



CLM Annual Conference  
March 13-15, 2019  
Orlando, Florida

## **Cannabis-From Seed to Sale to Suit**

### **I. Understanding The Plant**

Cannabis is a plant and is grown in three types, sativa, Indica and ruderalis. Each has its own individual attributes. Sativa is the form used to get “high”. Indica is more known for its sedating properties and ruderalis is similar to Indica but has little commercial value due to size and grow yield. The types of cannabis can be biologically mixed or cultivated into “strains”. These strains result in hybrids. Each type of cannabis has over 70 cannabinoids, which is a fancy way of saying active constituent. The human body has cannabinoid receptors and when certain cannabinoids are introduced, or an amount of a cannabinoid is introduced the human brain will react differently. The most commonly known cannabinoid is Tetrahydrocannabinol or THC. This is the primary psychoactive compound of cannabis. The second is Cannabidiol or CBD, which is more known for its medicinal properties to treat various conditions such as pain, anxiety and inflammation. There are other cannabinoids with varying THC levels and properties. Hemp is a commercially grown variety of cannabis sativa, more known for its industrial uses. These uses include paper, textiles, clothing and insulation. Hemp has low concentrations of THC (.003% or less) and higher concentrations of CBD and likely to produce no psychoactive effects.

### **II. Understanding The Law**

#### **A. Federal Law**

Cannabis and currently by extension Hemp are both Federally illegal substances. Presently both are regulated by the Federal Controlled Substances Act (CSA) of 1970. This lists marijuana as a Schedule 1 drug, placing it along with LSD and heroine, finding it has no medical value. It cannot be prescribed, possessed, distributed or sold in the United States. Legally, there is only one location which can grow marijuana for research purposes. Hemp falls into the Schedule 1 as the levels of THC in Hemp tend to be around .003%. Hemp however is also regulated under the Federal Farm Bill, which allowed Hemp to grow for research or scientific purposes. As of late 2018, The Federal Farm bill pending in US Senate would remove Hemp from the CSA and allow for the unregulated cultivation of Hemp in the US. The bill had strong support.

#### **B. State Law**

As of late 2018, 10 States either through legislation or ballot legalized adult recreational cannabis use. These states included Alaska, California, Colorado, Maine, Mass. Michigan, Vermont, Oregon, and Washington. There were 13 states and several cities which decriminalized the use of marijuana. There were also 33 states which legalized medical marijuana in some form. The 2018 midterm elections showcased legalized as a top platform topic. The Food and Drug Administration approved 4 cannabinoid base drugs targeted to treat specific disorders. The number of patents granted by the US Patent office for cannabis-based formulations and products more than double. In 2018 the first cannabis-based patent infringement suit was filed.

### C. Federal Efforts to Deregulate

Under the Obama administration the official policy of the Justice Department as to those states which had legalized cannabis either medically or recreationally as dictated by “The Cole Memo” Written by US Attorney General James Cole, in 2013, the policy of the DOJ was a hands-off approach. The administration decided not to prosecute those who were operating legally in their states if they were following state regulations and adhering to state policy and paying taxes. The Cole Memo did not apply to the activities of other governmental agencies such as the IRS. In 2018, the Attorney General Jeff Sessions rescinded the Cole Memo and declared the hands-off policy void. This led to several bills introduced in both the House and Senate including the Gardner/Warren Bill, House Bill-HR 1227, The Right to Try Bill, efforts to allow the VA to pay for medical recommendations and other efforts. As of late 2018 no bill has advanced, although the White House indicated at support for the Gardner/Warren bill, which would allow those states which choice to legalized in some form to operate independently.

## III. The Seed

### A. Growing Cannabis

Cannabis is grown by seed or by mixing seeds into various strains to produce a mother clone plant. Cuttings or clones are the starter plants of a particular strain or type such as Blue Dream or OG Kush. Cuts are then taken from the mother plant and placed into various types of bedding systems which could range from high tech nursery operations to big red plastic cups with soil. Grows are done outdoors where climate may permit, but the prefer method is greenhouse grow which allows the grower greater control and more growing seasons. The cuttings are place in the greenhouse where the grower will select particular soils, root systems, watering systems, cooling and heating systems, and lighting systems. As the plant grows to a flower or bud the plant is trimmed, weighed and constantly measured and treated with nutrients. The data is collected for state reporting and for future grow efforts. The grow room or space must be clean, free of pests, mold and fungicides to produce the purest high-quality product. Plant disease is common such as powdery mildew and pest will destroy an entire season’s product. Once the buds are fully developed, colorful and coated with what looks like a white sugary substance, the flower is most likely ready for harvest. It is at this time, when the terpenes (organic compounds) and cannabinoids reach desired levels. The plants must be trimmed and manicured by hand. They are then hung to dry in a dark room, between 60 to 70 degrees and then sealed. Sealing is part of the curing process and also involves “burping” the container to avoid moisture.

### B. Extraction

Once the plant is fully cured it is the ready for extraction. This is the point when the processor will decide the type of end product, he/she wishes to sell be it oil, pill, flower, shatter, tincture. The method used for extraction various. Extraction is chemistry It is when the plant material is divided into parts that contain different chemicals and isolate the different compounds. It must be done in a safe manner with expensive laboratory equipment. The various types of extraction include alcohol extraction which relies upon alcohol as a solvent, CO2 extraction which uses high pressure and high heat to create a gas-based distillation and Butane or propane extraction which are used to create hash oil. There are also nonsolvent extractions which are heavy grinding methods.

#### Product Testing

Product testing is becoming a large segment of the industry. The consumer wants better product and state regulations demand cleaner product. Product testing, done by outside independent laboratories ensure the purity of the THC or CBD levels, the absence of mold or other impurities and in the case of “off label or white label situations” the selling is getting what the selling purchased. The labs test of residual solvents for the extraction process, physical contamination, microbial contamination, potency levels, and heavy metals.

#### **IV. The Sale**

##### **A. The Finished Product**

Cannabis can be sold in many forms including vapes, oils, pills, infused edibles, creams and flower. At this point it becomes a matter of consumer choice and what state law will allow as to what can be sold and how. For example, some states do not allow edibles in any format. Vape pens are E-cigarettes with a vile filled with cannabis oil. They can also be rechargeable through a USB port. Edibles come in the form of cookies, candy and liquids. Tinctures are made by soaking cannabis trim in alcohol and can be taken orally or in a drink of choice Presently, in the US product is sold through state licensed dispensaries. Retail locations are state dependent. Some permit on site usage or lounges. Some states permit a “destination” type atmosphere. There are also web-based programs (example Weed Maps) which allow the patient or adult to geographically local the nearest dispensary, browse inventory and where permitted set up a delivery. Transactions are all cash and/or voucher or blockchain type payment systems, as banking, credit cards, etc. are out of the question due to Federal law. Employees are known as Bud Tenders. In medical operations, bud tenders are normally certified. Background checks are required, and some states do not permit anyone with a felony record to work in the industry.

#### **V. Suit**

The above provide a brief overview of the ever-evolving cannabis industry. The opportunity for liability is readily apparently when looking at the complex regulatory, growing, manufacturing and retail operations. This does not even contemplate the legal issues of taxation or operating a Federally illegal business or ancillary business.

##### **A. The Seed**

Growing involves greenhouse construction which is done in accordance with local regulations but must also meet the needs of the industry. The construction must provide a clean structure that can house various rooms for the various grow and develop stages and equipment, including lighting systems, HVAC, water, odor control, waste water, security, etc. Soil and planting beds are purchased in a various shapes and sizes. Soil and clones begin the process, and should the wrong clone be provided, or the soil contaminated, the entire season’s grow is ruined. Fertilizers must produce maximum output without mites, mold and using as little water as possible. If promises are not fulfilled or expectations not met, breach of warranty claims are just a docket number away. Laboratories must provide truthful and accurate testing results. If the information is not accurate and is reported to the state and impacts a grower’s license, the entire business venture may fail. Extraction methods are high heat, high pressure large chemistry sets. Failure of an expensive extraction system is a products liability suit. Catastrophic failure is a worker’s compensation suit or worse.

##### **B. The Sale**

Liability potential through sale is large. Selling a product in a retail out is inviting the public into a space, bring with it premises liability. Inviting the public into a space with large cash transactions is another concern. Home delivery brings with is host of potential problems. A driver carrying marijuana become a target, a driver with cash becomes a target, lost product due to car accident or an automobile accident in and of itself. Employee liability is also a large concern, which extends back to the growers but also to the sellers. Workman’s compensations issues are presented. The nature of the work force may become an issue in and of itself. Product tampering, product failure, failure to deliver the product as advertised also must be consider. Products liability considerations with packaging are at issue. The packaging is attractive. The containers are supposedly child proof. However, there are many instances where the product can get into the wrong hands or used inappropriately. There may also be medical malpractice to consider or failure to prescribe claims. The risks are present.

Defending The Suit

Cannabis-related suits will be unique. It is anticipated that suits will be brought for bodily injury and property damage allegedly caused by the product. These suits will seek damages for third party claims, product recall, loss of profits, loss of inventory, loss of stock. The experts needed will require a new level of expertise including chemistry, biology, cannabis-value market analysis, toxicology and engineering.

### C. Managing The Risk

#### 1. Insurance Coverage

The issue of insurance coverage and what can be covered must be addressed. There are markets offering coverage for cannabis operations. These include products liability, E&O, crop loss, property damage, worker's compensation, automobile, technology, security, environmental liability. The question is what types of companies are writing this coverage, what types of coverage are afforded and if any coverage can be obtained through a General Commercial Liability policy.

### D. Training The Work Force

This is a new industry and, in some ways, a new and untested worked force. Many of the employees and the owners come from diverse backgrounds which often do not include a course in HR manage or employee relations. Also, this is a highly related industry. The grower or seller is held to a high level of accountability to the governing state agency. Failure to meet state requires will result in loss of license. This is where work force interaction also becomes very important as the business depends on the level of scrutiny given by the employees doing the hands-on day to day work.

### E. The Considerations

This is an industry that changes on almost a daily basis. Regulations are ever changing in each state. Many states are playing catch up to Colorado and California which have seen significant economic growth as result of legalization. However, legalization has come with some cost. There is state level drug enforcement issue that must be considered such as DWI, School Zones, underage use. Many states have not yet come to terms with legalization on a medical level or still have restrictive medical programs. There are social justice aspects of legalization which include expungement of records of those convicted of nonviolent marijuana related crimes or those who are in prison on the same or similar charges. There are also ethical considerations for an attorney advising his or her client about entering into this space or one that is already operating in this space. Also, there are issue concerning what attorneys should be telling their malpractice carriers if they are working with clients in this pace and what malpractice carriers will soon be asking about attorney who are working with clients in this space.