



ETHICS IN THE
STATE APPROVAL
OF CANNABIS

CANNABIS
EXPUNGEMENT
STATUTES

THE RISE
OF HEMP
LITIGATION

VOL. 60, NO. 1
WINTER 2021

THE JUDGES' JOURNAL

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION | JUDICIAL DIVISION

THE IMPACT OF EMERGING CANNABIS LAWS ON COURTS

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THE JUDGES' JOURNAL, AMERICAN BAR ASSOCIATION, 321 N. CLARK STREET, CHICAGO, IL 60654-7598

THE SCIENCE AND TESTING OF CANNABINOIDS

By Fred Niehaus and Jeff Beverly

One of the most daunting challenges for regulators and law enforcement in the cannabis/hemp legalization landscape has been to determine legal from illicit operations. The same challenges apply to products, labeling, and production protocols, which all directly relate to consumer protection and public health and safety.

As liability and potential litigation increase, it will be increasingly relevant and important for the judiciary to have the benefit of legitimate, accurate, and reliable measures by which the merits of a case may be evaluated. Presently, evidence is largely inaccurate, anecdotal, and subject to interpretation. Ultimately, such interpretations are subject to legitimate legal challenge.

When referring to protocols and standards relating to public health and safety, as well as consumer protection, one need only go back to the “vaping crisis” during the fall of 2019. A federal investigation was initiated to determine what caused the rash of mysterious and sometimes fatal lung illnesses apparently linked to vaping cannabis products. Ultimately, it was determined that

counterfeit products from the illicit market—often bearing the names of legitimate, regulated brands—were being illegally packaged and sold by illicit producers.

These rogue producers added untested cannabis oils and other ingredients to these illicit vape cartridges. The primary selling point was that it appeared legitimate while being much less costly than that which could be purchased in a licensed, legal cannabis dispensary. Unfortunately, a number of consumers paid with their lives.

Had there been a certification program in effect, it would have achieved the following:

- Lawful, regulated products would be identified and differentiated from illicit, unlawful products.
- Definitive categories of approved additive ingredients would be in place.
- Traceable recall procedures would be in place for any tainted product found in the legal, regulated market.
- Reliable protocols would be in place relating to chain of custody of products and the ingredients within those products.



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Providing a framework for implementation of these protections across jurisdictions is in large part the rationale behind the pilot certification program being developed by the Policy Center for Public Health & Safety (PH&S).

Another example involves an Illinois hemp company that was recently accused (by the testing lab employed to test its CBD products) of altering 24 of those test results produced by the lab. The hemp company allegedly altered the certificate of analysis from the lab to show that one of its hemp products was compliant with the Controlled Substances Act (under 0.3 percent tetrahydrocannabinol (THC)) at 0.1

cannabis companies strive to market clean and safe products, some are solely driven by a financial bottom line—expand market share as rapidly as possible and sell the operation at a significant profit. In order to accomplish this, a company wants to ensure that all products going to market pass all testing that is mandated by a state. The consequence is that some less scrupulous companies engage in “lab shopping.” The compliant, protocol driven labs that are strict about test results are avoided, and less experienced and less compliant labs are sought out to provide false test results so that retail products appear to be legally compliant when, in fact, they are compromised.

production. Under the Farm Bill, hemp testing will ultimately be required to be performed by labs licensed by the Drug Enforcement Administration (DEA).

Testing is not simply about THC. While this component garners the most attention from law enforcement, there is an emerging public health and safety element. Testing also must analyze microbial, heavy metal, mold, and other impurities. A recent study by the Florida Department of Agriculture found serious levels of lead in hemp products. This type of testing is crucial to instill and maintain truth-in-labeling standards within the marijuana industry.


PH&S, in collaboration with ASTM International (formerly known as the American Society for Testing and Materials), a global standards development and certification organization, has initiated a pilot project whose goal is to certify production of both cannabis and hemp operations. In doing so, more consistent standards are achievable.

ASTM is a global standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services. ASTM is one of the oldest and most respected consensus-based standards organizations in the world.

In 2017, ASTM formed committee D-37 to develop standards for cannabis and hemp. Standards developed through the ASTM process include participation from state regulators and 14 different countries, allowing for the creation of objective regulatory criteria in marketplace compliance. Further, certification is crucial to determining how best to separate legitimate, credible lab-testing operations from less-scrupulous entities whose results are often driven by client needs.

A fundamental aspect of the pilot program is to determine the effectiveness of our approach. Currently, there is no federal standard because cannabis is a Schedule I drug and is illegal within the federal and certain state governments. With regard to these standards, the collateral impact on the hemp industry is profound.

There is a legitimate law enforcement need and a marketplace demand for certification of standardized processes. These



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percent THC when the actual report showed THC levels of 0.5 percent. This kind of alleged fraud would not be possible under the protocols proposed by the pilot program.

All labs are not necessarily of equal capability or competency. With the booming demand for third-party cannabis testing, a nearly universal mandate across states intended to provide a veil of independence and prevent false testing results by producers, new lab operations are being established. As a result, they often do not possess the knowledge or tools to adequately provide accurate and consistent testing. When contaminants are not identified, products become potentially dangerous to the consumer. Such inaccuracies come at the expense of public health and safety as well as undermining consumer confidence.

While the majority of legal licensed

This is yet another demonstration of the need for standards and certification at the highest level. In turn, from a legal perspective, the path relating to liability and responsibility can become much more transparent.

PH&S was founded to support state attorneys general as the chief law enforcement officials in states working through legalization issues and to serve as safety, consumer protection, anti-money laundering, and rule of law watchdogs. In order to accomplish this goal, PH&S emphasizes the importance of standardized testing protocols for both marijuana- and hemp-derived products. Without standardized testing, public health and safety are in jeopardy.

Testing of THC levels has become one of the most compelling issues facing law enforcement since the advent of the Farm Bill and the legalization of hemp

legally compliant measures involve public health and safety, labeling, manufacturing practices, demonstrable legal production, consumer protection, and more. Consistent, accurate, and reliable testing is key to rule of law implications and legitimacy of regulated operations.

For the past three years, PH&S, in conjunction with ASTM, has been reviewing certification of the processing facilities in actual cannabis and hemp operations. The goal is to partner with independent certified labs to achieve consistency and continuity in testing. In doing so, this completes the full range of chain of custody, predictability, legitimacy, and reliability of legal testing procedures. As a result, such testing results become evidentiary as they relate to questions of legality. The quality systems, good manufacturing processes, and accuracy of the testing method can impact the accuracy and legitimacy of the product test results and therefore the admissibility of such evidence in a legal proceeding.

As standards are developed through the ASTM process, it will allow subjective evaluation to regulatory criteria in global marketplace compliance. This does not suggest changes in individual state laws or regulations, but, rather, the adoption of recognized marketplace standards developed by an accredited body.

When assessing production and testing standards, attention to the purity, accuracy, and compliance of finished goods labeled for consumer purchase is paramount. Due to lack of consistent testing requirements and standards, bad actors have been able to operate on the fringes of the industry, giving those companies with public health and safety in mind a bad name.

Key elements that the U.S. Food and Drug Administration (FDA) have focused on include:

- **Purity:** Cannabinoid products can be contaminated through the cultivation, extraction, refining, and manufacturing phases. Evaluations must assess potential product contamination from heavy metals, residual pesticides, fungi, mycotoxins, and residual solvents. Several companies have issued recalls for adulterated products, and several

lawsuits claiming heavy metals contamination have been filed.

- **Accuracy:** Because cannabinoid products impact public health and safety, the accuracy of labeled cannabinoid content must be assured. The dangers of lax testing standards were recently underscored by a report submitted to Congress by the FDA after purchasing and testing over 100 products labeled for cannabinoid potency. The results were striking with over 60 percent of products testing at more than a ± 20 percent variance of labeled potency.
- **Compliance:** Marijuana-based cannabinoid products must be compliant with all state license and reporting requirements, and hemp-derived cannabinoid products must be compliant with THC levels under 0.3 percent. Testing protocols to ensure that all products are compliant to these standards protect against marijuana diversion and “hot” hemp products. The recent FDA report to Congress showed that 64 percent of tinctures and oils, 41 percent of pet products, and 29 percent of gummies tested had THC levels higher than allowed.

Testing, quality standards, and established protocols can protect public health and safety on several levels while providing significant data for law enforcement. However, the current break in the chain of legitimacy in testing lies with the current absence of certified cannabis and hemp facilities and labs whose certification is tied to a legitimate legal standard and one that is validated by law enforcement and trusted by virtue of the certification that is affixed. Such an accepted standard is what PH&S and ASTM are striving for in this pilot project. Currently, there is no consistency in testing or quality protocols that require focus on sampling and collection methods.

A final element, which thus far has eluded the states that must deal with legalization as well as adverse impacts on both the legal cannabis and hemp industries, is the interstate transport preclusion, which does not allow for lab samples to be sent to labs across state boundaries. The

consequence lies in rather than having several credible centralized facilities around the country, each state is required to have a lab, which has, in large part, resulted in substandard operations due to the cost of building an FDA class of facilities.

Herein lies a final option for consideration. While interstate transport remains an illegal action, there is an existing mechanism by which lab samples can legally be moved by interstate. The DEA currently issues reverse distribution licenses. These are predominantly utilized by pharmacies that handle Schedule I drugs. When these drugs expire, a reverse distribution license allows them to be picked up and moved by interstate to various sites for destruction. By administrative action, such licenses could be issued by the DEA, which would allow for the movement of lab samples only. By virtue of this action, it would result in a major step forward in both certification of labs as well as instituting reliable and consistent testing protocols that are relevant to law enforcement and the courts.

So why do we need certification? While laws have been developed on a state-by-state basis, there is very little uniformity resulting in the patchwork of laws we now navigate. There have emerged public health issues, as demonstrated by the vaping crisis. Laboratory challenges exist as it relates to development of national testing protocols and continuity. And there exists a real marketplace need for consistency and uniformity of products for public health and safety.

Federal regulatory agencies, state governments, and departments of health and agriculture—along with law enforcement—have been seeking guidance on how the marketplace operates, its best practices, and how these industries—cannabis and hemp—are currently being regulated across multiple states. In fact, the industries themselves are asking for both clarification and more stringent, understandable guidelines under which they operate.

The collaboration with ASTM International and others is a game changer for industry testing standards and consistency, in addition to bringing a credible level of certainty both to the marketplace and into the courtroom. ■