging in this practice area may have adverse consequences – both criminally and professionally. If the professional chooses to practice in this area, though, one principle that is crucial: Know your potential partners in the cannabis industry to ensure that they fully comply with the drug laws of the state in which they operate and perform the duties imposed on you by law with the safety of the public in mind.

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