

The Intellectual Property Law Section presents

THE CANNABIS IP LAW CONFERENCE

The Green Evolution: Where Are We
and How Did We Get Here? A Legal and
Regulatory History of Cannabis in
California

Omar Figueroa

April 19, 2023

Happy Bicycle Day



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About Omar Figueroa

Omar is the Founder and Managing Partner of the Law Offices of Omar Figueroa, a boutique law firm focused on cannabis, hemp, and psychedelics law with offices in California and New York.

Omar is a Director of the National Cannabis Industry Association and graduated from Yale College, Stanford Law School, and the Trial Lawyers College.

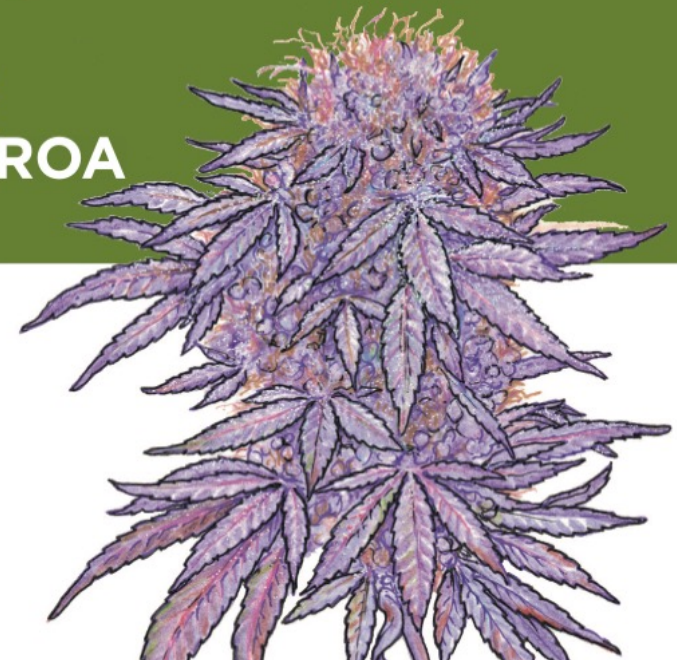
He is also the author of a series of legal reference works. The latest edition is entitled *2023 California Cannabis Laws and Regulations*.

Omar is on the Ganjier Council and helped develop a curriculum for training Ganjiers (cannabis sommeliers) in addition to a methodology for judging fine cannabis and concentrates (Systematic Assessment Protocol).

CALIFORNIA CANNABIS LAWS AND REGULATIONS

2023

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Outline

How did we get here?

- History of cannabis prohibition under federal law
- History of cannabis prohibition in California
- Cole Memorandum
- History of regulated cannabis in California

Where are we?

- Types of Licenses Issued by the California Department of Cannabis Control
- Registration of cannabis trademarks by the California Secretary of State
- CDFA's OCal comparable-to-organic certification program
- CDFA's Cannabis Appellations Program
- Legal ethics: duty to advise clients on conflicts of laws

Where are we headed?

- Cole Memo 2.0?
- California Prepares for Interstate Cannabis Commerce

Q&A





How Did We Get Here: History of Federal Prohibition

- Hemp arrived in Colonial America with the Puritans in the form of seed for planting and as fiber in the lines, sails and caulking of the Mayflower.
- Hemp was the fiber of choice for maritime uses because of its natural decay resistance and its adaptability to cultivation. The Colonies produced cordage, cloth, canvas, sacks and paper from hemp during the years leading up to the Revolutionary War.
- In 1937 the Marihuana Tax Act was passed and imposed a federal tax on cannabis.
- Samuel Caldwell was one of the first people convicted and sentenced to prison for selling cannabis without paying the tax required by the Marihuana Tax Act.
- During World War II, the Marihuana Tax Act was lifted briefly to allow for hemp fiber production for the U.S. Navy, and the U.S. government released a film entitled Hemp for Victory explaining the uses of hemp and encouraging farmers to grow as much as possible.



How Did We Get Here: History of Federal Prohibition

- The constitutionality of the Marihuana Tax Act was challenged by psychedelic guru Timothy Leary in *Leary v. United States*, 395 U.S. 6 (1969). The Act was declared unconstitutional by the Supreme Court because it required self-incrimination in violation of the Fifth Amendment.
- Congress responded by passing the Controlled Substances Act in 1970, which classified cannabis as a Schedule I controlled substance, meaning it has a high potential for abuse and no currently accepted medical use.
- The CSA remains in effect and imposes draconian mandatory minimum penalties, such as: a mandatory minimum of ten years for conspiracy to cultivate 1000 or more plants or conspiracy to distribute 1000 or more kilograms. The bigger the dream, the longer the sentence.
- Successful entrepreneurs have been sentenced to a mandatory minimum of twenty years for violating the Continuing Criminal Enterprise statute, 21 U.S.C. § 848.



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How Did We Get Here: History of California prohibition

- Cannabis was legal in California until 1913, when the Poison Act was amended to outlaw “narcotic preparations of hemp or loco-weed.”
- In the 1950’s, possession was escalated to a felony with mandatory incarceration.
- In 1976, the Legislature decriminalized possession of small quantities of cannabis with the Moscone Act.
- Yet, the cultivation of a single plant, and the sale (or possession for sale) of any amount remained non-reducible felonies for decades as the Drug War escalated.
- In 1996, voters approved Proposition 215, making California the first state in the nation to legalize the possession and cultivation of cannabis for medical use by qualified patients and their primary caregivers.

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How Did We Get Here: History of California prohibition

- In 2004, Senate Bill 420 became effective, establishing a voluntary program for the issuance of official state ID cards for patients and caregivers; it also established a medical defense for patients and caregivers who associate “in order to collectively or cooperatively cultivate cannabis for medical purposes.”
- The era of collectives and cooperatives was born, and lasted for about fifteen years, until January 9, 2019, when Health & Safety Code Section § 11362.775 was repealed.
- SB 420 had two “loopholes”:
 - 1) no limit on how many patients and caregivers a collective or cooperative could have, and
 - 2) no limit on how many collectives and cooperatives a patient or caregiver could join.
- In 2016, voters approved the Adult Use of Marijuana Act (AUMA), which quasi-legalized cannabis in California for adults ages 21 and over. Most cannabis crimes remained on the books, with reduced penalties.
- AUMA was shaped by 2013 US DOJ guidance known as the Cole Memo.

“The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement **strong and effective regulatory and enforcement systems** that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.”

2013 Cole Memorandum

DOJ Enforcement Priorities

- Distribution to minors
- Criminal enterprises, gangs, cartels
- Diversion to states where cannabis is illegal
- State-authorized activity used as fig leaf for trafficking other drugs or other illegal activity
- Violence and use of firearms
- Drugged driving
- Growing marijuana on public lands
- Marijuana possession or use on federal property



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

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;



History of Regulated Cannabis in California

- In 2015, the Legislature passed the Medical Marijuana Regulation and Safety Act (MMRSA), which went into effect on January 1, 2016.
- This legislation established a new regulatory agency, the Bureau of Medical Marijuana Regulation (BMMR).
- MMRSA also created a regulatory framework with a dual licensing system requiring both a local permit and state license to operate, which gave local jurisdictions veto power over medical cannabis businesses.
- Finally, MMRSA added a sunset clause to the collective and cooperative statute.
- In the next year, more legislation was added, which resulted in numerous changes including a renamed Medical Cannabis Regulation and Safety Act (MCRSA) and Bureau of Medical Cannabis Regulation (BMCR).

History of Regulated Cannabis in California

- On November 8, 2016, the voters approved Proposition 64, which officially went into effect the next day, and established a regulatory framework for non-medical adult-use cannabis similar to the MCRSA regulatory framework for medical cannabis.
- In 2017, the Legislature merged the laws governing medical and recreational cannabis to create the Medicinal and Adult-Use Cannabis Regulation and Safety Act, which set forth a comprehensive regulatory framework with different license types overseen by different regulatory agencies.
- Cultivation was regulated and licensed by CalCannabis Cultivation Licensing within the California Department of Food and Agriculture.
- Manufacturing was licensed by the Manufactured Cannabis Safety Branch within the Department of Public Health.



History of Regulated Cannabis in California

- Distribution, laboratory testing, storefront retail, delivery-only retail, microbusinesses, and cannabis events were regulated by the Bureau of Cannabis Control within the Department of Consumer Affairs.
- These agencies promulgated three different sets of emergency regulations which took effect on January 1, 2018, when the State of California began issuing cannabis licenses.
- The emergency regulations evolved over time until the final permanent regulations were approved by the Office of Administrative Law in 2019.
- In January 2020, Governor Newsom announced a proposal to simplify licensing and regulatory oversight by consolidating the three regulatory agencies into a new Department of Cannabis Control.
- This proposal required amending the MAUCRSA regulatory framework and restarting the regulatory rulemaking process.



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History of Regulated Cannabis in California

- The COVID-19 pandemic delayed regulatory unification, but the cannabis industry emerged stronger after it was deemed an essential industry by the Governor, meaning licensed cannabis businesses were allowed to remain open while many other types of businesses were not.
- The long-anticipated Department of Cannabis Control was finally created in July 2021.
- In 2022, the three sets of regulations were consolidated, allowing similar regulations to be combined and conflicts between the separate regulations to be resolved.
- The current Director of the DCC is Nicole Elliott. Previously, she was Director of the San Francisco Office of Cannabis.
- The MAUCRSA regulatory framework is predicated on a dual licensing system: a business must have both a local permit and a state license in order to operate.

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Types of Licenses issued by DCC

Cultivation

- 3 categories of cultivation licenses: Outdoor, Indoor, and Mixed-Light (Types 1-5)
- Nursery (Type 4)
- Processor (trimming, drying, curing, grading)

Manufacturing

- Non-Volatile Manufacturing (Type 6)
- Volatile Manufacturing (Type 7)
- Infusion (Type N)
- Packaging & Labeling (Type P)
- Shared-Use Manufacturer (Type S)

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Types of Licenses issued by DCC

- Testing Laboratory (Type 8)
- Non-storefront Retail (Type 9)
- Storefront Retail (Type 10)
- Distributor (Type 11)
- Microbusiness (Type 12)
- Transport-Only Distribution (Type 13)
- Event Organizer (Type 14)
- Temporary Cannabis Event (Separate license required for each event; local approval required as well.)

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City and county rules

Each city or county can decide whether to license cannabis businesses in their area. They can:

- License all cannabis businesses
- License some types and prohibit others
- Prohibit all cannabis businesses

Where cannabis businesses are allowed

Cannabis use is legal in California. But cities and counties can prohibit cannabis businesses, like retail. As a result, the state is a patchwork of areas where it is and is not legal to establish a cannabis business.

44%

of cities and counties
allow at least one type
of cannabis business

(237 out of 539)

56%

of cities and counties do
not allow any type of
cannabis business

(302 out of 539)

61%

of cities and counties do
not allow any retail
cannabis business

(327 out of 539)



Registering Cannabis-Related Trademarks in California



DR. SHIRLEY N. WEBER
CALIFORNIA SECRETARY OF STATE

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<https://bpd.cdn.sos.ca.gov/cannabizfile/registering-cannabis-related-trademarks-in-California.pdf>

Are There any Pre-Registration Requirements?

Yes, to register a Trademark in California, it must be lawfully in use in commerce. For cannabis businesses, this means that the cannabis-related goods or services associated with the Mark are authorized under California law.

Applicants should ensure that any local and state licenses required to conduct the cannabis activities in California have been obtained prior to seeking registration of a Trademark.

Applicants should ensure that they are in compliance with labeling and packaging requirements for cannabis products (e.g. product labels include the Universal Symbol ).

Examples of common classification codes used for cannabis-related Trademarks include the following:

Classification Code 5: Pharmaceuticals: trademarks for medicinal products containing cannabis extracts

Classification Code 31: Natural Agricultural Products: trademarks for live cannabis plants

Classification Code 34: Smokers Articles: trademarks for cannabis products intended for smoking

Classification Code 35: Advertising and Business: service marks for retail stores selling cannabis products

Classification Code 39: Transportation and Storage: service marks for delivery of cannabis products

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CDFA's Ocal Cannabis Certification Program

- OCal is a statewide certification program administered by the California Department of Food and Agriculture that establishes and enforces comparable-to-organic cannabis standards.
- The OCal Program is intended to ensure that cannabis products bearing the OCal seal have been certified to consistent, uniform standards comparable to the National Organic Program.
- Why is it called “comparable-to-organic” cannabis?
- The term “organic” is a designation reserved by the U.S. Department of Agriculture for eligible products that comply with the standards of the National Organic Program. Since cannabis is illegal under federal law, cannabis products are not eligible to carry the “organic” designation.
- This “certification program” is not a federally registered certification mark.



CDFA's Cannabis Appellations Program

- Rulemaking has been completed to allow licensed outdoor cultivators to file a petition to establish appellations of origin for cannabis.
- The Cannabis Appellations Program is terroir-based, and the regulations require that the cannabis be:
 - “planted in the ground in the canopy area”;
 - “cultivated without the use of structures” such as a greenhouse or hoop house; and
 - “cultivated without any artificial light in the canopy area.”
- The petition also requires:
 - “Identification of at least one specific standard, practice, or cultivar requirement which acts to preserve the causal link(s) between one or more distinctive geographical feature(s) and the cannabis.” Cal. Code Regs., Title 3 § 9106.
- Petitions are not yet being accepted; word is not until September at the earliest.



The State Bar *of California*



Legal Ethics: Duty to Advise on the Conflict of Laws

- In May 2020, the State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) issued Formal Opinion No. 2020-202.
- Issue: May a lawyer provide advice and assistance to a client with respect to conduct permitted by California's cannabis laws, despite the fact that the client's conduct, although lawful under California law, might violate federal law?
- Under the Rules of Professional Conduct, a lawyer may ethically advise a client concerning compliance with California's cannabis laws and may assist the client in conduct permitted by those laws, despite the fact that the client's conduct may violate federal law.



The State Bar of California

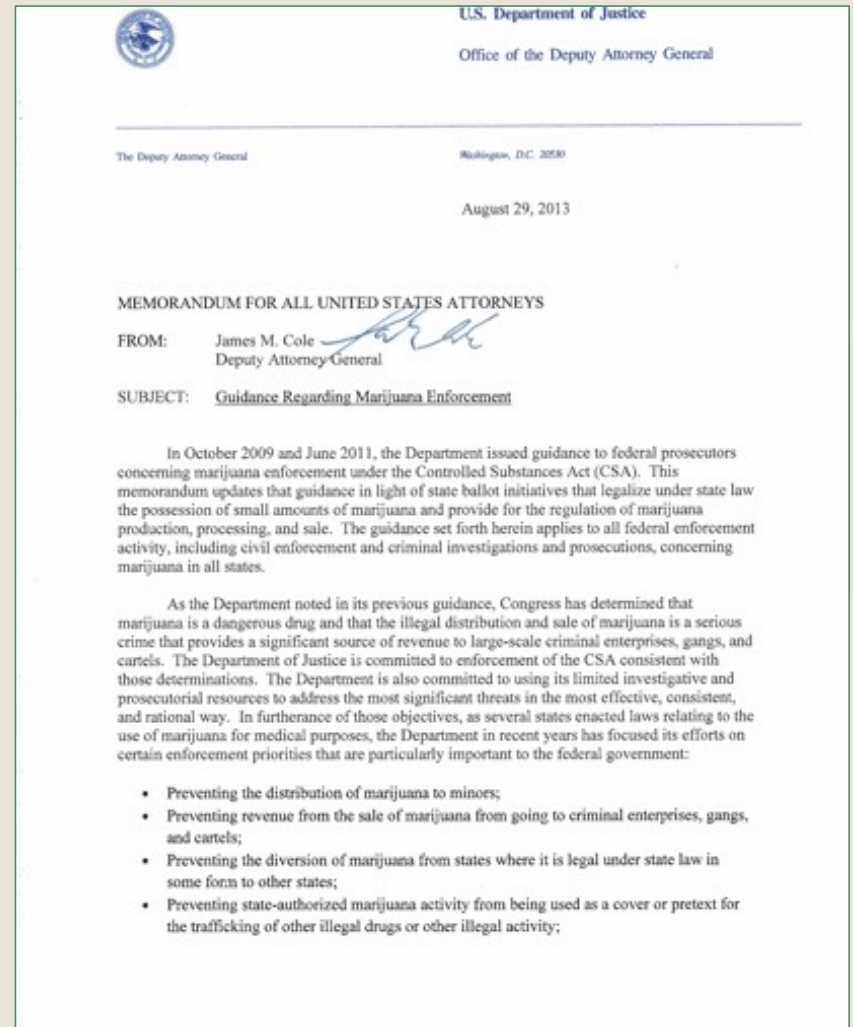


Legal Ethics: Duty to Advise on the Conflict of Laws

- Such advice and assistance may include the provision of legal services to the client that facilitate the operation of a business that is lawful under California law, such as:
 - incorporation of a business
 - tax advice
 - employment advice
 - contractual arrangements
- A lawyer may not advise a client to violate federal law or provide advice or assistance in violating state or federal law in a way that avoids detection or prosecution of such violations
- The lawyer must also inform the client of the conflict between state and federal law, including the potential for criminal liability and the penalties that could be associated with a violation of federal law.

Where Are We Headed: Cole Memo 2.0?

- In 2018, former Attorney General Jeff Sessions rescinded the Cole memo
- In 2021, during his confirmation hearings, Attorney General Merrick Garland stated that limited federal resources would not be used to pursue those in strict compliance with state laws.
- In March 2023, AG Garland added, “I think that it’s fair to expect what I said at my confirmation hearing with respect to marijuana and policy, that it will be very close to what was done in the Cole Memorandum.”





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California Prepares for Interstate Cannabis Commerce

- Senate Bill 1326, signed by Governor Newsom in September 2022, set the stage to allow for interstate marijuana commerce from California to and from other legal states, contingent on an official assurance that the activity would not put the state at risk of federal enforcement action.
- In late January 2023, DCC Director Nicole Elliott sent a letter to California Attorney General Rob Bonta's office, which contains an eight-page analysis in which the department lays out reasons it believes the state would likely avoid federal legal issues by clearing the way for cannabis commerce across state borders.
- The DCC emphasized in its letter that the federal Controlled Substances Act provides explicit immunity for states and officials that enforce laws and municipal rules relating to controlled substances.
- The DCC is preparing to lay the foundation for the state-to-state agreements that are at the heart of SB 1326.

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Q & A

Omar Figueroa, Esq.

Law Offices of Omar Figueroa

7770 Healdsburg Ave.

Sebastopol, CA, 95472

(707) 829-0215

info@omarfigueroa.com

