

CANNABIS LAW DESKBOOK

Attorney General Alliance

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Managing Editors

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Part 1

BACKGROUND AND HISTORY OF STATE CANNABIS REFORMS

Chapter 1

Cannabis Law: Moving Fast *and* Slow

By Austin Bernstein and Bruce Turcott, Managing Editors

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§ 1:1 Reflections on the development of cannabis law

As the managing editors of the *Cannabis Law Deskbook*, and each having advised and represented state agencies tasked with the responsibility of regulating adult-use and medical cannabis markets, we pause to offer some reflections on the pace of cannabis reform and the creation of this First Edition.

In his Nobel Prize winning book, *Thinking Fast and Slow*, Richard Kahneman describes how the human brain utilizes two different systems—one emotional, the other logical—to make decisions. The moniker aptly describes the development of cannabis law. Depending on one’s vantage point, cannabis law moves *fast* and/or *slow*.

Advocates struggling to expand access to patients and rectify harms caused by disproportionate enforcement of the War on Drugs may feel the status quo is moving five miles below the speed limit. For law enforcement officials, trained for decades to

respond to cannabis as an illicit substance that automatically provides probable cause to stop and search, the complexity of changing laws may be perceived as something *done to you*, rather than *with you*. For regulators and their counsel, citizen initiatives mandate the rapid design and creation of formerly illegal industries from scratch, often requiring standing-up new government programs in the matter of months. For citizens, cannabis legalization represents a sea change in what is culturally acceptable and surrounded by much uncertainty. For thought leaders in academic and scientific circles, accustomed to policy changes based on deliberate data collection and analysis, choices made to design intrastate reforms may be viewed as putting the proverbial cart before the horse. And for parents and public health advocates concerned with the impact of tetrahydrocannabinol (THC) consumption on the developing brain, the rapid proliferation of new intrastate markets may be alarming.

Compounding the challenges of state reform is the disconnect with federal law. Cannabis, defined as “marijuana” under federal law, is classified as a Schedule I narcotic in the Controlled Substances Act, which prohibits its cultivation, manufacture, distribution, possession, and use. In response, states have developed strict regulatory requirements to protect consumers and align with federal guidance issued under the Obama administration. Meanwhile, those that question the long-term viability of intrastate-only markets may perceive the pace of federal reform to be lagging, especially regarding banking, taxes, and access to scientific research.

Oh! As if all that is not confusing enough, “marijuana” proven to contain less than 0.3% THC is classified as “hemp” by the federal government under the 2018 Farm Bill and is legal to manufacture. However, hemp-derived substances, like cannabidiol (CBD), that are infused in consumer products may not technically classify as legal under federal food and drug law, unless the ingredient has been pre-approved. For readers grappling with these complexities, federal reforms to hemp laws moved suddenly, while federal response is slow relative to the burgeoning hemp-derived products market. And, yet again, state reforms for hemp-derived products are moving rapidly, but in different directions.

Despite these legal complexities, public opinion, financial investment, and consumer demand are at all time highs. U.S. domestic sales of cannabis topped out in 2020, with estimates of sales in the tens of billions of dollars. Perhaps unlike other social policy changes, cannabis reform has been accelerated by economic drivers. Business entrepreneurs, operators, and investors

recognize cannabis markets as a significant opportunity, and everyone wants to be positioned as a first mover when a new state comes online.

On one hand, market maturation brings sophisticated business practices, and accounting and legal counsel, that may result in consumers and patients accessing higher quality and tested products. For example, in early adult-use markets, although prohibited, it was not unusual for consumers to purchase cannabis in zip-lock baggies! Today, the packaging and labeling of cannabis products better resembles packaging of pharmaceutical grade drugs and other packaged goods. On the other hand, motives to return shareholder investment may result in business and marketing practices that take advantage of consumers, especially youth.

For those of us public sector attorneys in the trenches of developing, refining, and enforcing cannabis laws, the cycle of reform is a constant evolution. Markets develop, emerging issues and state lobbyists pressure legislators and executives to change policy objectives, agencies respond to mandates or exercise discretion to codify statutory gaps, enforcement actions remove noncompliant actors, and the cycle repeats.

Public health related challenges in late 2019 offer a prime example of the constant evolution of cannabis law. Before the COVID-19 pandemic, state policy makers and public health authorities responded with agility to rising lung illnesses and deaths associated with vaping products, known as e-cigarette or vaping product use-associated lung injury (EVALI). Although the ultimate culprit remains elusive, most agree the cause was linked to counterfeit electronic device products infused with cutting agents unsafe for consumption in the lungs, such as Vitamin E acetate. States responded in a variety of ways, placing products on hold and amending legislative and regulatory requirements to ban certain additives.

Speaking of public health, with the innovative spirit that marks this industry, new types of products have proliferated. The testing of cannabis flower and products is critical to protecting consumers and patients, and state programs have well developed laboratory testing programs. However, given the history of federal prohibition on researching the cannabis plant, there has been a lack of generally-accepted scientific protocols for consistency in testing procedures, and these are just being developed by the scientific community.

In the realm of public safety, the emergence of adult-use cannabis markets has caused challenges for those in the law enforce-

ment community regarding poly-substance impaired driving, distinguishing regulated cannabis from illicit cannabis, and responding to illicit market and grey-market operators who use a variety of tactics to conceal their operations. Yet, research conducted by Washington State University suggests legalization has had no statistically significant impact on crime.

Indeed, all stakeholders are affected by the legal challenges that accompany state reform of cannabis.

Therefore, the intended audience of the *Cannabis Law Deskbook* is a reader involved in the development of cannabis law and policy. A primary audience is the legal community, and in particular state, local, and federal public sector practitioners charged with developing and enforcing regulatory structures and rules to govern cannabis activity in their jurisdictions. Secondary audiences include the growing private sector legal community that provides legal services to licensed cannabis businesses, the cannabis businesses themselves, and ancillary businesses across the U.S.

The *Cannabis Law Deskbook* is intended to provide readers with a cogent analysis of national and localized issues, ranging from public health and safety to social equity in the marketplace, protecting consumers from bad actors, and federalism. The *Deskbook* analyzes fundamental aspects of state cannabis programs and their policy objectives, while comparing similarities and differences among the states. It is a practical tool for those who provide legal advice to state and local government policymakers, businesses operators, and others. Ultimately, we hope the *Cannabis Law Deskbook* will be a roadmap through the complex patchwork of laws, regulations, and public policy goals guiding the cannabis industry in the United States.

The rollout of novel and varied cannabis regulatory programs on a state-by-state basis may be confusing to consumers, businesses, and law enforcement. As chief legal officers and stewards of the public trust, State Attorneys General and their staff are uniquely positioned to help clear some of the confusion.

§ 1:2 Who are the contributing authors?

Cannabis Law Deskbook is a co-publication of Thomson Reuters and the Attorney General Alliance (AGA). The AGA, an affiliate of the Conference of Western Attorneys General (CWAG), is a bipartisan 501(c)(3) non-profit educational organization that convenes Attorneys General, states, organizations, countries, and public and private partners throughout the world. Attorneys General and their staff are responsible for defending state laws,

including initiatives passed by voters, that legalize cannabis within their states. As the legal advisors to state agencies, their ultimate client is the people of the state they represent.

Recognizing the need for increased coordination, in the fall of 2019 the AGA launched a Cannabis Project to serve the State Attorney General community as a central and objective clearing house for information gathering and sharing. The Cannabis Project aims to increase multi-jurisdictional collaboration by sharing best practices specific to cannabis legislation, regulation, and litigation. The Cannabis Project's core functions are to *study* developing trends in cannabis law, *educate* Attorneys General and their staff on those trends, and *convene* a forum for dialogue on how cannabis law might protect public safety and consumers, and ensure the rule of law, while respecting the role of state experimentation as laboratories of democracy.

The most consistent piece of feedback received throughout the first year of the Cannabis Project was a request for a simplified and consolidated accounting of the patchwork system of cannabis laws. Reflecting upon the success of the American Indian Law Deskbook published by CWAG with Thomson Reuters, we identified an opportunity for the Attorney General community to provide clarity and guidance.

The Cannabis Project recruited, organized, and managed the contributing authors from within the State Attorney General community and their client agencies. The contributing authors are subject matter experts on cannabis law and policy from over a dozen jurisdictions. They are deputy and assistant attorneys general and, in some cases, in-house counsel or staff to state and local regulatory agencies. Their contributions were voluntary and on a *pro bono* basis. As managing editors, we express sincere appreciation to the contributing authors for their dedication to the *Cannabis Law Deskbook* and to promoting a better understanding of cannabis law and policy.

§ 1:3 Structure and overview of the Deskbook

The *Cannabis Law Deskbook* is organized into five main parts. Part One sets the table. It contains chapters that offer a historical accounting of state reforms, federal responses, and issues related to the conflict between state and federal law.

Parts Two and Three are the core substantive content of the book regarding cannabis regulation in the United States. Part Two offers a thorough accounting of the policy objectives articulated within state cannabis programs. Issues such as state enforcement priorities, incentives to market participants, local

authority, taxing systems, dealing with the illicit market, and social equity are all addressed.

Part Three identifies the “nuts and bolts,” of state adult-use programs and examines how those systems function: rulemaking, licensing and types of licenses, ownership, track and tracing, testing, packaging and labeling, advertising regulations, due process considerations, and enforcement and administrative actions.

Part Four addresses the legal complexities regarding hemp and hemp-derived products.

Part Five provides readers with a thorough accounting of how the Canadian federal government designed and implemented a federal regulatory system. The Canadian regulatory framework offers important insights and comparisons for practitioners grappling with how to design and implement cannabis laws in the U.S.

Each chapter presents an analysis of the fundamental legal and public policy questions embedded in a particular aspect of cannabis law. The authors showcase how legislatures, agency heads and regulators, and the courts have addressed the public policy issues. As compared to other bodies of law, cannabis law is nascent. The *Cannabis Law Deskbook*, therefore, relies heavily on understanding the patchwork system of state statutory law and agency regulations.¹ Precedential case law is conspicuously light at this stage, but growing.

This *Cannabis Law Deskbook* will evolve to track legal, policy, and market developments. An annual print update will be provided in soft cover. Subscribers to the Proview ebook, to be made available shortly after the first edition is published, can expect updates more frequently, which will be incorporated and expanded on in the annual print edition. The *Deskbook* will also be available on Westlaw. The content on Westlaw will be updated as important changes in state and federal law dictate. Updates will capture issues arising in legislative, regulatory, and litigation domains.

In a body of law that is moving at breakneck pace relative to

[Section 1:3]

¹A note on terminology. By now, readers may have recognized that one of the fundamental challenges with the patchwork set of laws and regulations governing cannabis is the lack of a consistent terminology. For example, some jurisdictions refer to “cannabis,” others to “marijuana.” States refer to non-medical marijuana as either “adult-use,” “retail,” or “recreational.” Accordingly, terminology may vary with the jurisdictions being discussed. In future editions we hope to add a glossary to help find a way through this patchwork.

other legal areas, we expect there will be readers who have more questions than will be answered in these pages. We welcome your feedback on how to refine, expand, and improve this tool, which you can submit to abernstein@agalliance.org.

Let us return to our metaphor of cannabis law moving both fast and slow, as intrastate cannabis laws and regulated marketplaces continue to mature, and recognizing the uncertainty surrounding the federal government's position, it will be important for practitioners to balance both logical and emotional inputs. The need for accurate and robust data collection, reflection, and adjustment cannot be overstated. Policy makers, practitioners, and advocates must also pay special attention to the considerations, frustrations, and desires of a range of stakeholders impacted by a state's decision to reform cannabis laws.

For states that are either recently charged with building adult-use markets or expect to be soon, lessons learned from the early-adopting states are presented here. For states already implementing adult-use programs that need refinement, their needs are also addressed. We hope the *Cannabis Law Deskbook* will spot the critical issues for you and provide the analysis necessary for reaching a deeper understanding and better serving the public interest in your important work.

