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The ABCs of CBD and Hemp: A Primer

By Gregory J. Gamalski*

Hemp and marijuana both come from the cannabis sativa plant but as a result of the Agriculture Improvement Act of 2018 (the “2018 Farm Bill”),¹ cannabis sativa with a THC content of less than 0.3% was removed from the federal controlled substance definition of “marijuana” and was classified as “hemp.” The plant has been used since colonial times and even earlier for a variety of industrial and agricultural purposes, including for fibers such as those used in rope and cordage, fabric, oil from its seeds, building material, and even as a biofuel. Of late, chemical by-products of hemp, mainly the non-psychoactive substance known as CBD, are offered and sold as medications and food supplements by national retail chains. Furthermore, hemp seeds are now processed as food additives, baking flour, protein supplements, and other nutritional uses. All of this is allowed on the generally sound assumption that the psychoactive properties of legalized hemp are below effective psychoactive levels. Hemp THC content cannot be more than 0.3% by dry weight.

Subject to controls discussed below, hemp is generally legal under Michigan law and a claimed odd loophole in current federal regulations may even allow sale of some pharmaceutically active hemp. The loophole is that Delta-8-THC, which is normally extracted from CBD derived from hemp but which still has a psychoactive effect, is slightly different chemically from Delta 9-THC, which is the main psychoactive ingredient in marijuana.² These

various uses, processes and developments create a separate market for hemp and hemp-derived CBD that pose different and generally less complicated issues for attorneys counseling clients in this separate new industry.

I. Federal and State Authorization of Legalized Hemp

Federal authorization of hemp cultivation occurred with the 2018 Farm Bill.³ In Michigan, industrial hemp production was legalized by a section of initiative Proposal 1 of 2018, which essentially legalized recreational marijuana use.⁴ This Proposal was enacted as the Michigan Regulation and Taxation of Marihuana Act. The Act defines “industrial hemp” as:

a plant of the genus Cannabis and any part of that plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of 0.3% or less on a dry-weight basis, or per volume or weight of marihuana-infused product, or for which the combined percent of delta-9-tetrahydrocannabinol and tetrahydrocannabinolic acid in any part of the plant, regardless of moisture content, is 0.3% of less.⁵

from Delta-9, which is the main psychoactive ingredient in marijuana).

1 P.L. 115-334.

2 M. Richtel, *This Drug Gets You High, and Is (Maybe) Legal Across the Country*, New York Times (Feb. 27, 2021), <https://www.nytimes.com/2021/02/27/health/marijuana-hemp-delta-8-thc.html> (Delta-8-THC, which is extracted from hemp, still has a psychoactive effect but is slightly different chemically

3 Pub. L. 115-334.

4 2018 IL 1, MCL 333.27951 et seq.

5 MCL 333.27953(c). Note the precise statement about Delta-9 THC and consider its relationship to the loophole discussed in footnote 2.

* Gregory J. Gamalski is an of counsel attorney with Bodman PLC and 2020 Chair-Elect of the State Bar of Michigan’s Real Property Law Section Council. Mr. Gamalski has made a number of presentations on real estate topics on behalf of the State Bar of Michigan and the Institute of Continuing Legal Education. He is the author of multiple articles published in Michigan Real Property Review.

The Act specifically states that industrial hemp is not marijuana.⁶ Another 2018 Michigan enactment, the Michigan Industrial Hemp Research and Development Act (“Act 641”), became effective on January 15, 2019.⁷ Among other things, Act 641 established the licensing program for persons growing, processing, and handling industrial hemp. More recently, in October 2020, Michigan’s industrial hemp plan was approved by the United States Department of Agriculture (USDA).⁸ Then in early 2021, the USDA published final rules on hemp production, effective March 19, 2021.⁹ In an unusual fit of legislative alacrity, Michigan updated its statutory scheme, aligning it with the new federal standard scheme in March 2021 by passing Public Act 220 of 2020, which updated (and thus repealed and replaced) 2020 PA 137, the Industrial Hemp Growers Act created by Senate Bill 850 of 2020.¹⁰

Legally, hemp cultivation and processing have come into the commercial mainstream and out of the shadow of reefer madness as an acceptable and legitimate agricultural and processing industry. Essentially, processing, cultivating, obtaining, transferring or transporting industrial hemp is not grounds for arrest, prosecution or penalty in any manner and or denial of any other right or privilege.¹¹ Hemp, claimed to be one of the world’s oldest cultivated crops, is now a legal product and industry, authorized under Michigan law. Hemp cultivators and processors must nonetheless pay careful attention to testing issues because if the THC content of the hemp or hemp-derived product

exceeds 0.3%, the hemp crop or product could become illegal. Hemp sellers and processors are responsible for establishing that their hemp products are below those maximum THC levels under the current regulatory regimes.

An October 2019 newspaper article cited great enthusiasm for an initial harvest of hemp by Michigan farmers.¹² At that time, there were 572 licensed growers, who planned to plant 32,614 acres of hemp, and 423 proposed hemp processors. Hemp flowers were to be processed for CBD and hemp fibers were also to be processed for building materials, textiles and paper. There were estimates that hemp production could yield approximately \$10-\$12,000 per acre as compared to corn, which might yield in 2019 about \$540 per acre. In fact, by 2020, in Michigan there were an estimated 13,225 acres and 11 million indoor square feet in actual cultivation, 806 outdoor growers, 350 indoor growers, and 447 processor-handlers.¹³

II. Hemp and Marijuana Pose Different Legal Issues

Michigan and the nation have a complicated history related to cannabis, hemp and marijuana legalization. The federal government banned these products in the 1920s and 1930s as controlled substances, in part to control immigrant workers in the Southwest during the Great Depression. Michigan followed that trend, if not for the same reasons. The bans made no distinction between marijuana as a recreational drug and industrial hemp.

Since hemp is now legal under federal law and some state laws, attorneys counseling clients about the hemp industry are not faced with the perhaps complicated ethical considerations associated with representing clients in the marijuana industry. The question is whether advice and counsel about a matter that is legal under Michigan law nonetheless exposes the lawyer to possible disciplinary proceedings because the conduct contemplated under the Michigan Medical Marijuana Facilities Act and the Michigan Medical Marijuana Act must, by its very nature, contemplate violation of federal law. Since under federal law marijuana remains a so-called Schedule I drug, commentators have suggested rules of professional responsibility

6 MCL 333.27953(e)(ii).

7 2018 PA 641, MCL 286.841. See also H. Lindberg and G. Allesandri, *FAQ on Hemp Licensing and Regulation*, Michigan State University Agricultural Extension Service, Hemp Production (Jan. 23, 2020), <https://www.canr.msu.edu/news/faq-on-hemp-licensing-and-regulation>.

8 Michigan Department of Agriculture Press Release, *USDA approves Michigan’s industrial hemp state plan* (Oct 20, 2020), <https://content.govdelivery.com/accounts/MIDARD/bulletins/2a6de51>.

9 7 CFR 990, 86 FR 5596, Jan. 19, 2021, <https://www.federalregister.gov/documents/2021/01/19/2021-00967/establishment-of-a-domestic-hemp-production-program>. The USDA posted a detailed online seminar about its recent regulations: *U.S. Domestic Hemp Production Program Final Rule Webinar* (March 26, 2021), <https://www.youtube.com/watch?v=cSkGA5Mvy9A>.

10 2021 SB 0816, amending 2020 PA 220, MCL 333.29101 et seq.) The previous version of the Industrial Hemp Growers Act, 2020 PA 137, had been repealed by 2020 PA 220 on Oct. 15, 2020.

11 See MCL 333.27960(i).

12 K. Gray, *Thousands Of Acres Of Hemp Being Legally Harvested In Michigan For The First Time*, Detroit Free Press, (Oct 7, 2019).

13 L. Drotleff, *2020 Outlook: Licensed US Hemp Acreage Falls 9% From 2019, But Grower Numbers Increase 27%*, Hemp Industry Daily, (June 19, 2020), <https://hempindustrydaily.com/2020-outlook-licensed-u-s-hemp-acreage-falls-9-from-2019-but-grower-numbers-increase-27/>

might be breached by attorneys advising clients in the marijuana.¹⁴ However, attorneys working in the hemp and CBD industries are not providing counsel that might be contrary to federal law and thus no issues of legal ethics arise.

On a related note, unlike the marijuana industry, hemp and CBD product growers, processors and sellers do not face banking difficulties with regulated financial institutions. For instance, bank deposits by hemp and CBD producers, processors and sellers will not prompt a bank to file a so-called “SAR” or “suspicious activity report” with financial regulators since the products are, in fact, legal under Michigan and federal law. From business and real estate perspectives, issues that bedevil marijuana entrepreneurs, such as site selection, utility use, secure waste disposal, overall site security, and qualifying workers, staff and investors, are simply not issues in the hemp industry. The problematic zoning regulations and authorizations associated with medical or recreational marijuana do not apply in relation to hemp and CBD related products. Because hemp is essentially a field crop, cultivation generally takes place in an ordinary farm field and does not require the tightly controlled enclosed agricultural operation typical to recreational or medical marijuana cultivation. While typical indoor medical and recreational marijuana facilities require considerable energy and water, hemp cultivation is not likely to have the same requirements. And while Michigan imposes stringent security requirements on marijuana growers, processors and sellers, about the only regulatory requirement related to growing industrial hemp in a field (aside from obtaining the necessary license from the Michigan Department of Agricultural and Rural Development (“MDARD”)) is that signage must be posted indicating hemp is being grown in a particular field location.¹⁵ This is considerably different from the exhaustive regulations governing marijuana grown for medical or recreational use requiring extraordinary site controls and security systems.

¹⁴ The State Bar of Michigan Representative Assembly approached the Michigan Supreme Court about modifications to the Michigan Rules of Professional Conduct (“MRPC”) related to counseling clients in the industry but the Michigan Supreme Court ultimately decided not to modify the Rules as proposed. See Michigan Supreme Court ADM File Nos. 2016-47 and 2016-48. See also Michael Rubin, *Smokin’ Hot: Ethical Issues for Lawyers Advising Clients in States Where Medical or Recreational Marijuana Has Been Legalized*, Continuing Legal Education Proceedings of the American College of Real Estate Lawyers, Mid-Year Meeting, March 28-30, 2019.

¹⁵ MCL 333.29305.

III. The Lighter Regulatory Environment of Hemp

Because CBD and hemp are legally viewed as benign cousins of psychoactive cannabis, they are subject to lighter and limited regulation. Once issued a license from the MDARD, the hemp growing or processing business can begin operations. The licenses are essentially automatically renewed every year.

Act 641 sets forth the framework for Michigan’s licensing program and it governs growing, processing handling, brokering and marketing of industrial hemp. MDARD’s application for a hemp related business license is uncomplicated and does not require the extraordinary vetting imposed on recreational and medical marijuana related businesses other than that an applicant cannot have a felony conviction for a drug-related offense within the preceding ten years.¹⁶

Examination of the MDARD website shows an almost charming near-solicitation of potential hemp industry participants. Its tone is significantly different from that of the Marijuana Regulatory Agency published under Michigan Department of Licensing and Regulatory Affairs (“LARA”) auspices. While the rules and regulations adopted for recreational and medical marijuana run on for dozens of pages and the complicated licensing process can take months, the sum of the early Emergency Rules governing hemp production and products in Michigan was a Hemingway-esque six pages.¹⁷

As of late 2020, MDARD has federal approval of Michigan’s Industrial Hemp Plan, which essentially means that Michigan’s plan complies with the 2018 Farm Bill requirements and the USDA’s Interim Final Rule, which outlines a federal program for growing hemp.¹⁸ Upon the USDA’s approval and effective as of December 2020, key changes that growers need to be aware of include the following:

1. In addition to the legal description of the property that was already required to be submitted to MDARD, growers will be required to submit their hemp acreage directly to the USDA Farm Service Agency.
2. For hemp that is non-compliant, growers must follow the specific notification requirements included in the state plans prior to destruction.

¹⁶ 7 U.S.C. § 1639(e)(3)(B) (i); 297B(e)(3)(B) (i) of 2018 Farm Bill.

¹⁷ See MDARD *Emergency Rules Measuring THC Content In Industrial Hemp* (Aug 15, 2019), https://www.michigan.gov/documents/lara/Industrial_Hemp_663307_7.pdf.

¹⁸ MDARD, *USDA Approves Michigan’s industrial hemp state plan* (Oct 20, 2020), <https://www.michigan.gov/mdard/0,4610,7-125--542773--,00.html>.

3. The MDARD application required applicants to provide a criminal history report; however, under the USDA Rule, this report is required to include any felony drug convictions that occurred outside of Michigan. As a result, growers will be required to use the FBI background tool rather than the previous ICHAT tool that was allowed.
4. Growers will no longer be able to collect and provide their own samples for submission to the MDARD labs for the THC analysis; instead, growers now must make an appointment by contacting the MDARD so that MDARD staff can collect the samples.¹⁹

Each of these changes were implemented to meet the requirements under federal regulations.

Note that a registration or license issued under Act 641 is not alone sufficient for a grower or processor to meet requirements of federal law. There is an additional step, as the MDARD site notes. In order to meet federal requirements, the grower or processor should enroll in the State of Michigan's Hemp Agricultural Pilot Program and enter into a research agreement with the State of Michigan. By doing so, the grower or processor meets the technical federal requirement that the grower or processor participate in a research program. Entering into those agreements appears to be a pro forma exercise and the number of participants is not limited. As noted above, in 2019, there were over 500 authorized hemp growers and over 400 licensed processors.

The actual MDARD application is two pages with seven steps. Several parts of the form merely require a box to be checked, which is surely very different from the complicated qualification process for recreational or medical marijuana.²⁰ According to the MDARD checklist, the grower application merely requires the name and address of the business, contact information, the location of the proposed growing operation and its acreage, a map identifying property entry locations and structures such as greenhouses, and the \$100 application fee. Unusually, the names of licensees need not be publicly disclosed by MDARD.

IV. MDARD, FDA and FTC Issues

There are nonetheless still some quirks to be ironed

¹⁹ *Id.*

²⁰ The hemp grower application can be found at https://www.michigan.gov/documents/mdard/Grower-Application_652868_7.pdf and the hemp handler or processor application can be found at https://www.michigan.gov/documents/mdard/Processor-Handler-Application_652870_7.pdf

out and processors and sellers should take note of those issues. For instance, while CBD derived from hemp is legal to use or possess, the Food and Drug Administration ("FDA") has not yet approved CBD derived from any source as an additive to foodstuffs or as medicine for general use.²¹ Under the 2018 Farm Bill, the FDA has regulatory authority over the production, distribution and sale of hemp. All hemp products must meet applicable FDA requirements; MDARD enforces the FDA standards. In addition, while CBD can be sold as a dietary supplement or as a topical application, it cannot be incorporated into food offered for sale. For example, it would be illegal to market alcoholic or other beverages with a CBD additive under FDA and MDARD rules.²²

Three hemp seed-derived food products are designated as "Generally Recognized as Safe" ("GRAS"). Because hemp seeds do not contain CBD or THC, hemp seed, hulled hemp seed, hemp seed protein powder, and hemp seed oil can legally be used in the U.S. food supply. Any food products made with hemp seed ingredients are subject to the same FDA requirements as other food, of course. Additionally, in Michigan, all food production, including foods made with hemp seed-derived products, is subject to Michigan food related laws and licensing requirements, including following applicable food safety practices.

Nonetheless, the FDA has not approved CBD (as opposed to hemp seeds, for instance) for use in food, drink, dietary supplements or animal feed. And, of course, products derived from hemp with a THC concentration above 0.3 percent are sure to be classified as marijuana and regulated under applicable laws. Thus, one must carefully note the distinction between hemp as a food supplement or additive and the hemp-byproduct CBD as a food additive. Hemp can be added or combined with other foodstuffs for human consumption but CBD, though derived from hemp, is not legally recognized as an additive even though

²¹ Federal Trade Commission, *FTC Sends Warning Letters to Companies Advertising their CBD-Infused Products as Treatments for Serious Diseases, Including Cancer, Alzheimer's, and Multiple Sclerosis* (Sept 10, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-sends-warning-letters-companies-advertising-their-cbd-infused>

²² *Federal Alcohol Regulator Follows FDA, No CBD in Beer, Wine and Liquor*, National Law Review (April 29, 2019), <https://www.natlawreview.com/article/federal-alcohol-regulator-follows-fda-no-cbd-beer-wine-and-liquor>; *Hemp in Food and Dairy Products*, Michigan Department of Agriculture & Rural Development Bulletin (May 3, 2021), <https://content.govdelivery.com/accounts/MIDARD/bulletins/2d76116>

CBD itself is legal and can be consumed, but not added to food offered for sale.

So, for instance, MDARD guidance states hemp may be added to food products by a person doing small-scale production under the Cottage Food Law:

Can I sell hemp-containing products under the Cottage Food Law (CFL)? *Yes. If you obtain the hemp product from an approved source, meet all the criteria to operate under the CFL, and your product is compliant with the CFL. Products cannot contain CBD or ingredients containing THC. Hemp ingredients must meet the FDA GRAS standard as stated above.*²³

With regard to CBD additives, however, the MDARD FAQs answer states:

Can I add CBD to my brownies to sell at the farmers market? *No. CBD is not an approved ingredient and cannot lawfully be added to or included in a food product.*²⁴

Therefore, brownies with CBD from hemp (which are not actually psychoactive) are not allowed, while oddly enough, products with higher THC content using marijuana or marijuana extracts are actually allowed under Michigan's recreational marijuana laws. That seems an unlikely result in some respects.

In addition, the Federal Trade Commission ("FTC") regulates CBD advertising. Under the Federal Trade Commission Act, "it is unlawful to advertise that a product can prevent, treat, or cure human disease unless the seller has competent and reliable scientific evidence substantiating that the claims are true when made."²⁵ In late 2020, the FTC announced a crackdown on CBD products being deceptively marketed. The agency began taking action against sellers of CBD for making unsupported claims about the products by issuing warning letters stating a concern that one or more of the efficacy claims made may

not be substantiated with bona fide scientific evidence. Currently, only one medical use has been approved by the FDA for CBD (a treatment for seizures).²⁶ Moreover, even that particular approved drug uses CBD extracted from marijuana rather than hemp.

V. Conclusion

While laws and regulations related to medical and recreational marijuana use, cultivation and distribution continue to change and evolve, as do criminal penalties, banking regulations and zoning regulations and local ordinances, the legal framework for the hemp and CBD industries are substantially established, relatively easily understood and, by comparison, uncomplicated. As the recreational and medical marijuana industries will continue to solve and refine legal issues, participants in the hemp industry have a fairly clear roadmap to guide them. Eventually, we will see whether hemp will prove to be as economically viable and profitable as initial optimistic projections suggest.

²³ *Hemp in Food and Dairy Products*, Michigan Department of Agriculture & Rural Development Bulletin (May 3, 2021), <https://content.govdelivery.com/accounts/MIDARD/bulletins/2d76116>

²⁴ *Id.*

²⁵ Federal Trade Comm'n, *FTC Sends Warning Letters to Companies Advertising Their CBD-Infused Products as Treatments for Serious Diseases, Including Cancer, Alzheimer's, and Multiple Sclerosis* (Sept 10, 2019), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-announces-crackdown-deceptively-marketed-cbd-products>

²⁶ US Food & Drug Admin, *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)* (Jan 22, 2021), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#farmbill> (noting the FDA has approved Epidiolex, which contains a purified form of the drug substance CBD, for the treatment of certain types of seizures).