

Cannabis in Personal Injury Litigation: Allegations of Mislabeling and Injuries From Product and Delivery System Use

TUESDAY, NOVEMBER 5, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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David G. Evans, Senior Counsel, **Cannabis Industry Victims Educating Litigators (CIVEL)**,
Flemington, NJ

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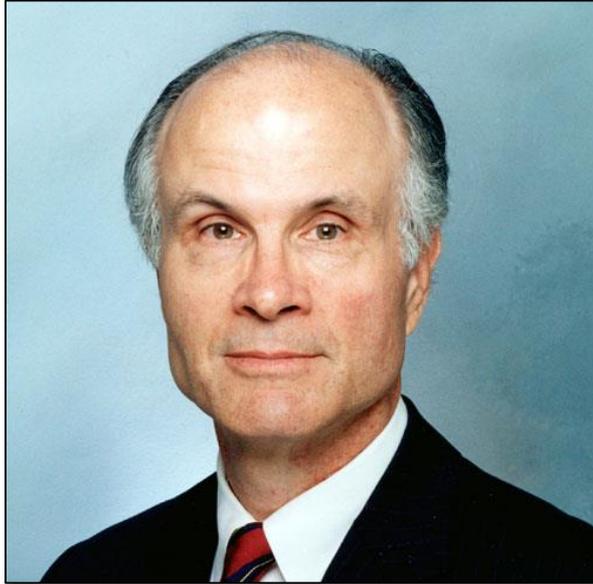
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A close-up photograph of a cannabis plant with vibrant green, serrated leaves. The background is a soft, out-of-focus gradient of warm colors, transitioning from a bright yellow-orange sunburst at the top to a darker, reddish-orange glow, suggesting a sunrise or sunset. The text is overlaid on the left side of the image.

**Cannabis in Personal Injury Litigation:
Allegations of Mislabeling and Injuries
from Product and Delivery System Use**

Panelists



David G. Evans
Senior Counsel
CIVEL



Jenny Covington
Partner
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Legal marijuana could soon be a bigger market than soda



Jeremy Berke



Apr. 10, 2018, 12:43 PM

34,767



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Marijuana is giving soda and beer a run for their money. Drew Angerer/Getty

- **Legal marijuana** is set to hit \$75 billion in sales by 2030, according to a note from analysts at the investment bank Cowen.

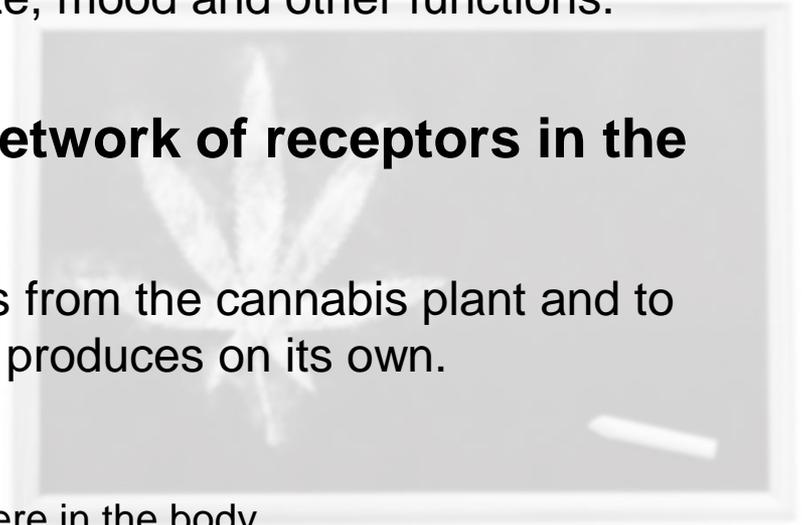
Cannabis Consumption 101

- Cannabinoids / Endocannabinoid System
- Marijuana vs. Hemp
- THC containing products vs. CBD
- Medical vs. Recreational
- Smokeable products (Flower)
- Edibles
- Vaping
- Oils, Rosins, & Dabbing
- Tinctures
- Terpenes

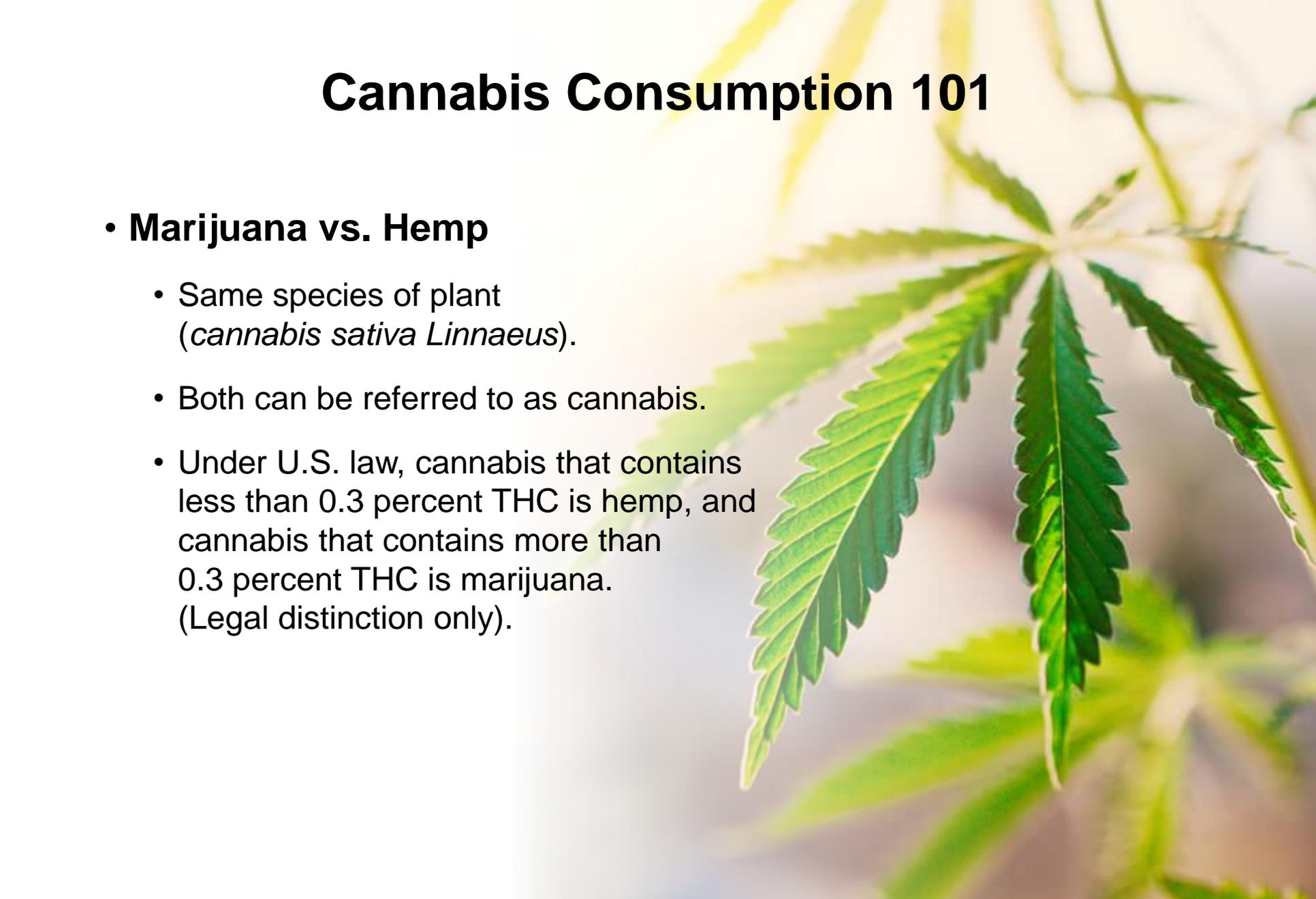


Cannabis Consumption 101

- **Cannabinoids are compounds found in the cannabis plant**
 - Responsible for the medical and psychoactive effects of cannabis, binding to cannabinoid receptors in the human body.
 - Humans also produce their own endogenous cannabinoids, suspected of playing a role in regulating appetite, mood and other functions.
- **Endocannabinoid system is a network of receptors in the human body**
 - Receptors bind both to cannabinoids from the cannabis plant and to the endocannabinoids that the body produces on its own.
 - CB1 receptors prominently in the brain
 - CB2 receptors more prominent elsewhere in the body



Cannabis Consumption 101



- **Marijuana vs. Hemp**

- Same species of plant (*cannabis sativa* Linnaeus).
- Both can be referred to as cannabis.
- Under U.S. law, cannabis that contains less than 0.3 percent THC is hemp, and cannabis that contains more than 0.3 percent THC is marijuana. (Legal distinction only).

Cannabis Consumption 101

- **THC containing products vs. CBD**

- THC and CBD – different types of cannabinoids.
- 100 different types of cannabinoids in cannabis.
- THC is the main cannabinoid responsible for marijuana's psychoactive effects and other pharmacological benefits.
- CBD is not thought to have psychoactive properties and clinical trials have shown it is helpful for preventing seizures in some patient populations.

Cannabis Consumption 101

- **Medical vs. Recreational**

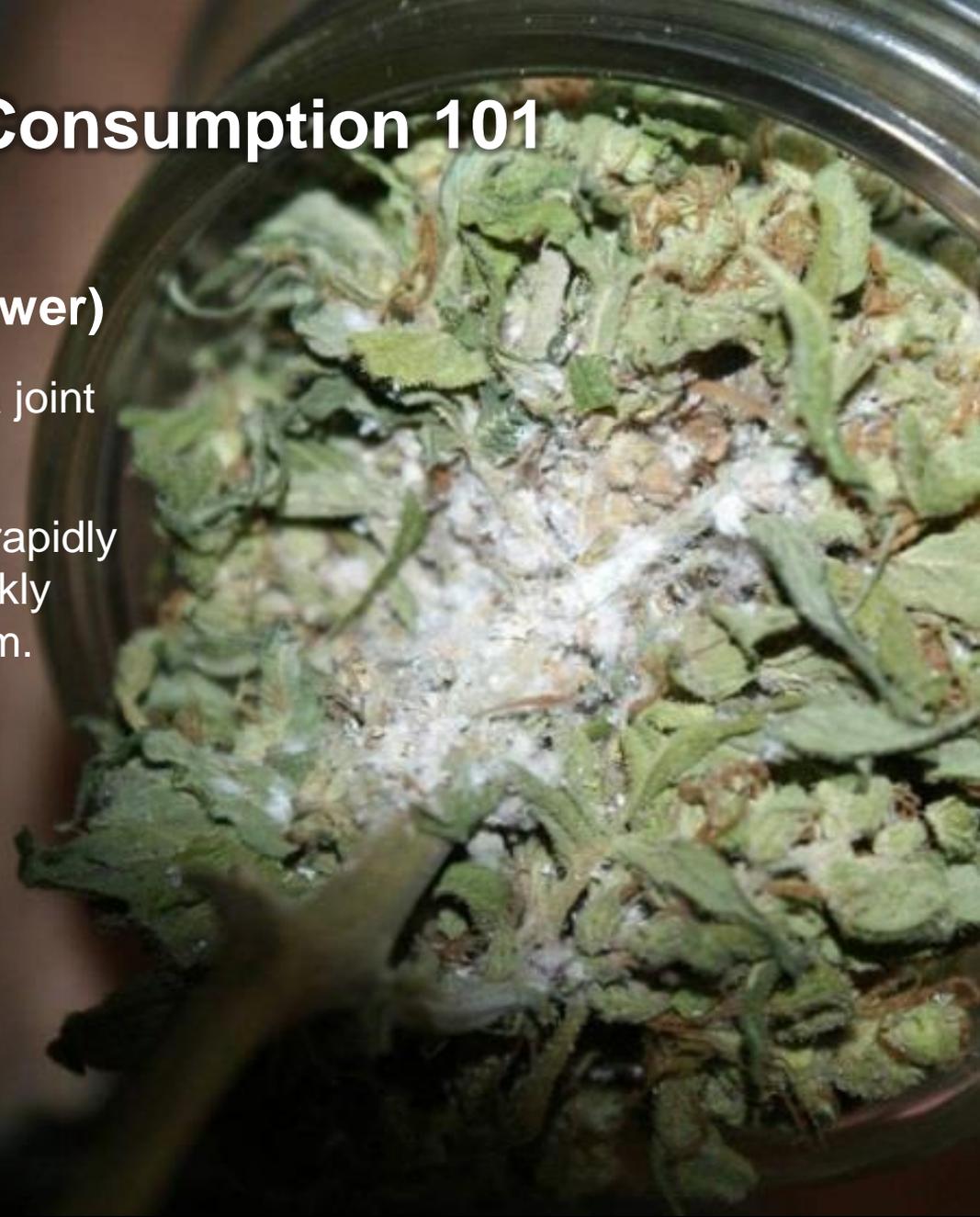
- Many states' legalization schemes for marijuana usage differentiate between medical and recreational use.
- Medical-use-only states typically require some type of preregistration and proof of a condition the state deems treatable by marijuana.
- Recreational-use states allow use of marijuana at home for recreational enjoyment.



Cannabis Consumption 101

- **Smokeable products (Flower)**

- Plant material is rolled into a joint and smoked.
- When smoked, cannabis is rapidly absorbed and relatively quickly cleared from the bloodstream.



Cannabis Consumption 101

- **Tinctures**

- Alcohol-based cannabis extracts or distillates.
- Can be added to food or taken under the tongue (sublingually).
- Sublingual absorption is faster than food consumption.



Cannabis Consumption 101

- **Edibles**

- Food is infused with marijuana extractions (commercial-grade distillates or fat infusions like cannabutter).
- The absorption of edibles by the human body is much slower than smokeable products.
- It takes longer for consumers to feel the effects of an edible cannabis product and longer to become sober again.



Cannabis Consumption 101

- **Vaping**

- Users employ vaporizing machines (similar to nebulizers) or vape pens to inhale cannabis concentrates.
- Involves heating the product to produce vapors without combustion.
- Rapid absorption like smokeable products.



Cannabis Consumption 101

- **Oils, Rosins & Dabbing**
 - Manufacturers use a variety of processes such as rosin presses, butane or CO² extraction, etc., to extract a concentrated, sticky substance that can be diluted for vape pens and other delivery devices or used directly (dabbing).



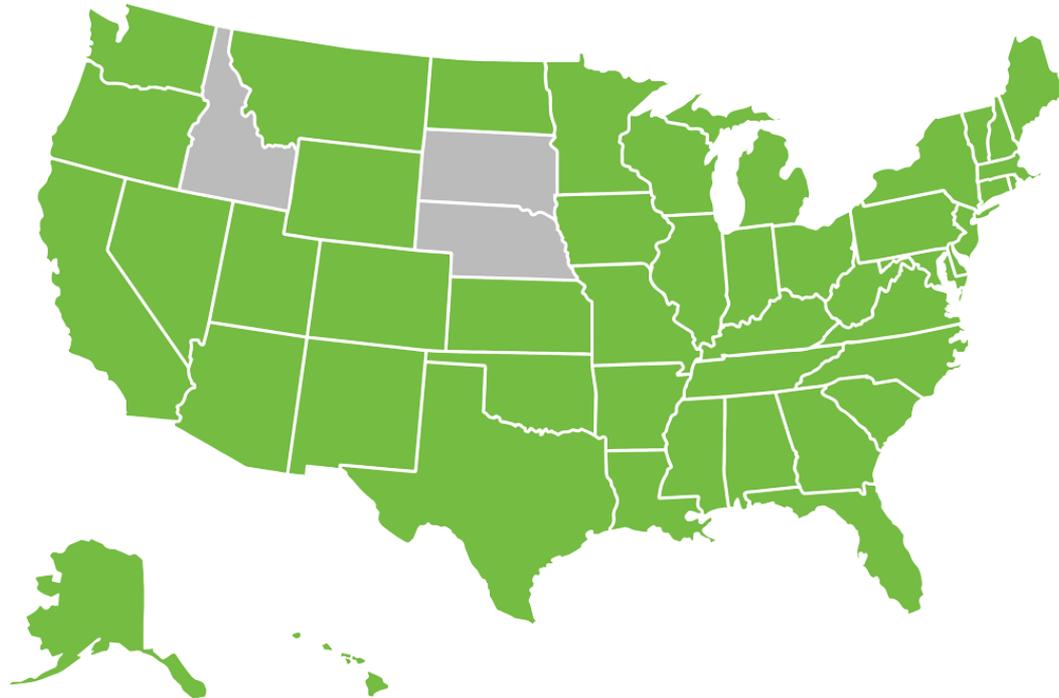
Cannabis Consumption 101

- **Terpene Extracts**

- Aromatic oils that create aromas and flavors in cannabis.
- Terpenes do not contain the psychoactive component of THC.



States with Law Legalizing Products That Contain Some Form of Cannabis*



EXCEPTIONS:

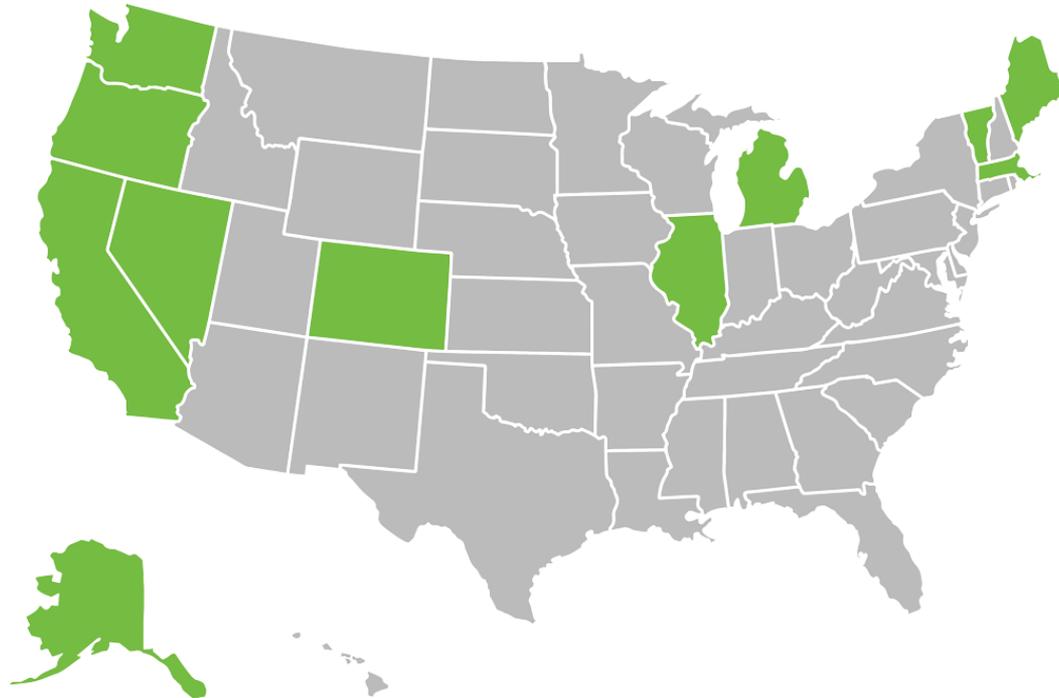
Idaho

Nebraska

South Dakota

*Only half the states in the US have decriminalized cannabis obtained outside of legal distribution programs

Legal Use of Recreational Marijuana



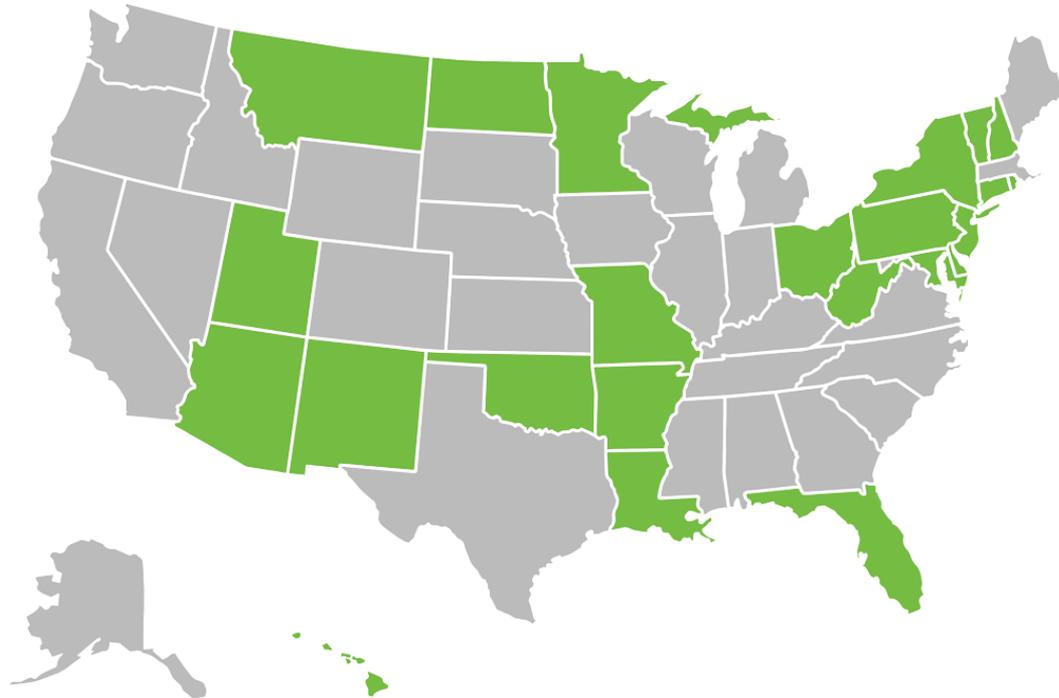
Alaska
California
Colorado
Illinois¹
Maine
Massachusetts
Michigan²
Nevada
Oregon
Vermont³
Washington

¹ Recreational cannabis bill passed in May 2019; sales set to begin Jan. 1, 2020.

² Recreational marijuana initiative legalized in 2018; sales expected to begin in 2020.

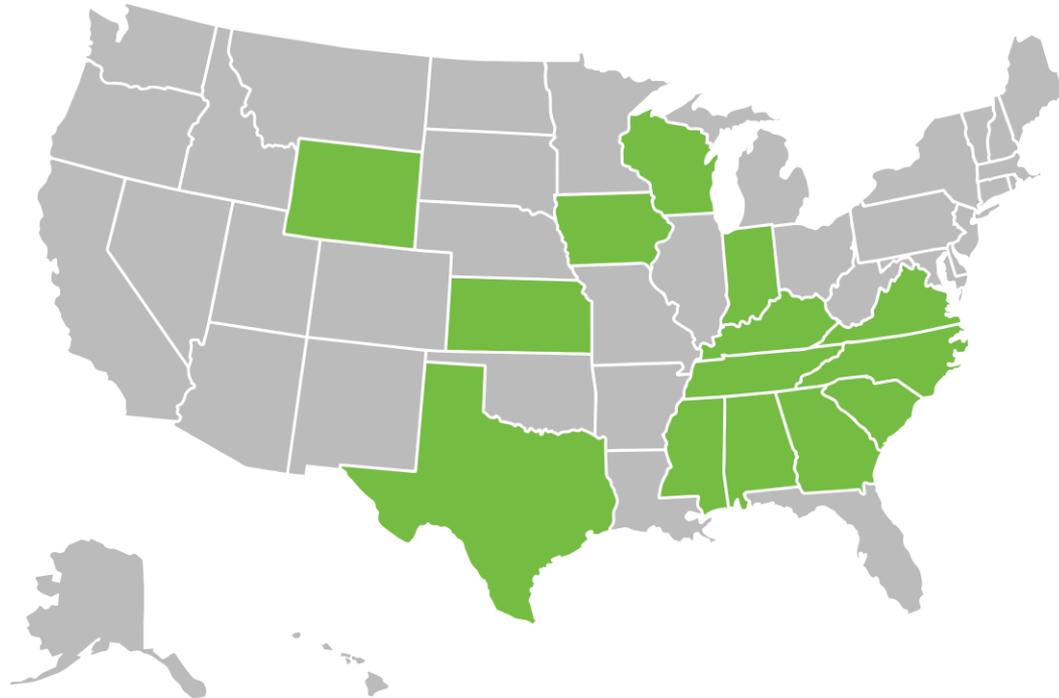
³ Recreational marijuana use legalized in 2018; current state law forbids retail sales but legislature is working on retail-system bills.

Medical Use Only



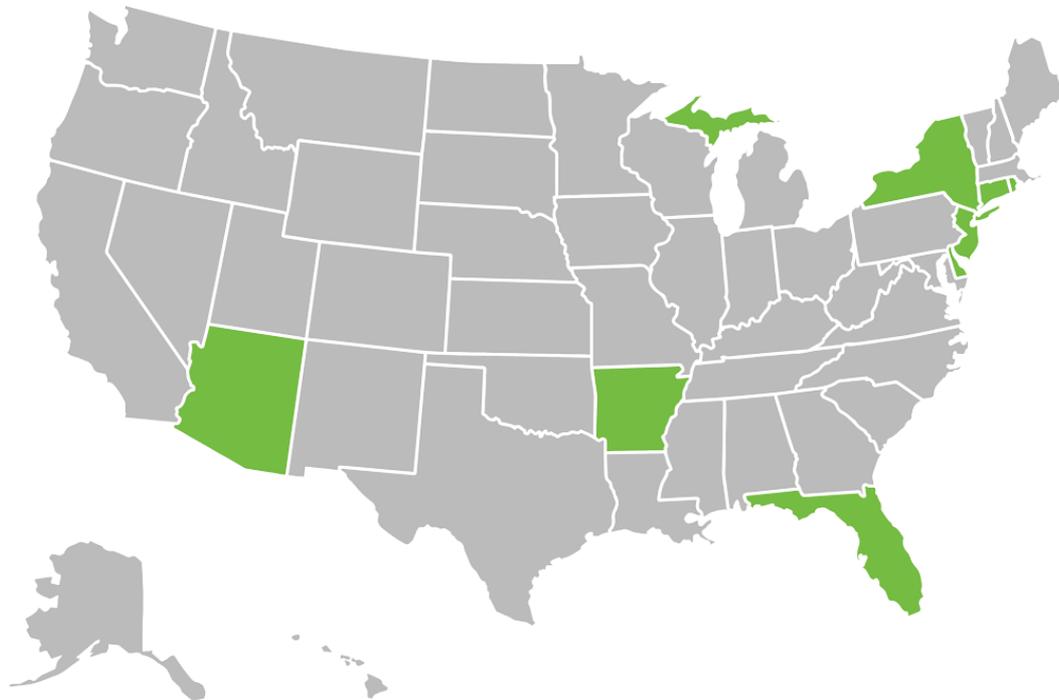
- Arizona
- Arkansas
- Connecticut
- Delaware
- Florida
- Hawaii
- Louisiana
- Maryland
- Minnesota
- Missouri
- Montana
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Dakota
- Ohio
- Oklahoma
- Pennsylvania
- Rhode Island
- Utah
- West Virginia

Low THC CBD Only



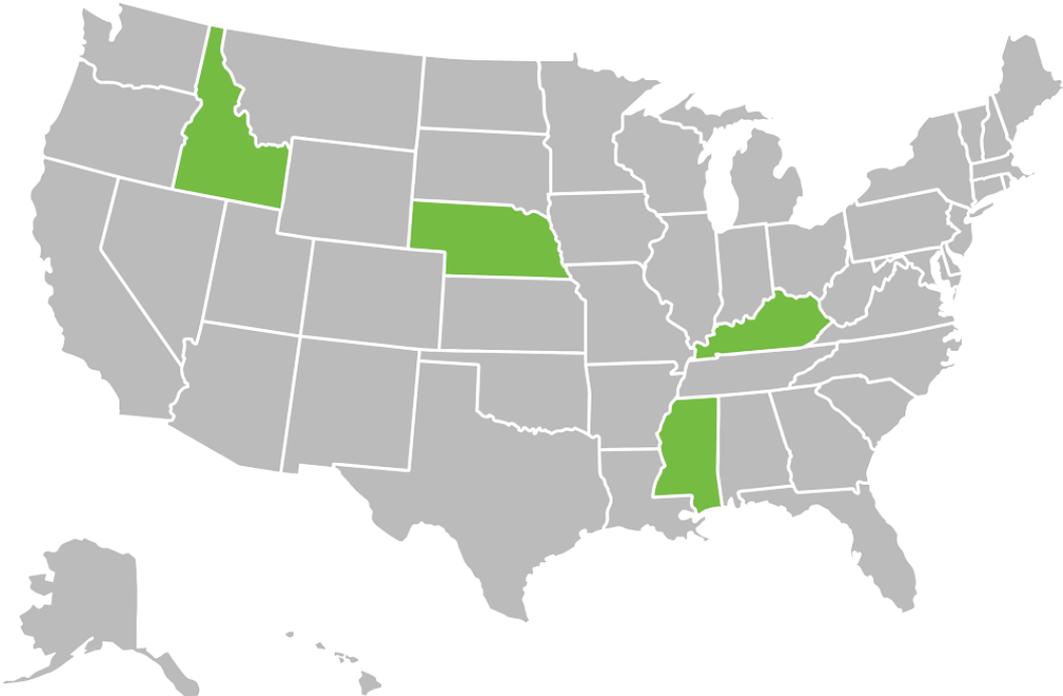
Alabama
Georgia
Indiana
Iowa
Kansas
Kentucky
Mississippi
North Carolina
South Carolina
Tennessee
Texas
Virginia
Wisconsin
Wyoming

Recreational Marijuana Under Consideration



Arizona
Arkansas
Connecticut
Delaware
Florida
New Jersey
New York
Rhode Island

Medical Marijuana Under Consideration



Idaho
Kentucky
Mississippi
Nebraska

Controlled Substances Act

- Marijuana and All Cannabis Derivatives are Considered Schedule 1 Substances – Illegal on a Federal level

Title 21 Code of Federal Regulations	
PART 1308 — SCHEDULES OF CONTROLLED SUBSTANCES	
SCHEDULES	
§1308.11 Schedule I.	
(23) Marihuana	7360
(31) Tetrahydrocannabinols	7370
Meaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant, such as the following:	
1 cis or trans tetrahydrocannabinol, and their optical isomers	
6 cis or trans tetrahydrocannabinol, and their optical isomers	
3,4 cis or trans tetrahydrocannabinol, and its optical isomers	
(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)	
(58) Marihuana Extract	7350
Meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant.	

What is the Cole Memo?



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

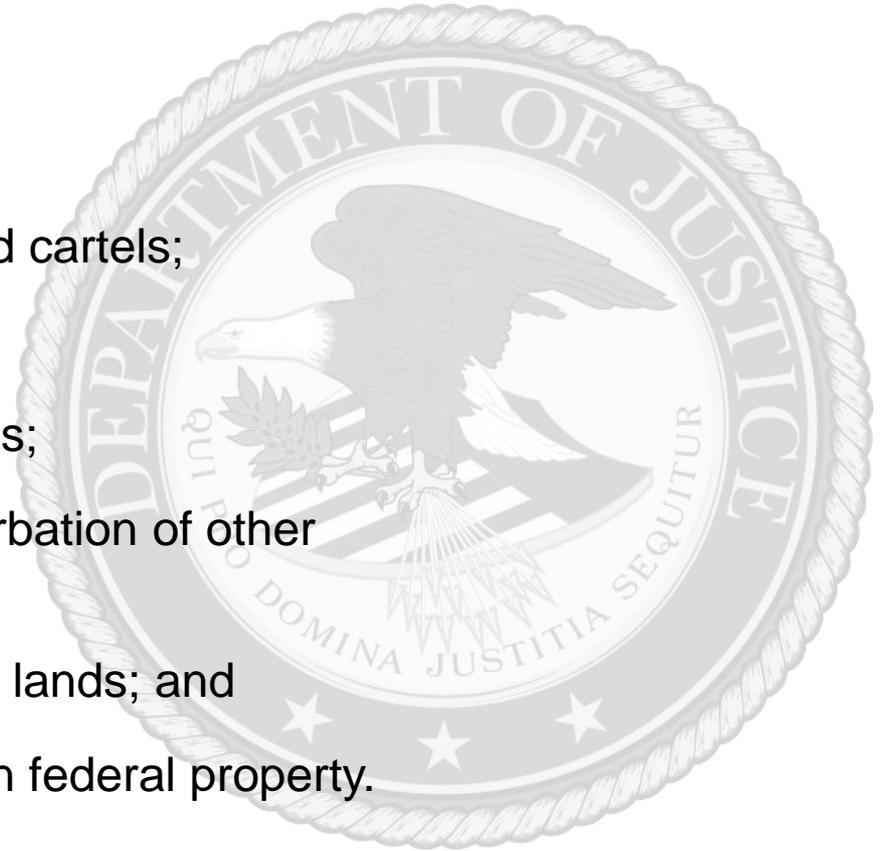
MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

What is the Cole Memo?

- Enforcement guidelines:
 - Distribution to minors;
 - Criminal enterprises, gangs and cartels;
 - Interstate distribution;
 - Violence and the use of firearms;
 - Drugged driving and the exacerbation of other adverse public health;
 - Growing of marijuana on public lands; and
 - Marijuana possession or use on federal property.



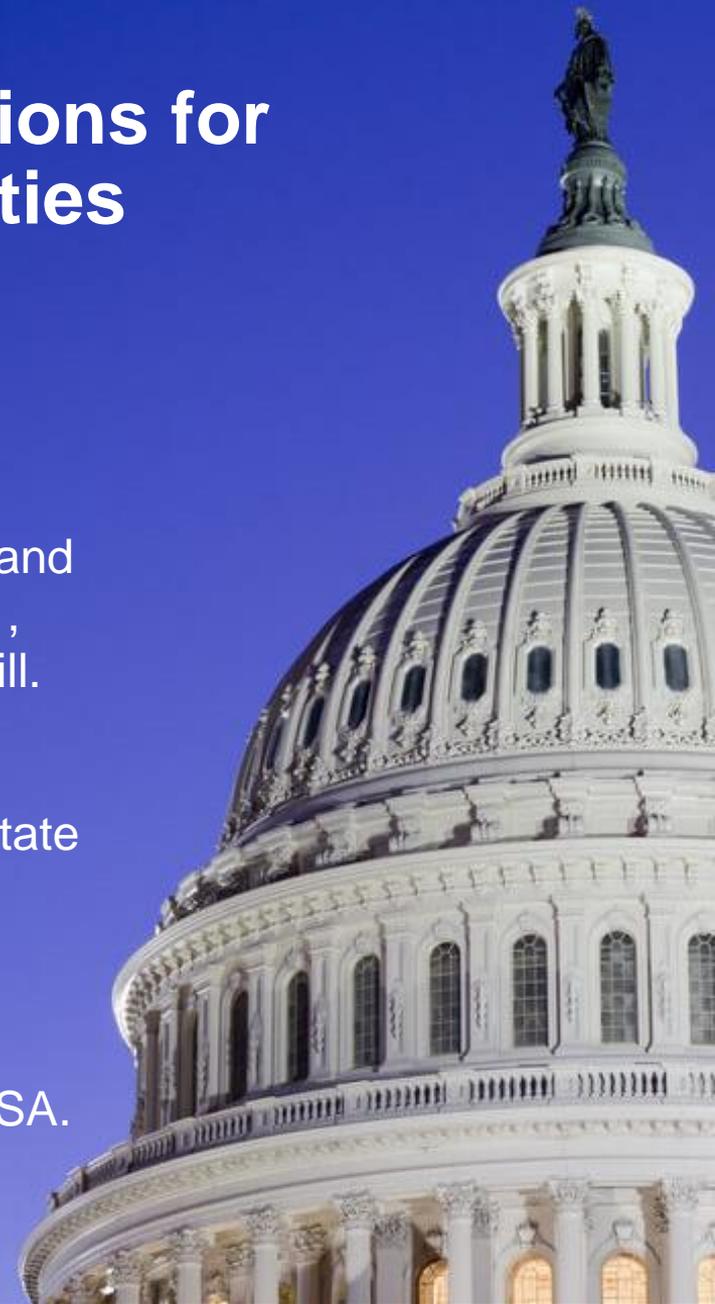
Cole Memo No Longer in Effect

- On January 4, 2018, former AG Jeff Sessions announced Cole Memo rescinded.
- *Thus far, no further Federal guidance from the DOJ or the DEA.*



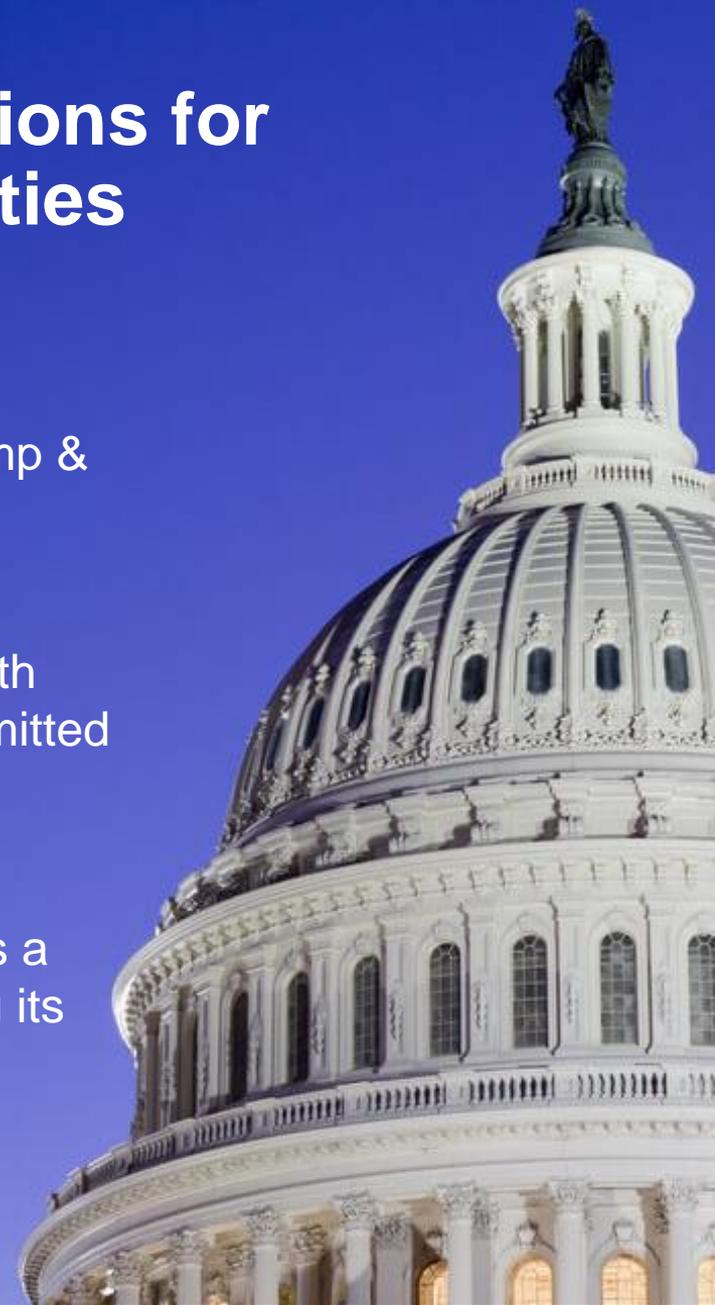
Other Federal Protections for State Legal Activities

- Rohrabacher-Blumenauer Amendment
 - Formerly known as Rohrabacher-Farr.
 - 1st passed in May 2014 & recently renewed and extended in September though November 21, 2019 and for the fiscal year 2020 spending bill.
 - Prohibits DOJ from using federal funds to enforce federal marijuana law against legal state medical-cannabis programs.
 - Does not apply to recreational cannabis or change the designation of cannabis as a Schedule I controlled substance under the CSA.



Other Federal Protections for State Legal Activities

- 2018 Farm Bill
 - 1st piece of federal legislation legalizing hemp & removing its DEA Schedule I controlled substance designation.
 - Legalizes hemp cultivation in accordance with certain regulations (2014 Farm Bill only permitted research on industrial hemp under narrow circumstances).
 - Amended the CSA by declassifying hemp as a Schedule I controlled substance and shifting its supervision from the DEA to the USDA.



New USDA Hemp Rule

- On October 29, 2019, the U.S. Department of Agriculture released its long-awaited interim rule for the domestic production of hemp:
 - Before the rule, multistate CBD manufacturers, distributors and retailers struggled to comply with a mishmash of state laws
 - New rule gives the USDA power to approve hemp production plans developed by states and Native American tribes
 - Must include testing requirements to ensure that marijuana is not grown under the program, and steps for disposing of plants and licensing requirements for farmers.
 - States and Native American tribes may no longer prohibit the interstate transport of hemp that has been legally grown under the program



FDA Oversight

- US Federal Policy Overview re Medical Marijuana
 - In 2016, the FDA reviewed cannabis research in connection with petitions to reschedule marijuana and related extracts.
 - In 2016, the FDA and DEA rejected a petition to reschedule marijuana, but indicated an openness to expanding scope of research.
 - No applications to become federally-approved cannabis suppliers have yet been granted.
 - From 2016 - present, the FDA issued numerous warning letters to CBD extract distributors.
 - In 2018, the FDA invited comment in the federal register re potential rescheduling in connection with the World Health Organization & international treaties.
 - The docket was reopened September 2019 for additional comment.

The logo for the U.S. Food and Drug Administration (FDA), consisting of the letters 'FDA' in a bold, white, sans-serif font against a blue background.

FDA Oversight

- FDA Approved Cannabis-Related Drugs

- Marinol (dronabinol) (1985)

- Synthetic THC
 - Indicated for nausea in chemotherapy patients



- Cesamet (nabilone) (1985/2006)

- Synthetic THC-like cannabinoid
 - Indicated for nausea and neuropathic pain



- Epidiolex (IND/EAP):

- Indicated for epilepsy (now FDA approved)





Drug Made From Cannabis Plant Gets Backing From FDA Staff

By **Anna Edney**

April 17, 2018 7:55 AM CDT

LIVE ON BLOOMBERG

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- GW Pharma's treatment could be first derived from cannabis
- Drug works against rare forms of epilepsy, FDA staff said



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Pavilion

FDA Oversight

- FDA Pipeline of Cannabis-Related Drugs
 - GW Pharmaceuticals Clinical Trials: Plant-based products
 - Sativex (IND): Indicated for MS
 - Zynerba
 - ZYN002 – transdermal synthetic cannabinoid treatment for rare and near-rare neurological and psychiatric disorders
 - Pre-NDA trial for Fragile X Syndrome



How A Cannabis Company Is Taking A Page Out Of The Pharmaceutical Playbook



Mona Zhang, CONTRIBUTOR

I cover cannabis policy, business, and culture [FULL BIO](#) ▾

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Thank You

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**CANNABIS IN PERSONAL INJURY LITIGATION:
ALLEGATIONS OF MISLABELING AND INJURIES FROM
PRODUCT AND DELIVERY SYSTEM USE**

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NEW OPPORTUNITIES FOR PERSONAL INJURY ATTORNEYS TO OBTAIN JUSTICE

- Personal injury attorneys are not used to thinking about marijuana as a cause of personal injuries and may not recognize a case. However, marijuana has been shown to cause many personal injuries and attorneys should be aware of potential liability claims.

PERSONAL INJURY DAMAGE REPORTS

1. World Health Organization - addiction, damage to children, pregnancy
2. The American Psychiatric Association - onset of mental illness
3. National Institute on Drug Abuse (NIDA) - pregnancy, mental illness, addiction, suicides
4. The 2017 National Academy of Sciences (NAS) - lung damage, mental illness, addiction, car crashes, low birth weight
5. FDA - warning letters, advisories, there are many false medical claims
6. DEA - Denial of Petition for Rescheduling - marijuana not safe or effective as a medicine – list of damages marijuana causes
7. HHS - brain damage, pregnancy
8. American College of Obstetricians and Gynecologists - pregnancy, damage to children
9. Pediatricians - damage to children

CIVEL EXPERTS

- CIVEL HAS A LIST OF MARIJUANA EXPERTS THAT ARE AVAILABLE TO ATTORNEYS

HIGH THC LEVELS

The delta-9 tetrahydrocannabinol (THC) in marijuana causes the “high” and leads to addiction, mental illness, violence, crime, traffic deaths, and many health problems. Marijuana products of today can reach 99%.

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US SURGEON GENERAL

- “There is no such thing as “medical” marijuana.”
- <https://m.youtube.com/watch?v=YeVs7aTh9vw>
- There is the risk of physical dependence, addiction, and paranoia, and psychosis. Edible marijuana takes time to absorb and to produce its effects, increasing the risk of unintentional overdose.
- THC can enter the fetal brain from the mother’s bloodstream and disrupt the endocannabinoid system, which is important for a healthy pregnancy and fetal brain development
- Marijuana use in pregnancy is associated with lower birth weight
- There is a misperception of the safety of marijuana.
- <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html>

VICTIMS OF THE MARIJUANA INDUSTRY

- Children with birth defects
- Accident victims
- Crime victims – marijuana is linked to violence and DUI
- Employers
- Environmental damage from marijuana grow operations
- Marijuana consumers damaged by contaminated products - pesticides, heavy metals and fungus.
- People who suffer mental illness due to marijuana use
- People who suffer physical disease due to marijuana use
- Property owners
- Schools - lawsuit over vaping
- Workers and farm employees in the marijuana industry

VAPING

- As of October 22, 2019, a total of 1,604 cases of vaping related illnesses including 34 deaths, were reported to the US Center for Disease Control (CDC).
- Use of THC-containing products in the 3 months preceding symptom onset was reported by 86% of patients.
- **Any use of THC-containing products was reported for 84% of patients who died**
- <https://www.cdc.gov/mmwr/volumes/68/wr/mm6843e1.htm>
- <https://learnaboutsam.org/marijuana-vaping-outbreak-not-just-a-black-market-issue/>

Marijuana and Addiction

- 30% of those who use marijuana may develop some degree of marijuana use disorder. Those who begin using marijuana before the age of 18 are 4 to 7 times more likely to develop a marijuana use disorder. Studies suggest that 9 % of people who use marijuana will become dependent on it rising to about 17 % in those who start using in their teens.
- <https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-addictive>

DSM 5

In the DSM 5 cannabis abuse and dependence are now considered part of the same substance use disorder, or simply, cannabis use disorder.

High levels of THC such as 99% THC are more likely to cause problems.

CANNABINOID HYPEREMESIS SYNDROME AND OTHER DISEASES

- Studies show that chronic use of marijuana can lead to Cannabinoid Hyperemesis Syndrome (CHS) which is a condition with recurrent bouts of severe nausea, vomiting, and dehydration. CHS usually occurs in people under 50 years of age and with a long history of marijuana use. CHS can lead users to make frequent trips to the emergency room, but can be resolved when a person stops using marijuana. Cannabis hyperemesis syndrome can result in kidney failure and death.
- Marijuana is also linked to brain damage, cancer, cardiac problems and many other diseases. See: FDA Submissions Marijuana as a Medicine - Policy, Side Effects, Specific Illnesses at www.civel.org

LAWS THAT APPLY TO THE MARIJUANA INDUSTRY

- The “marijuana industry” referred to here are those who illegally, negligently or fraudulently produce, market, or distribute marijuana. Virtually all are in violation of federal law.
- Since marijuana is used in foods, as a medicine, and to intoxicate people, the personal injury laws that apply to foods, medicines and intoxicants (alcohol) will apply. The claims in lawsuits against the tobacco, opiate and prescription drug industries can also be used against the marijuana industry.

STATES' RIGHTS

- Regulation of marijuana is not a “states rights” issue. *Gonzales v. Raich*, 545 U.S. 1 (2005). *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).
- In *United States v. Hicks*, 722 F.Supp.2d 829 (ED MI 2010) the court stated that it is indisputable that state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana.

MARIJUANA IS A “MEDICINE” OR IS ITS USE MALPRACTICE?

- Unless a marijuana product has been approved by the FDA as a medicine under the federal Food, Drug and Cosmetic Act (FDCA) it may be neither safe or effective and puts patients at risk and is illegal under federal law. 21 U.S.C.A. § 321 (g)(1) and (p). Because the FDA has only approved one botanical product as a medicine, all of the other medical claims for botanical marijuana can be considered to be false claims under the FDCA. 21 U.S.C. § 321(g)(1) and (p); 21 U.S.C.A. § 331 and 355 (b)(1)
- “the presence of FDA marketing approval obviously is powerful evidence that a drug has currently accepted medical use and accepted safety for use under medical supervision.” *John Doe, Inc., v. Drug Enforcement Administration*, 484 F.3d 561, 571 (CA DC 2007).

CAN A DRUG BE USED THAT IS NOT APPROVED BY THE FDA?

- A drug can also meet the following test:
- The drug's chemistry must be known and reproducible;
- there must be adequate safety studies;
- there must be adequate and well-controlled studies proving efficacy;
- the drug must be accepted by qualified experts; and the scientific evidence must be widely available. *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131,1135 (CA DC 1994).
- According to the FDA and the DEA, botanical marijuana has not met these tests primarily because the quality of the studies cited for marijuana as medicine do not come close to satisfying FDA standards for safety and effectiveness. 81 FR 53767-01, 2016 WL 4240243 (August 12, 2016)

FEDERAL STANDARD OF CARE FOR “MEDICAL” MARIJUANA

- A provider may be liable to a patient, or a third party, for the adverse consequences of violating a standard of care. A physician who assists a patient to obtain marijuana in violation of federal law may face a malpractice claim for recommending a drug for which there is no standard of care or approval under federal law.
- Our national standard for medicine approval is usually determined by the FDA.

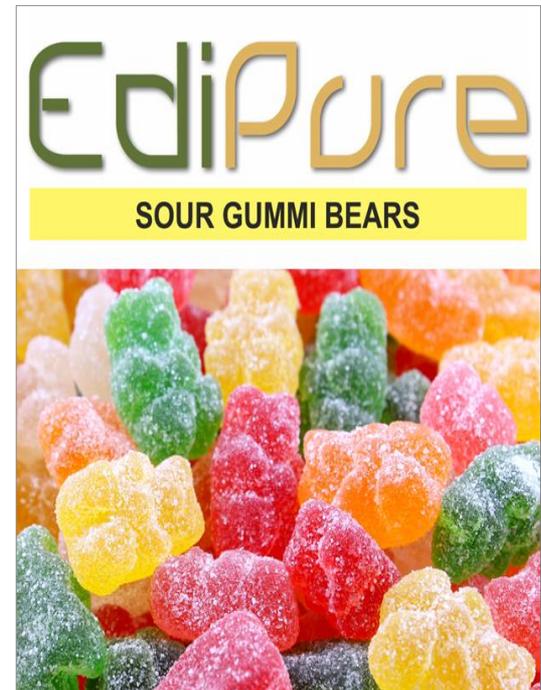
MARIJUANA IN FOODS

- The FDA's position is that it is unlawful under the FDCA to introduce food containing added CBD or THC into interstate commerce, or to market CBD or THC products as dietary supplements.

Marijuana-infused foods



All of these foods are infused with marijuana concentrates and are sold in states that have legalized marijuana for medical or recreational use.





VENUE

- A malpractice case may be removed to or initiated in federal court if there is a “federal question.” A violation of federal law regarding use of marijuana may present such a federal question. *Pharmacann Penn, v. Development Superstition*, 318 F.Supp.3d 708 (ED PA 2018).

CAUSES OF ACTION

THERE ARE MANY

NEGLIGENCE

- Negligence is a deviation from the standard of care in producing, selling or recommending marijuana. This standard is the “highest care,” because the product is going into the human body.
- Negligence can be failure to test, failure to inspect, inadequate directions for use, failure to warn, design fault and statutory liability.

FALSE CLAIMS

- There is now a class action lawsuit regarding false medical claims for marijuana and for violations of the federal securities laws. *Skibbe v. Curaleaf*, 1:19-cv-04486-13 (E.D. N.Y. 2019)
- Many CBD products have been shown by the FDA to not be pure or safe and CBD companies have made many false medical claims. See: Food and Drug Administration warning letters from 2015 to 2019. Source: Warning Letters and Test Results for Cannabidiol-Related Products, Food and Drug Administration, www.FDA.gov.

BREACH OF WARRANTY AND CONTRACT CLAIMS

- A breach of implied warranty claim may have to show that the marijuana product was not reasonably fit for the intended purpose for which it was sold such as due to contamination.
- Breach of contract claim arises when a buyer enters into a contract to purchase marijuana and the product was not what it was represented to be or there was more danger in its use than expected.
- Contracts regarding marijuana may be upheld as a matter of federal law. *Williams v. Eaze Solutions*, 2019 WL 5312956 (NDCA 10/21/2019)

STRICT LIABILITY

- Strict liability may apply to marijuana products that are contaminated, defective or decomposed or that may otherwise fail to meet standards.
- Under federal law marijuana is not considered to be safe and effective unless approved by the FDA. To use it without FDA approval may impose strict liability.

CLAIMS BASED ON STATE CONSUMER LAWS

- In a case against opiate manufacturers, Ohio alleged that drug companies should never place their desire for profits above the well-being of their customers or the communities where those customers live. They brought claims such as:
 - Public nuisance, Ohio Product Liability Act
 - Public nuisance, Ohio common law
 - Ohio Consumer Sales Practices Act
 - Medicaid fraud
 - Common law fraud
 - Ohio Corrupt Practices Act.
- Source: Complaint, State of Ohio ex. rel DeWine v. Purdue Pharma, et. al., Common Pleas Court of Ross County, Ohio, filed May 31, 2017.

INFORMED CONSENT

- A provider has a duty to explain, in terms understandable to the patient, what the provider intends to do. This is to protect the patient's right to self-determination in medical treatment. This cannot be done with marijuana because there is no agreement as to dosing and there is a lack of scientific evidence that marijuana can effectively or safely meet all the false claims made for it.

FAILURE TO WARN

- A drug manufacturer has a duty to properly prepare a drug and include proper directions and warnings.
Restatement Third, Torts: Prod. Liab. § 2.
- Inadequate warnings about nonobvious risks that the manufacturer knew or should have known may render a product “defective or unreasonably dangerous.”
- Plaintiffs may have a claim that the marijuana industry failed to warn people about the many acute effects of THC.

RISKS OF “MEDICAL” MARIJUANA

- As with any drug there may be risks from marijuana use that could require warnings including:
- Health risks.
- Harmful interaction between marijuana and a food, beverage, dietary supplement or another drug.
- Marijuana may cause side effects.
- Acute effects of high potency marijuana THC products.
- Misrepresenting marijuana as safer than alternatives.
- Adverse incidents such as overdoses, death, mental illness, suicide, addiction, etc.
- There are health risks for mother and unborn child.
- The risk of operating machinery while using marijuana.
- The marijuana product was produced without regulatory oversight for health, safety, or efficacy.
- The intoxicating effects of marijuana edibles may be delayed.
- There may be nonorganic pesticides, fungicides, and herbicides used during the cultivation of the marijuana.
- There are age limits for consumption.
- Warning about marijuana use and mental illness and depression and suicide

AIDING AND ABETTING - VIOLATION OF FEDERAL CRIMINAL LAW

- Under some state laws, medical care providers assist patients to obtain marijuana. These actions may violate federal law by acting with specific intent to provide the patient with the means to acquire marijuana. *Conant v. Walters*, 309 F.3d 629 (CA 9 2002); cert denied *Walters v. Conant*, 540 U.S. 946 (U.S. Oct 14, 2003).

FAILURE TO PROPERLY LABEL

- Some states require labels on marijuana products, but they do not come close to FDA requirements for labels. Marijuana consumers may rely on improper labeling and suffer damage.

CONTAMINATION

- Abundant sources document that many marijuana products have chemical contamination, pesticides, heavy metals, mold and fungus, even in “regulated” marijuana states. Marijuana products are smoked, inhaled through vaporizers, ingested in food and drinks and so pesticides, fungus and solvents are also being inhaled and ingested. www.civel.org
- In Colorado, plaintiffs brought a class action against a marijuana supplier claiming it used the pesticide Eagle 20, which was not an approved pesticide for use on marijuana and turns to cyanide when heated. *Flores v. LivWell, Inc.*, Case No. 2015-cv-33528 (D.CT Denver County, CO, 2015S)

THIRD PARTY ENDANGERMENT

- Under the influence of marijuana people show the same lack of coordination as those who had too much alcohol. This can cause car crashes and workplace accidents and business losses. Providers could be liable for these injuries without proper warnings or care.
- The manufacturer of Marinol, an FDA approved form of synthetic THC used as a medicine, warns that: **“Do not drive, operate machinery, or do other dangerous activities until you know how Marinol affects you.”**

LOSS OF A CHANCE DOCTRINE

- This doctrine applies when a provider fails to diagnose an illness and the delay in treatment reduces the plaintiff's chances of survival. Use of marijuana instead of conventional treatment could also cause a loss of a chance to get well.

AGGRAVATION OF A PRE-EXISTING CONDITION

- The negative effects of marijuana can cause aggravation of pre-existing conditions such as mental illness, heart disease or addiction.

OTHER MALPRACTICE CLAIMS

- Failure to detect, treat or cure marijuana's side effects.
- Failure to keep up to date on the science on marijuana.
- Failure to be aware of contraindications to use of marijuana.
- Failure to administer a proper medical examination or to have a bona fide physician-patient relationship.
- Allowing the patient to become addicted.
- Failure to exhaust alternative safer FDA approved medical treatments.
- Failure to properly monitor the patient's use of marijuana.
- Failure to properly determine the dose of marijuana. Creating a standardized botanical dose poses major difficulties - especially with marijuana where there are widely varying strains and large numbers of chemical components about which little is yet known.

ENVIRONMENTAL CASES

- Pesticides
- Heavy metals
- Fungus
- Water contamination
- Wildlife deaths
- Private rights of action - California Proposition 65
- SILENTPOISON.COM

SERVER LIABILITY - DRAM/GRAM SHOP AND SOCIAL HOSTS

- There is server liability for marijuana stores that sell medical or recreational marijuana to customers who then kill or injure others in car crashes or other accidents.
- These are statutory or case laws that provide that a person (can include an employer) who serves an intoxicant to an intoxicated individual may be liable for the damages caused by such individual. In some states, a server may also be liable for injuries sustained by the intoxicated individual.

DRUG DEALER LIABILITY ACT

- Several states have passed laws that make drug dealers civilly liable to those injured by a driver under the influence of drugs or families who lose a child to illegal drugs and others injured by illegal drugs.
- Plaintiff need only prove that a defendant was distributing illegal drugs in the community
- That the distributor was distributing the same type of drug used by the user
- The defendant's distribution in that community was during the time that the user was using.
- The plaintiff need not prove that the drug user received a specific defendant's illegal drugs.

OPERATING A MARIJUANA BUSINESS IS FEDERAL RACKETEERING

- Irrespective of Department of Justice enforcement policy, marijuana businesses, **investors, and those who conspire to assist them**, face the risk of civil liability under the Racketeer Influenced and Corrupt Organizations Act (“RICO”). RICO makes it unlawful for any person to conduct the affairs of an incorporated business or other enterprise through a pattern of “racketeering activity.” 18 U.S.C. § 1962
- RICO’s definition of “racketeering activity” includes violations of the federal drug laws as well as money laundering. 18 U.S.C. § 1961(1). Those who operate an incorporated business devoted to the cultivation and sale of marijuana easily satisfy most of the elements of a violation of RICO.

CIVIL RICO - A BOUNTY FOR LAWYERS

- RICO creates a private right of action for “[a]ny person injured in his business or property by reason of a violation” of the statute. 18 U.S.C. § 1964.
- Successful civil RICO plaintiffs are entitled to recover treble damages and attorneys’ fees. These extraordinary remedies change the economics of such suits, creating a bounty for plaintiffs and lawyers who can prove an injury caused by a business’s racketeering activity.

NEW VISION HOTELS V. MEDICAL MARIJUANA OF THE ROCKIES

- Plaintiff was a Holiday Inn franchisee faced with loss of high school ski team business due to the planned opening of nearby recreational marijuana shop.
- The plaintiff asserted RICO claims against an array of businesses that provided services to the planned marijuana shop and collected \$70,000 in settlements from the shop's accountant and the underwriter of its tax surety bond.

SAFE STREETS ALLIANCE V. HICKENLOOPER

- The Safe Streets plaintiffs own property in Colorado that is adjacent to a marijuana cultivation facility that emits a pungent marijuana odor. The plaintiffs filed a civil RICO suit in federal court in 2015, alleging that the facility's smell interferes with their use and enjoyment of their property and diminishes its value.
- Foul odors, noise, stigma, and reduced property values are very common problems caused by marijuana facilities

THE TENTH CIRCUIT'S SAFE STREETS RULING

- The trial court initially dismissed the RICO claims, ruling that the plaintiffs had not sufficiently alleged an “injury to business or property” under RICO. In June 2017, the Tenth Circuit overruled the trial court, holding that the plaintiffs could prevail by showing any of the following injuries:
 - that the odor emitted by the facility interferes with use and enjoyment of the plaintiffs’ property
 - that the odor diminishes the market value of the plaintiffs’ property
 - that the stigma associated with the facility diminishes the value of the plaintiffs’ property. Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 884-91 (10th Cir. 2017).
- The Tenth Circuit’s opinion also reviewed the other elements of a civil RICO claim and explained how a typical marijuana business satisfies each of them. 859 F.3d at 881-84.
- Plaintiffs lost at trial. Bad facts?

CRIMSON GALERIA LIMITED PARTNERSHIP V. HEALTHY PHARMS, INC.

- The plaintiffs own several buildings near Harvard Square in Cambridge, MA – an urban area with some of the highest property values in Greater Boston. In September 2017, the plaintiffs filed suit in federal court challenging the opening of a nearby medical marijuana shop.
- Before suing, the plaintiffs retained one of the leading commercial real estate appraisers in New England to assess the effect of the shop on nearby property values. The appraiser estimates that the plaintiffs' buildings will collectively lose \$26 million in market value if the shop remains open.
- The RICO defendants asked the trial court to dismiss this case, essentially arguing that the Tenth Circuit's decision in Safe Streets was wrong. The court denied the motion and the case settled.

RICO AND EMPLOYMENT

- There is a recent RICO case involving false claims about a marijuana product that led to a truck driver losing his job when he tested positive for THC on a drug test after being told by the manufacturer that a CBD product had no THC. *Horn v Medical Marijuana*, 15-CV-701-FPG (WD NY 2019).
- There is a RICO whistle blower case just filed in the Arizona U.S. District Court. Plaintiff was terminated from his employment for cooperating with DEA in an investigation against his former employer. This termination was a predicate act of racketeering for the purposes of RICO and was committed in furtherance of the goals of the racketeering organization.

MORE LEGAL INFORMATION ON MARIJUANA AND THE LAW

- Evans, David G., Marijuana and Product Liability; Cannabis Law 300:100 (available on Westlaw).
- Evans, David G., Medical Marijuana and Medical Malpractice Liability, Cannabis Law 500:100 (available on Westlaw).
- Evans, David G., Drug Testing Law Technology and Practice (available on Westlaw).
- The CIVEL website also has other legal and technical information
- www.civel.org

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