



THE **Cannabis** COUNSELOR  
WITH ALEECE BURGIO

**Episode 11: “MWBE and Social Equity Go Hand in Hand, Featuring David Burch”**

Speakers: Aleece Burgio, host, and David Burch, partner, Barclay Damon

**[Aleece Burgio]** Hey, everyone, this is a Barclay Damon Live broadcast. You’re listening to The Cannabis Counselor, and I’m your host, Aleece Burgio. Let’s get into it.

**[AB]** David, thanks so much for joining us for Episode 11 of The Cannabis Counselor. How are you doing today?

**[David Burch]** I’m doing well. How are you, Aleece?

**[AB]** I’m doing very good, now today our topic is minority women owned businesses in the state of New York. You obviously have a huge background that has one, both certified those types of businesses and, are kind of our Cannabis Service Team go to for the social equity component what we’re going to see in the next year or so. Can you give everyone just a brief overview of what the process looks like for New York State with certifying minority and women owned businesses?

**[DB]** Yeah, Aleece, glad to do so. So maybe just before I get into the details on that, just a little bit of background on where I’ve been involved in the past of these issues. So I really have done it from soup to nuts with minority and women owned business enterprise certifications. I’ve been involved on the up-front, really the planning stage. What does the business organization need to look like to be certified? Many, many applications that I’ve assisted in, and then also on the side of when things don’t go so well with, you know, civil and criminal fraud investigations, both with the certified entities, unfortunately, but also with businesses that do business with MWBE certified entities. So I’ve seen how to do this right. And what happens when things aren’t done right.

You know, starting off sort of at the beginning is planning for the certification, making sure all of your documents and all of that is in order. The actual certification application itself is an online application. There’s a portal that Empire State Development has set up, and businesses log in there and it’s fairly straightforward. There’s a number of required submissions and then a number of optional submissions that are really tailored to each particular business. So the actual mechanics of applying are fairly straightforward. What’s not so straightforward is making sure that your business will qualify. And the review process is pretty onerous ... takes many months to get through, if not longer, and the more you can do up front to make sure your application is in order, and you’re avoiding those questions that will come up every time about the typical issues that the reviewers at Empire State Development will spot, the better off you’ll be.

**[AB]** So, let’s talk about the minority and women owned businesses. The process takes a while, it’s a lengthy process. Does it require the owner to be 51% either minority- or women-owned?



**[DB]** Yeah. That’s a good place to go back to. So, yes, under state law, for minority- and women-owned business enterprises, generally, the minority or woman business owner needs to own and control at least 51% of the enterprise. And there’s a little bit more detail provided both in the statute and regulations on what that means. So it has to be ownership that is real, substantial, and continuing.

**[AB]** Okay, Let’s break that down. So “real, substantial, and continuing,” and you emphasize the word control. So that kind of sounds like it can’t just be this façade, right? Which I think a lot of people are talking about in context, and I’m sure in other businesses, but for purposes of the podcast we’ll focus on marijuana. But we’re getting a lot of clients that are talking about putting it in their wives’ name, finding a friend to be the owner. And maybe on paper, it says 51%, but it doesn’t necessarily mean that in a real capacity. What is your interpretation of people trying to kind of go through that process with that momentum?

**[DB]** Yeah. Those ... When I mentioned the bad situations I’ve become involved in, I haven’t ever been involved setting up a situation like that, but I’ve seen plenty of them turn out badly. That’s where people try to fake it. There’s no faking who’s owning and controlling a business. The state will find out, and we can get into it a little bit, sort of the fraud aspects. And there’s a very prominent hotline for reporting fraud on these issues, but they really mean it: “Real, substantial, and continuing.” It can’t be, “I decide since there’s this opportunity, I’m going to put it in my wife’s name or my sister’s name or my mother’s name,” or “I’m going to promote some woman who works in the business to CEO two days before I apply.” This is really something you can’t fake. I can’t stress that enough. So, yes, there can be adjustments to ownership, but the reality of the situation has to be at the heart of it. And that’s got to be demonstrable ownership and control that’s real, and the state will look into it.

Part of the application process is resumés for all the key people have to be submitted. They look at the experience of the key people, including women and non-women or minority and non-minority people involved in managing and owning the business. And they’ll do interviews—people will be interviewed—sometimes in person, more often, particularly these days, by phone or video. And they’re listening for people who sound like they’re really involved and in control, versus people who are kind of stumbling through those interviews ...

**[AB]** ... just passive owners. Now, is the 51% just in a percentage of one person’s interest? Or could you have four women who total to 50%?

**[DB]** It’s not just one person. So it could be a group of minority members or a group of women that together in the aggregate, own more than 51%. I will say, that’s when thinking through your control provisions, it really becomes more complicated. You know, I’ve seen situations where there’s a group of women or a group of minority members, and yes, they all add up to 51% but there’s the ability for non-minority members or men in the business to sort of take control by creating a voting block or something like that, those are the types of details that will be looked at, and it’s really important to think through and make sure your documents are in order so it’s crystal clear that the minority group or the women that are together, the majority owners really control it and it’s unassailable control.



**[AB]** So I know that women who are minorities can be either or both a woman and minority business. Is there any type of process to combine minorities and women to be 51%, or does it have to be minority-owned business for 51% or women-owned business for 51%, but not necessarily a combination? So like, as an example, say, you had three Black men and three women own 51% of one company, but independently, they both wouldn't own the 51% does that make sense?

**[DB]** It does make sense. I will say I think the state really views it as an “or”—so it's often abbreviated minority, “MWBE,” they have minority business enterprises and women business enterprises. And I've not seen a successful aggregation ... of both.

**[AB]** ... of both

**[DB]** And they really do consider those two separate things.

**[AB]** So what's interesting in purposes of the adult cannabis legislation is the social equity applicant actually has a few different categories for a person to qualify. So we have women, we have minority, but we also have disadvantaged farmers and disabled service veterans, and then members of the community who've been disproportionately impacted by the prohibition. So they've kind of expanded this category of social equity to kind of fall under what we're used to as the MWBE category. So there is some legislation currently that's been submitted to the Finance Committee that discusses how the OCM—the Office of Cannabis Management—may have temporary authority to kind of certify these businesses applying for adult use licenses, but that eventually they'll have to submit to Empire to kind of certify them permanently. Do you think that they'll expand those categories to be included then on the MWBE website, or do you think that these will kind of be separate processes?

**[DB]** So it's unclear right now. I think the concern, obviously by the legislators who have introduced these bills is that it takes a long time to get MWBE-certified currently, and that's just because the state does such a good job of reviewing everything and being very careful, and it's a substantial network. And there's a substantial number of companies that want to be certified.

In the cannabis space I think there wasn't a real driver for ... to be certified in the past. So there aren't a lot—or maybe there aren't any—certainly not a lot of existing companies ready to apply for a license under the MRTA that are already certified. And so there's going to be this lag between when they can apply for certification and when they can apply for a license and what these legislators are trying to do is eliminate that lag so that there's a temporary certification for [a] minority and women owned business enterprises.

You know, when I review the legislation that's pending, it looks to me like they're not going to have a separate process. That the idea really is that it's the same process. But there will be a temporary certification that, as drafted (if this was to pass), it'd be, first, to apply for temporary certification in 60 days, you would get a temporary and then you'd also have the longer review process that everyone would go through, whether they're in the cannabis business or not. And you could have your certification made permanent after that, subject to the renewal recertification provisions everybody goes through every few years, or you could have it revoked—your temporary revoked, because they drilled down and they realized there's something that's not proper there. Right now that looks like the direction they're going in, that they're going to use the existing process and just trying to sort of put in a temporary certification category only for businesses that are ... it says, “intend to participate in the medical cannabis or adult use cannabis industries.”



**[AB]** Interesting. I think we're going to see a really ... kind of "first impression" situation with this temporary certification, especially because ... and what we're seeing just with our potential clients and current clients is everyone's trying to kind of apply as a social equity applicant and trying to award up to 50% of the applications and licenses to social equity applicants. So it's guaranteed, depending on how many people are going to be allowed a license, that there's just going to be the incredible influx of social equity certifications that are going to be happening that I don't know necessarily that OCM is really ready for in terms of that review process. That's a super lengthy review process. We're talking about people reviewing incorporation documents, you know, resumé's, bios, all those documentation that's going to indicate whether or not you're qualifying, which already is a lengthy process in itself, and then trying to do that and give you an adult use license in the process is going to be very challenging, I think.

I kind of want to end our discussion on kind of cautionary tales of what not to do in terms of what happens if you do commit fraud and you do lie on your application and you do make a social equity applicant 51%, but they're not, in actuality. So can you kind of just do a little warning to the listeners about things that we should be mindful of.

**[DB]** Yeah. Absolutely. It really is not a time to be sneaky on these applications. Those won't ... almost always turn out poorly. It can be ... at the most minor situation, it's going to cost tens of thousands of dollars in, you know, accounting fees and legal fees to fix things and engage with government investigators and explain things and negotiate some sort of civil penalty. And in the worst-case scenario, people go to state or federal prison for fraud in these programs. And if you Google/search "MWBE fraud," which I did before this podcast, there's dozens of very recent examples just in New York where there's New York state attorney general investigations or joint state and federal investigations into fraud in these programs.

And the thing that's unique here is one little instance of fraud on the front end with an application. You try to fake it, the old "fake it till you make it," and put somebody in as a female or a minority owner just because you want to get the ball rolling. You get this temporary certification, if that's the way things go. And then all of a sudden, you build your business on that fraud, and it's a snowball that will be next-to-impossible to stop. So I can't caution people enough to really try to do it the right way up front, plan for things, make sure it makes sense. Get professional advice from lawyers and accountants who have experience in these programs so things are set up the right way, and that sort of preventative work up front will avoid a lot of pain later on. One thing that's unique here, I think, provides a unique planning opportunity, is, in general if you're applying for an MWBE certification, you have to show a year, at least a year, and ideally more, but at least a year of experience in whatever industry you're working in. And that often means that it's too late to sort of reset everything at the planning stage once you're applying because you already set your business up years in the past.

With cannabis businesses—I assume although this is going to be in the details of the regulations—there won't be that sort of one-year operational requirement, because people ... you can't legally operate in the adult use cannabis industry in New York State right now. And certainly, this was not set up to put roadblocks to the social equity applicants. So I think they're going to have to ...

**[AB]** ... waive that?

**DB** ... have a waiting period. So it really means that there is an opportunity to set things up the right way, right at the time you're applying.



**[AB]** I think that's...that's a great point, Dave. And, you know, for those listening, the rules and regulations as we talked about will not be coming out for another six months. We anticipate to see them in the fall, so September, October we'll look for them. There's a comment period then. And the rules and regulations are really where we find that density, where we see the actual explicit requirements to become a social equity applicant, what the application is going to look like. Assemblywoman Stokes mentioned in a few podcasts ago that there might be some investment component for those who are applying as social equity applicants. So all things that need to be tracked and thought about if you intend to apply as a social equity applicant, we still have time. Licenses and applications are set to be for 2022. We will be on top of it on this podcast. And if you have any questions regarding minority or women owned business enterprises, feel free to reach out to David Burch here at Barclay Damon. Thanks, David. We really appreciate you talking today.

**[DB]** Yeah, thank you. Thanks for having me. I look forward to continuing this discussion.

**[AB]** All right, thanks. The Cannabis Counselor podcast is available on YouTube, LinkedIn, Apple Podcast, Spotify and Google Play. Like, follow, share and continue to listen. Thanks.

