



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 8, 2022

The Honorable Brett W. Ligon
Montgomery County District Attorney
207 West Phillips, 2nd Floor
Conroe, Texas 77301-2824

Via E-Mail

Re: Authority to prosecute individuals for the possession and sale of delta-8 tetrahydrocannabinol products derived from hemp (RQ-0439-KP)

Dear Mr. Ligon:

You have requested an attorney general opinion regarding whether products containing delta-8 THC are unlawful to possess or sell under the Texas Health and Safety Code, or instead whether section 481.002(5) of the Health and Safety Code statutorily excludes delta-8 THC from the definition of “controlled substance” under the law. It has come to our attention that the question asked in your opinion request is also the subject of at least two lawsuits: (1) *Texas Dep’t of State Health Servs. v. Sky Marketing Corp.*, Cause No. 03-21-00571-CV, pending before the Court of Appeals for the Third Judicial District, and (2) *Sheikhani Group Inc. v. Tex. Dep’t of State Health Services*, Cause No. D-1-GN-21-006388, pending in the 455th Judicial District, Travis County, Texas. The plaintiffs in those lawsuits claim that the Department of State Health Services exceeded its authority by modifying the State’s Schedule of Controlled Substances contrary to state law that exempts hemp-derived delta-8 THC from the controlled substances list.¹ Thus, the issues raised in your opinion request and the underlying basis for them are now the subject of pending litigation before Texas courts.

It is the policy of this office to refrain from issuing an attorney general opinion on questions that we know to be the subject of pending litigation. See Tex. Att’y Gen. Op. Nos. GA-0502 (2007) at 3–4; MW-205 (1980) at 1; V-291 (1947) at 5–6. This policy, which has been in effect for more than sixty years, is based upon the fact that attorney general opinions, unlike those issued by courts of law, are advisory in nature. By contrast, court decisions are binding unless and until they have been modified or overturned by a higher court or until the law they construe has been amended.

¹See Plaintiffs’ Second Amended Petition and Application for Temporary and Permanent Injunctions, *Sky Marketing Corp. v. Tex. Dep’t of State Health Servs.*, No. D-1-GN-21-006174 (126th Jud. Dist. Tex. Nov. 4, 2021) at 28; Plaintiffs’ Original Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunction, *Sheikhani Group Inc. v. Tex. Dep’t of State Health Servs.*, No. D-1-GN-21-006388 (455th Jud. Dist. Tex. Oct. 22, 2021) at 8.

Consequently, when a legal matter is being litigated, the courts are generally the appropriate forum for resolving the issue.

Section 402.042(c)(2) requires this office to issue attorney general opinions within 180 days of receipt of a valid request or to notify the requestor in writing that the opinion will be delayed or not rendered and state the reasons for the delay or refusal. While we will proceed to answer the remaining questions in your request, please consider this letter to be your notice under section 402.042(c)(2) of our reasons for declining to issue an opinion.

If your question remains unresolved at the conclusion of the litigation, you may resubmit a request at that time. If you have further questions, do not hesitate to contact me.

Sincerely,

Virginia K. Hoelscher
Chair, Opinion Committee

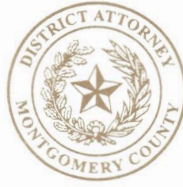
VKH/som

Attachment: Request No. 0439-KP

cc: The Honorable Greg Abbott, Governor of Texas
Mr. Luis Saenz, Chief of Staff, Office of the Governor
Mr. James Sullivan, General Counsel, Office of the Governor
The Honorable Charles Perry, Texas State Senate
John Hellerstedt, M.D., Commissioner, Texas Department of State Health Services
Ms. Barbara Klein, General Counsel, Texas Department of State Health Services
Mr. Charley Wilkison, Executive Director, Combined Law Enforcement Associations of Texas, Inc.
Mr. Robert Leonard, General Counsel, Combined Law Enforcement Associations of Texas, Inc.
Ms. Elizabeth Nichols, Chairman of the Board, Texas Cannabis Industry Association
Mr. Robert Kepple, Executive Director, Texas District & County Attorneys Association
Ms. Diane Burch Beckham, Staff Senior Counsel, Texas District & County Attorneys Association
Ms. Melissa J. Schank, CEO, Texas Criminal Defense Lawyers Association
Ms. Susan Hays, Counsel, Texas Hemp Growers Association

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By Opinion Committee at 4:24 pm, Nov 05, 2021



BRETT W. LIGON

District Attorney
9th Judicial District

RQ-0439-KP

FILE# ML-49051-21

I.D.# 49051

Michael R. Holley
First Assistant District Attorney

Christopher R. Smith, Chief Investigator
Melisa G. Appleton, D.A. Administrator

November 1, 2021

Hon. Ken Paxton
Attorney General of the State of Texas
ATTN: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

Re: request for an opinion regarding whether the exclusion of “tetrahydrocannabinols in hemp” from the statutory definition of “controlled substance” precludes prosecution of individuals for the possession and sale of delta-8 tetrahydrocannabinol products derived from hemp.

Dear Attorney General Paxton:

Montgomery County peace officers have encountered products labeled for sale as containing a therapeutic or intoxicating concentration of delta-8 tetrahydrocannabinol (THC). I request your legal opinion regarding the following issue:

Are products containing concentrated or synthesized delta-8 THC still unlawful to possess or sell under sections 481.103, 481.113 and 481.116 of the Texas Health and Safety Code? Or are delta-8 THC products no longer subject to prosecution under section 481.002(5) of the Health and Safety Code—which excludes “tetrahydrocannabinols in hemp” from the statutory definition of “controlled substance”—if the delta-8 THC is extracted or synthesized from lawfully-grown hemp products?

This office respectfully suggests that the attorney general confirm that possession or sale of concentrated or synthesized delta-8 THC products remains a criminal offense under the Health and Safety Code; and that the section 481.002(5) exclu-

sion for “tetrahydrocannabinols in hemp” is limited in scope to the small quantities of THC isomers which naturally occur in lawfully grown hemp plants and the cannabinoids products derived from those plants.

a. Background.

Tetrahydrocannabinols and their synthetic derivatives and isomers have been assigned to Penalty Group 2 of the Texas Controlled Substance Act since the adoption of the Act in 1973.¹ Possession of *any* amount of a Penalty Group 2 substance is a felony offense;² and possession or sale of a larger quantity of a Penalty Group 2 substance is punishable by a lengthy prison sentence.³

In 2019 the Texas Legislature legalized the production and sale of hemp products containing a concentration of no more than 0.3 percent delta-9 THC. House Bill 1325 amended the statutory definition of the term “controlled substance” to specifically exclude “tetrahydrocannabinols in hemp”:⁴

(5) “Controlled substance” means a substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V or Penalty Group 1, 1-A, 1-B, 2, 2-A, 3, or 4. The term includes the aggregate weight of any mixture, solution, or other substance containing a controlled substance. ***The term does not include hemp, as defined by Section 121.001, Agriculture Code, or the tetrahydrocannabinols in hemp.***

¹ See Tex. Health & Safety Code Ann. § 481.103 (West Supp. 2020).

² See Tex. Health & Safety Code Ann. § 481.116 (West 2017).

³ See Tex. Health & Safety Code Ann. § 481.113 (West 2017).

⁴ Tex. Health & Safety Code Ann. § 481.002(5) (West Supp. 2020) (emphasis supplied).

In response to the passage of House Bill 1325, the Texas Department of State Health Services (TDSHS) amended its schedule of controlled substances to exclude from the list of schedule I hallucinogenic substances all “tetrahydrocannabinols in hemp”:⁵

-Schedule I hallucinogenic substances

* * *

(31) Tetrahydrocannabinols, meaning tetrahydrocannabinols naturally contained in a plant of the genus *Cannabis* (cannabis plant), ***except for tetrahydrocannabinols in hemp*** (as defined under Section 297A(1) of the Agricultural Marketing Act of 1946), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant . . .

By January of 2020, the market for cannabidiol (CBD) products derived from legally grown hemp was said to be “exploding.”⁶ And when an oversupply of CBD extracted from hemp “caused the price of CBD to plummet,” hemp industry chemists began to use chemical processes to convert CBD into delta-8 THC.⁷

⁵ See 44 Tex. Reg. 1468 (March 15, 2019).

⁶ Naomi Andu, *CBD Products Are Everywhere in Texas Since the State Legalized Hemp*, TEXAS TRIBUNE, Jan. 23, 2020, available at <https://www.texastribune.org/2020/01/23/texas-cbd-products-are-everywhere-heres-what-you-should-know/>.

⁷ See Britt E. Erickson, *Delta-8 THC Craze Concerns Chemists*, CHEMIST AND ENGINEERING NEWS, Aug. 30, 2021, available at <https://cen.acs.org/biological-chemistry/natural-products/Delta-8-THC-craze-concerns/99/i31>.

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Delta-8 THC is a “psychoactive cannabinoid found in the Cannabis plant,” and it is an “isomer of delta-9-tetrahydrocannabinol”⁸ While small quantities of delta-8 THC are naturally found in Cannabis plants, it “can also be produced in an industrial or laboratory setting by exposing CBD to acids and heat.”⁹

The United States Food and Drug Administration (FDA) recently issued a warning¹⁰ that consumption of delta-8 THC products entails “serious health risks,” due in part to the presence of byproducts of the chemical reaction used to synthesize delta-8 THC from CBD:

The natural amount of delta-8 THC in hemp is very low, and additional chemicals are needed to convert other cannabinoids in hemp, like CBD, into delta-8 THC (i.e., synthetic conversion) Some manufacturers may use potentially unsafe household chemicals to make delta-8 THC through this chemical synthesis process. Additional chemicals may be used to change the color of the final product. The final delta-8 THC product may have potentially harmful by-products (contaminants) due to the chemicals used in the process, and there is uncertainty with respect to other potential contaminants that may be present or produced depending on the composition of the starting raw material. If consumed or inhaled, these chemicals, including some used to make (synthesize) delta-8 THC and the by-products created during synthesis, can be harmful.

On November 17, 2020, the Texas Commissioner of State Health Services objected to a recent FDA modification of its definitions of “tetrahydrocannabinol,” on

⁸ *Delta-8-Tetrahydrocannabinol*. Wikipedia, <https://en.wikipedia.org/wiki/Delta-8-Tetrahydrocannabinol>.

⁹ *Id.*

¹⁰ See United States Food and Drug Administration, *Five Things to Know About Delta-8 Tetrahydrocannabinol*, available at <https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc>.

grounds that “the [new FDA] definitions allow for the presence or addition of tetrahydrocannabinols aside from the presence of delta-9-tetrahydrocannabinol,” and “[m]ultiple tetrahydrocannabinol isomers and variants may have pharmacological or psychoactive properties.”¹¹

And on March 19, 2021, TDSHS published an amended schedule of controlled substances¹² that omitted the broad exception for all “tetrahydrocannabinols in hemp,” and replaced it with a more limited exception for “up to 0.3 percent delta-9 tetrahydrocannabinols in hemp”:

-Schedule I hallucinogenic substances

* * *

(31) Tetrahydrocannabinols, meaning tetrahydrocannabinols naturally contained in a plant of the genus *Cannabis* (cannabis plant), *except for up to 0.3 percent delta-9-tetrahydrocannabinols in hemp* (as defined under Texas Agriculture Code 121), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant . . .

The TDSHS commissioner plainly intended to clarify that delta-8 THC and similar THC isomers—other than delta-9 THC in a concentration of less than 0.3—remain unlawful controlled substances under Texas law.

b. Argument and authorities.

When the Legislature excluded from the definition of “controlled substance” the “tetrahydrocannabinols in hemp,” it could not have intended to legalize an intoxicating THC product synthesized from a hemp product. The fact that delta-8

¹¹ See 46 Tex. Reg. 873 (January 29, 2021).

¹² See 46 Tex. Reg. 1768 (March 19, 2021).

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THC is being synthesized from a lawfully produced hemp product should not make a difference—the result is still a synthetic THC which is a penalty group 2 controlled substance.

If two statutes are in conflict, courts should “construe the different provisions in a way that harmonizes rather than conflicts.” *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 716 (Tex. 2015). In this instance, the exclusionary clause in section 481.002(5) can be harmonized with the inclusion of THC in penalty group 2 by limiting its scope to the minimal THC which naturally occurs in lawfully grown hemp.

This office respectfully suggests that the attorney general follow the example of the South Carolina attorney general’s office, which recently opined that delta-8 THC products were not legalized by the South Carolina Hemp Farming Act which permitted cultivation and sale of cannabis and “all derivatives, extracts, cannabinoids, [and] isomers . . . whether growing or not, with the federally defined THC level for hemp.” *See Op. S.C. Att’y Gen.*, 2021 WL 4630497 (Oct. 4, 2021).

In that opinion, the South Carolina attorney general’s office agreed that “lawful hemp” may contain “trace amounts of THC isomers, such as delta-8,” but the possession and sale of delta-8 THC in any other form was still punishable under the statute prohibiting possession of THC and its isomers:

In conclusion, we believe a court would hold that the Hemp Farming Act does not provide an exception for, and does not legalize, delta-8 THC or any other isomer of THC in itself. Section 44-53-190(D)(18) (2018) categorizes all isomers of THC as Schedule I controlled substances “unless specifically excepted.” The only exceptions found in the Hemp Farming Act involve “a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.” S.C. Code Ann. § 46-55-10 (Supp. 2020); *see also* 7 U.S.C. § 5940. Our Office has observed in the past that “the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification.” However, we believe that any good-faith reading of the plain language of the Act in conjunction with section 44-53-190 sup-

ports our conclusion here. *See Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019). This reading also is consistent with the prior opinion of this Office which reflects our view that the General Assembly intended the Hemp Farming Act to create an exception that is narrow. *Op. S.C. Att’y Gen.*, 2019 WL 3243864 (July 10, 2019).

Lawful hemp as contemplated by the Hemp Farming Act may contain trace amounts of THC isomers, such as delta-8. *See Aycock v. State*, 246 S.E.2d 489 (Ga. Ct. App. 1978). This opinion should not be read so as to speak to those trace amounts. We express no opinion on what any upper limit of THC isomer concentrations in lawful hemp might be, beyond the statutorily-expressed limit placed on delta-9 THC. *See S.C. Code Ann. § 46-55-10 (Supp. 2020)*.

* * *

The basic purpose of the Hemp Farming Act is to create a legal framework for the licensed, regulated production of industrial hemp as defined, and it must be construed consistent with that purpose. The plain text of the Hemp Farming Act and section 44-53-190(D) each operate in tandem to create a narrow exception for lawful hemp as defined, while preserving the existing prohibition on other isomers of THC.

In summary, our Office agrees with [the South Carolina Law Enforcement Division’s] essential analysis that the Hemp Farming Act did not legalize THC except as defined in lawful hemp. If the General Assembly intended to undertake legalization of THC on the scale that the industry posits, they would have done so expressly and unambiguously. Instead, the legislative scheme of the Hemp Farming Act was much narrower: to create a legal framework for the licensed, regulated production of industrial hemp as defined. It cannot fairly be read to accomplish sweeping THC legalization or a similar sea change from previous policy.

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The same can be said of the Texas 2019 hemp legislation. The Legislature plainly intended to allow only the production and sale of non-intoxicating hemp products, even if they contained a trace amount of naturally-occurring delta-8 THC and other isomers of delta-9 THC. On the other hand, if the Legislature had intended to legalize the possession and sale of concentrated delta-8 THC products, it would have not have retained severe penalties for the possession and sale of tetrahydrocannabinols and their synthetic derivatives and isomers.

c. Conclusion.

It is respectfully suggested that the attorney general issue an opinion concluding that delta-8 THC products are unlawful controlled substances for the purpose of criminal prosecution for the possession and sale of those products, regardless of the Legislature's exclusion of "tetrahydrocannabinols in hemp" from the statutory definition of the term "controlled substance."

Sincerely,


BRETT W. LIGON
Montgomery County District Attorney