

UP IN SMOKE

No, there are not free samples.

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A LITTLE HISTORY

- **In Colonial United States hemp was a crop mandated by the Crown. Cannabis was widely used for medicinal**

For something called 'weed' cannabis is deceptively complex and hard to grow.

Cannabis has 3 principal species

- Sativa ("mind high" most common)
- Indica ("body high")
- Ruderalis (dense and fibrous- found in Ukraine and Russia)

Hemp: Dense fibers used for everything from clothing to biofuel

Cannabinoids Can be psychoactive or nonpsychoactive

- Tetrahydrocannabinol (THC) Main psychoactive chemical
- Cannabidiol (CBD) non-psychoactive

Tetrahydrocannabinol (THC): Main psychoactive chemical

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AND MORE HISTORY...

- **June 21, 1788 The Constitution is ratified and includes Article 6: The Supremacy Clause**
"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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A LITTLE MORE HISTORY...

- **John Adams (yes, President John Adams) grew hemp and wrote of "hemp's mind altering capabilities"**
- **In 1910, following a revolution in Mexico, immigrants introduced the recreational use of cannabis.**
- **'20s Louis Armstrong played "Muggles"**

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'30s Harry Anslinger named Commissioner of the Bureau of Narcotics: *"No one knows, when he places a marijuana cigarette to his lips, whether he will become a philosopher, a joyous reveler in a musical heaven, a mad insensate, a calm philosopher, or a murderer."*

'38 marihuana is named as 'dangerous' by the Federal Pure Food, Drug & Cosmetics Act.

1970 the Controlled Substances Act made marijuana a Schedule I Controlled Substance: Production, Possession, Distribution and Use is illegal.

SCHEDULE I OF THE CSA

A) ...has a high potential for abuse

B) ...has no currently accepted medical use in treatment in the United States.

C) ...there is a lack of accepted safety for use of the drug or other substance under medical supervision.

"It shall be unlawful for any person knowingly or intentionally...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance."

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- '71 Computer science students from MIT and Stanford use ARPANET to broker a deal for the sale of cannabis- making pot the first item to be sold on-line.
- '70s & '80s Nixon, Ford, Carter & Reagan
- '70s some states begin decriminalization process: OR, AK, ME, CO, CA, OH, MN, MS, NY, NC, NE
- '96 CA decriminalizes medicinal
- '00s Largest opponents to cannabis regulation are "exiting the electorate"

A LITTLE HISTORY

First Obama term: Raids conducted on over 270 state authorized medical dispensaries. \$300m spent (\$100 million more GW Bush)

'13 the Obama administration issues the Cole Memorandum.

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COLE MEMORANDUM "THE DIRTY 8"

1. Prevent distribution to minors.
2. Prevent revenues from supporting criminal enterprises.
3. Prevent diversion to state without decriminalization.
4. Prevent cannabis activity from being used as a cover for trafficking or other illegal drugs or illegal activity.

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COLE MEMORANDUM

5. Prevent violence and the use of firearms in the production and distribution.
6. Prevent drugged driving.
7. Prevent growth of cannabis on public land.
8. Prevent cannabis use/growth on federal property.

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SESSIONS MEMORANDUM 1/4/18

- Directs that "[i]n deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow well-established principles that govern all federal prosecutions."

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'14 ROHRABACHER-FARR AMENDMENT

- Prohibits DOJ from using funds "to prevent states from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana."

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US V. MACINTOSH (2016)

- **Interprets the Rohrabacher-Blumenauer Amendment to prevent DOJ from prosecuting “individuals who engaged in conduct permitted by the state medical marijuana laws and who fully complied with such laws”**

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A LITTLE HISTORY

- '15: 1% of all electricity in the United States was consumed in the production of cannabis. (3% of all power in California)
- '15: Los Angeles reaches saturation point: there were more square feet of rental/lease space dedicated to dispensaries than Starbucks.
- '17 Study by Seedo found that more cannabis was consumed in NYC than any other city on the planet (more than twice as much as L.A.) 77.44 metric tons consumed yearly (same weight as the Endeavor space shuttle)

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2018: THE "FARM BILL" PASSES AND THE CBD CRAZE ESCALATES

CBD Full Spectrum (whole plant) is Cannabidiol CBD that contains all other cannabinoids found in the cannabis plant including Cannabinol (CBN) Cannabigerol (CBG), and Tetrahydrocannabivarin (THCV) and trace amounts of THC.

CBD Isolate is purified CBD that is isolated from the other cannabinoids.

Marijuana can contain up to 30% THC, Hemp has less than .3% THC. CBD can be derived from either.

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2019: CBD market unlike traditional agriculture crop.

WISCONSIN STATE UNIVERSITY

For many U.S. farmers who planted hemp, CBD boom leaves bitter taste

Introduction

(Theresa) This Madison planted eight acres of hemp on his Wisconsin farm for the first time this year, aiming to cash in on the exploding demand for CBD, a derivative of the plant reputed to ease anxiety and other ailments without the high of its close cousin, marijuana.

Some 10% of U.S. hemp farmers lack a buyer for their crop, often leaving them for alternative, according to a July survey by Whitney Economics. Hemp has less infrastructure than other crops, so farmers cannot rely on selling their crop to a local grain elevator.

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All marijuana is CBD but not all CBD is marijuana

New York prosecutor to drop marijuana charges in Vermont hemp seizure
 Published November 20, 2019

Prosecutors are planning to drop all charges against the man arrested on marijuana possession charges in connection with a case in which 106 pounds of hemp plants shipped from Vermont were mistaken as MJ and seized by the New York Police Department.

The Brooklyn district attorney's office said that Ronen Levy's felony marijuana possession charge will likely be dismissed Dec. 2.

Further, the police claimed that a field test came back positive for marijuana, but those tests often can't distinguish legal hemp from pot.

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THE HISTORY STUFF IS SORT OF INTERESTING- BUT WHY AM I HERE?

Criminal conspiracy laws don't make a legal distinction between touching the plant and not touching the plant- there is no requirement that you "touch the plant"

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CSA CASES OF INTEREST

GONZALES V. RAICH
 - No affirmative defense under the CSA for complying with the marijuana laws of a particular state.

U.S.V. ROSENTHAL
 - Jury prevented from hearing that the alleged criminal activity was decriminalized under state law.

LANDLORD GETS YEAR IN PRISON FOR TENANTS' MARIJUANA OPERATION
 By Steve Elliott
 A Montana landlord with no criminal history has been sentenced to a year in prison for a medical marijuana operation run by his tenants.

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A little insight into the federal government view on medicinal use..

Question 11e on Form 4473 – which asks if the buyer is “an unlawful user of, or addicted to, marijuana ... or any other controlled substance?” – now has a warning printed below it in bold type that states: “The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.”

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WHAT
WENT
WRONG?

- Sally Seller contacts Rosie REALTOR® to list her 3,000 square foot home in Marquette. The exterior of the home is in immaculate condition and Rosie knows the property will not be on the market long. Rosie has looked at comparable properties in the area and is prepared to deliver an amazing listing presentation. Sally gives Rosie a tour of the property and Rosie is somewhat surprised to discover that in the basement one room has two state-of-the-art hydroponic grow stations for cannabis, a sink and disposal system has also been installed for the hydroponic water waste. Sally explains to Rosie that she has a medical marijuana card and at any time has no more than 12 mature plants pursuant to state law.
- Rosie delivers her listing presentation and Sally signs a listing agreement that day. Rosie makes some recommendations for staging the property for showing including that the cannabis should be removed from the property during showings if possible and the room be aired out in advance. Sally expresses some concern due to the size of the grow stations and Rosie volunteers to loan Sally the moving van that her company owns and loans to clients when it's needed.

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HOW SHOULD YOU HANDLE LISTINGS WHERE CANNABIS IS PRESENT?

1

Avoid the unlicensed practice of law.

2

Work with client to ensure that the law requiring home grow be in a locked place in private residence is followed.

3

Use tools provided by the MLS and showing services to provide proper notification concerning unavailable portions of property.

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CLASS QUESTION: WHAT SHOULD RICK HAVE DONE IN PREPARATION OF ACCEPTING CANNABIS CASH?

- Rick REALTOR® has an active real estate practice that involves managing residential properties for several property owners. One of the properties, a single family home, has been rented for several years by Mary. Mary has never been late with her rent and on the occasions when Rick has been inside the property, he has noted that Mary takes excellent care of the property.
- Rick is surprised when Mary drops by his office to let him know that she has changed jobs and is now employed by ABC Cannabis Dispensary. Mary explains to Rick that ABC pays its employees in cash and Mary would like to pay her rent in cash as well.
- The lease is silent as to the form of payment and Rick has accepted cash payments from other tenants in the past, so he updates his file to reflect the new employer for Mary and tells her the cash payments will not cause a problem.

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WHEN CASH IS KING...
CANNABIS-IZING A
LEASE

- **When leasing to a cannabis business, or cannabis employee paying in cash, must have a system in place to process cash payments.**
- **Lease must address any particular requirements of cash process that are different from traditional lease.**

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US TREASURY FINANCIAL CRIMES ENFORCEMENT NETWORK (FINCEN)

- Goal was to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses”
- The **Marijuana Limited filing** means the financial institution’s due diligence indicates that the MRB does not raise any of the red flags as defined in the Cole Memorandum and is compliant with the appropriate state’s regulations regarding marijuana businesses. The financial institution is providing banking services to the MRB.
- The **Marijuana Priority filing** means the financial institution’s due diligence indicates that the MRB may raise one or more of the red flags as defined in Cole or may not be fully compliant with the appropriate state’s regulations regarding MRBs. The financial institution is providing banking services to the MRB while further investigation is being conducted.
- The **Marijuana Termination filing** means the financial institution decided to terminate its relationship with the MRB for one or more of the following reasons:
 - The financial institution’s due diligence indicates that the MRB raises one or more of the Cole red flags.
 - The MRB is not fully compliant with the appropriate state’s regulations.
 - The financial institution has decided not to have marijuana related customers for business reasons.

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WHEN CASH IS KING...

- Prior to leasing, landlord bank should be consulted. Depending on structure, they may have to comply with the requirements of FinCEN memorandum.

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- Several months later, Mary stops by the office to discuss the following situation with Rick: Her mother has been diagnosed with cancer and Mary would like her mother to move in with her while she receives treatment. Mary asks Rick if he would be willing to ask the property owner to amend the lease to remove the no smoking clause so her mother can use medical marijuana while she is staying with her. Rick contacts the property owner who asks Rick if he knows of any reason why he shouldn’t amend the lease and Rick says he doesn’t know of any. The property owner agrees to the change.
- Class Question: What should Rick have checked before making this change?

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PRE-LEASE CONSIDERATIONS

- Is there an underlying mortgage?
 - If yes, does the underlying mortgage forbid illegal activity or illegal use?
 - What are the consequences?
 - Lease acceleration is the most common consequence for this particular breach of mortgage agreement.

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KANOVSKY MEMORANDUM

- What to do when patients using medical marijuana live in federally subsidized housing.
- On January 20, 2011 HUD issued the Kanovsky Memorandum, addressing the question of whether PHAs and owners of federally assisted housing could grant residents reasonable accommodation for the use of medical marijuana.
- HUD emphasized the Quality Housing and Work and Responsibility Act of 1998 which "requires PHAs and owners to deny admission to those households with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a 'controlled substance' as the term is defined by the CSA.

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A TALE OF TWO COURTS...

FOREST CITY RESIDENTIAL MANAGEMENT V. BEASLEY (2014)

- **The court held that the CSA preempted the Michigan Medical Marihuana Act and the Fair Housing Act did not require a federally assisted housing complex to grant the recipient a reasonable accommodation to use medical marijuana in the complex.**

CEASEY V. HOUSING AUTHORITY OF INDIANA COUNTY (2021 PENNSYLVANIA)

- **The Court found that criminal statutes are the purview of the states and ordered the Housing Authority to establish "fair and reasonable standards for determining in what circumstances admission is prohibited for an applicant who is legally using medical marijuana pursuant to state law"**

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• Rick is shocked to receive a call one evening from the local fire department that the property rented by Mary is in flames. He drives to the property and is met by law enforcement who informs him the property is a complete loss and the fire was caused by faulty wiring in a grow light that was being used as part of a system to grow cannabis. Mary is at the property and explains that she and her mother had been growing the cannabis used by her mother to alleviate the symptoms of her illness.

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- **Class Questions:**
Will the property owner have an issue with receiving payment from the insurance provider?
Can a landlord/property owner refuse to allow cannabis to be grown?

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**GOOD
THING I'M
INSURED**

...

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CAUSE OF LOSS

• Cannabis ember?



• Fire



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GROWING...

MOLD?



CANNABIS CULTIVATION?



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**CLARIFYING LAW AROUND INSURANCE OF
MARIJUANA ACT
(CLAIM ACT)**

₿ Prohibit federal agencies from penalizing or discouraging insurers from underwriting or handling claims for a cannabis-related business.

📁 Forbid terminating or canceling the licenses of an insurer solely because the insurer engaged in the business of insurance in connection with a cannabis-related business.

🏠 Officers, directors, and employees of an insurer may not be held liable pursuant to any federal law solely for engaging in the business of insurance for working with a cannabis client.

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CASE STUDY: HERE WE GROW AGAIN

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• Ronald REALTOR has been working with MJ Budd for over a year trying to find the perfect location for his cannabis dispensary. Budd has outgrown his current space and while ideally he would like to purchase his new location, he is open to leasing. Ronald finds what he feels is an ideal location and Budd agrees that it is a workable location. When Ollie, the owner of the property becomes aware that it is Budd wishing to purchase the building he refuses to sell and instead proposes a lease where Budd would pay a low flat monthly rate and a percentage of the dispensary profits.

• Class Question: Is there a downside to this type of agreement?

• Budd refuses the proposed lease arrangement and eventually Ollie agrees to sell the property. Upon closing Ronald expects to receive the commission rate outlined in his agency agreement. Ollie was not represented by an agent. Budd responds to Ronald's request for payment by claiming the agreement was for an illegal purpose and is therefore unenforceable. The agreement clearly stated Roland was to find a location suitable for a cannabis dispensary, a use which is illegal under federal law.

• Class Question: Will Ronald get paid?

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LEASE CONSIDERATIONS

• If owner of property wishes to base rent on % of income- this may make the property owner a partner in the cannabis business and then the state authorization/regulation law requirements come into play.

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CONTRACT ENFORCEABILITY

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MANN V.
GULLICKSON,
2016 WL 6473215
(N.D. CAL.
NOVEMBER 2,
2016)

- Plaintiff Mann sold marijuana business to Gullickson. Gullickson agreed to pay \$400,000 in three installments.
- Gullickson failed to make payment and Mann sued alleging breach of contract.
- Gullickson moved for summary judgment arguing that the contract was void "because it relates to medical marijuana, which is still a prohibited substance" under the Controlled Substance Act.
- The court concluded that "even where contracts concern illegal objects, where it is possible for a court to enforce a contract in a way that does not require illegal conduct, the court is not barred from according such relief."
- Court looks at this and says touching the plant is illegal - possession, cultivation, distribution are in violation of the CSA. Paying what you owe doesn't require touching the plant.
- In the opinion of the court however it cites "the federal government's waiving policy on medical marijuana" in determining that its ruling doesn't "condone or encourage" illegal conduct.

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HAMMER V.
TODAY'S
HEALTH CARE II,
CV 2011-051310
(ARIZ. SUPERIOR
CT. APR. 17,
2012)

Took the opposite approach of Mann v. Gullickson and refused to enforce a contract where funds were loaned to a marijuana business.

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WHAT'S THAT MEAN?

Hammer is pre-Cole, Mann is post-Cole: in a post-Sessions memo analysis- the court may find that there is no distinction in "touching the plant" and find the contract void.

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WHAT SHOULD I DO?

- Parties to a contract may waive defenses to enforcement- agreements with cannabis industry clients should include this waiver.
- Include a waiver of federal court.
- Include arbitration to resolve disputes.

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