

- [Announcer] You are listening to the HR Mixtape, your podcast with the perfect mix of practical advice, thought-provoking interviews and stories that just hit different so that work doesn't have to feel, well, like work. Now, your host, Shari Simpson.

- Joining me today is Judge Mary A. Celeste, retired. She sat on the Denver County Court bench from 2000 to 2015. She was the presiding judge from 2009 to 2010 and the Denver County Court Sobriety Court co-founder. She's currently a law school and university professor, teaching cannabis and the law. She's considered a national content expert on the topic of cannabis. Mary, thank you so much for jumping on the podcast with me today.

- You're welcome, happy to be here.

- So you have a really interesting background as an educator and legal authority in a space that is somewhat of the wild, wild west still. So I have to ask, how would you describe your journey from wearing the judge's robe to teaching about cannabis law?

- While I was on the bench, I was hired by the National Highway Traffic Safety Administration to be their judicial outreach liaison for this region, which is Sussex State region. My duties included educating law enforcement, prosecutors, defense attorneys. All those who may be facing impaired driving issues. 'Cause it's the National Highway Traffic Safety Administration. So when I first was hired, the focus was alcohol. Alcohol-impaired driving. And we learned what we could about alcohol-impaired driving. And we went out there and we liaised with our region and the courts and judges and so on and so forth. And during my tenure there, Colorado had just passed their marijuana recreational legalization, or adult use legalization. So they needed, I was boots on the ground in Colorado. So they needed some information from our NHTSA office and region, about what impact that legalization was having on the roadways in Colorado. So that's how I got into the marijuana area where I started learning and teaching about the impact of the legalization of marijuana on the roadways. So I became an expert in cannabis and driving. And I would go to our state region and I would do presentations and education. And part of that process was sending us to the judicial college, the National Judicial College. And at that National Judicial College, I was trained on PowerPoint presentations. So my speaking, the PowerPoint presentations, it started to expand beyond just my region because it was young and fresh and people were just coming across it and they wanted to know what's the Colorado experience like. And then I started to expand beyond cannabis and driving. And while everybody was piling into cannabis and driving to speak on it, I moved from there and I thought, "I wonder how it's impacting the youth?" So I started studying and doing research on the impact of the legalization of marijuana on the youth. And then as a result of that, I started doing presentations on that topic, that subject matter. And then I

thought, "You know, I work in the specialty courts. Specialty courts like mental health courts, drug courts, veterans courts. I wonder what is gonna happen in those courts with the legalization of marijuana? Are people gonna be able to use their medical marijuana while they're in these programs or not?" So I started to research and study specialty courts. I had some background in it because I'm a co-founder of the Denver Sobriety Court. But now the focus was cannabis in specialty courts. So I researched, I studied, and I became an expert in that field. So it went on and on. What about the workplace? So I started studying on the workplace. What about constitutional issues? What constitutional issues are being raised? So when all was said and done, I had like 15 to 20 different areas, and I'm sure there's more that were being impacted by the legalization of marijuana and cannabis. And then came along CBD and Delta 8 and Delta 10 and all the other hemp derivatives. And I thought, "What's that doing to the courts? And what's that doing to testing? What's that doing to the workplace?" So I started researching. I wrote several articles on topics related to what I just described. You can find 'em on my website, www.judgemaryceleste.com, go to the publications and you can see a variety of articles that I've written on subject matters that I just discussed. So before I knew it, I became somewhat of an expert in all of these fields. And what they call me is a content expert. The content being cannabis. Not a workplace expert, or a driving expert, I'm a cannabis content expert. And I talk about it from a variety of angles.

- I have so many follow-up questions to that. And in prep of our call, I had sent over just a bunch of information, things that I'm curious about. But you mentioned one thing specifically that I'd love for you to dive in, 'cause I think there's some confusion about legal status of CBD, marijuana, and hemp derivatives, across various jurisdictions. So, maybe in layman's terms, you can help us, as HR professionals, understand these substances and their legalities.

- What I can tell you is that in 2018, the federal government passed what is called the the Agricultural Act, also known as the Farm Act. And that made CBD, cannabidiol, which is one of the compounds in a marijuana plant that has low psychoactivity, it made it legal. Hemp became legal. The southern states, particularly in Kentucky, where they used to grow tobacco, they wanted to grow hemp. And we had some hemp programs in place, about 16 or 17 states had hemp programs that had to be approved by the Feds and the state. But they wanted to make hemp totally legal. So they pulled hemp out of the Controlled Substance Act and left marijuana in there. And CBD also became legal as a drug under the CDC. It became legal for the use of a very rare form of epilepsy, called Dravet syndrome. Once they made CBD legal, and pulled hemp out of the Controlled Substance Act made it legal, then CBD became legal across the board. Now it's not legal under the FDA, as far as it being something that can be eaten or you can drink it, or something like that. But you see a lot of lotions and potions.

And so there's some question about the legality of the CBD itself. And some states, typically, if I was doing a presentation, I'd throw up a map and I'd show you the states. Some states, CBD is legal. Some states are cracking down and making CBD not legal. Now, once CBD became legal, took the CBD and started to adulterate it with silicic acid and water and thyme. And they created other marijuana. Other types of cannabinoids. They created from the CBD, Delta 8, Delta 10, THCP, HHC. These are all hemp derivatives. Which meaning they come from the hemp. They can be found in the hemp plant and they can be found in the marijuana plant. And the only difference really between the marijuana plant and the hemp plant is that the marijuana plant has the high psychoactivity, Delta 9, THC. And the hemp plant has very little psychoactivity. In fact, if it has more than 0.3% psychoactivity, it's not legal, from the hemp plant or the marijuana plant. But they're all under the same umbrella. Cannabis, right? Cannabis includes hemp and marijuana plants. And there's a variety of marijuana plants too. Indica, ruderalis, sativa, gargantuan. And typically the marijuana plant has the high psychoactivity or the high, quote unquote. And the hemp plant derivatives may be higher than even the Delta 9. And that's where it gets tricky because THCO in particular is not found in trace amounts in the hemp plant. So it's probably illegal under the Analog Act. But the feds haven't caught up with it yet. And they haven't started to regulate in this area. THCP, found in traces in the hemp plant, therefore probably legal. But guess what? States are starting to crack down on Delta 8. States are starting to crack down on CBD. So we have a flip-flop here. At the federal level, Delta 8 tetrahydrocannabinol or THC, excuse me, Delta 9 THC. The mother-load psychoactive ingredient in the marijuana plant is illegal at the federal level but legal at the state level either for adult use or for medical marijuana purposes Delta 8 and CBD are legal at the federal level. But the states are starting to make it illegal. So it's a flip flop, it's a really, what I call it in my article is the cannabis conundrum. So these things now are being sold on the open market, Delta 8, Delta 10, HHC, whether or not they're legal or not depends upon which state you're in. And at some point the regulators are gonna crack down even more. But it's out there. And the problem is when people use it, they think it's legal and it may not be legal in their state, number one. And number two, it has traces of other things in it. So you can't trust the labeling when you go to buy these CBD products and these Delta 8 products, Delta 10 products 'cause the labeling is many, many, many times incorrect. So people who think that they have sobriety are not having sobriety, people who are in programs in the court systems where they're not supposed to be using, it's zero tolerance are getting THC positive results from using a CBD product from the shelves. People in the workplace who think that they're using Delta 8 and it's legal are finding that it tests as THC, which is illegal. And in a zero tolerance workplace, they're losing their jobs and lawsuits are starting to happen as a result.

- How does HR even begin to navigate this and create, you know

policies that are fair and legally sound with, you know all of these different pieces of information, especially if you have a zero tolerance policy in place right now?

- You gotta work with your legal team. You should have either in-house counsel as an advisor or outhouse contract counsel as an advisor. And you should collaborate with them make sure that they're aware that there's some laws out there that may impact how to test, when to test where to test, or in the workplace. And some states that have case law that don't allow for the use in the workplace. I'll give you a good example of that. Colorado being deemed as one of the most liberal states on the issue of cannabis does not permit it in the workplace. We had a state supreme court case called Dish versus Coats where the plaintiff was a quadriplegic who worked for Dish Network in a sedentary job. And his doctor said that he was getting some pain relief by using his medical marijuana and he was fired for getting a positive test. And they brought it all the way up to the state supreme Court. The state supreme court said, "Hey as long as it remains illegal at the federal level it's illegal and you're using an illegal drug you're in a zero tolerance workplace." And he lost his case. So on one hand you would think that Colorado being one of the first states that came forward would also be liberal in that respect in the workplace. And they're not. And surprising, like a state like Michigan too, which is also deemed to be liberal with respect to marijuana I think they have some case law that would prevent the use of medical marijuana in the workplace. And certainly at the federal level, federal jobs, department of transportation jobs, forklift jobs, safety sensitive jobs, AV, the pilots, truck drivers anywhere where you can potentially have some kind of dangerous situation which is zero tolerance at the federal level. But a lot of states differ on whether or not they permit medical marijuana use and whether it may be violative of the American with Disabilities Act. For example, in New York, if you qualify for medical marijuana, you are deemed disabled. So the disability statutes in New York and their actual recreational marijuana statute in New York carves out a protection for the employee's use of medical marijuana in the workplace. But things like that, I mean you've gotta be aware of statutory schemes in the state. Disability discrimination, the actual recreational law might have pieces in it about the workplace. The medical marijuana laws might have pieces about it in the workplace. And certainly there are appellate cases at the state supreme court levels and court of appeals levels that could give you as the HR person and the attorney guidance on what to do with the use of marijuana in the workplace. Now I'm basically talking about medical marijuana it may be a different story, recreational marijuana. Some states are more liberal and they'll even allow for what is called off-duty conduct protection. If you use your marijuana and you use it offsite, on your time like a martini at lunch, not lunch, but a martini at dinner and you, you know, you smell like it or they think that you're using, but you didn't use it, but the night before. There's some statutes out there that they're called

off-duty conduct statutes that may protect the worker, as well as the employer. Sometimes they're different. They flop one way or the other. So you've gotta be aware of what's going on in your state what statutory schemes are out there that could apply. What are the testing guidance for your state? I know oral fluid testing is becoming big in the workplace which states allow for that which states don't allow for that? And how does it work with the second sample? How's the second sample stored? There's a lot of issues related to testing and the legalities of the use while working, or the use... the issue is, is you can't tell whether the use happened on site or the use happened the night before at a party. And blood tests, they're not usually used for purposes of workplace testing. But urine tests and oral fluid tests can only tell you that there was use. The breathalyzers claim that they can narrow the window to a few hours. Oral fluid said they can narrow the window better than urine. But I don't know all the science related to that.

- You know, you mentioned all the different uses and specifically kinda honed in on some medical examples. You know, I've heard chat around, you know marijuana being dubbed kind of like the next big thing when it comes to potentially employee wellness programs, right? Because it does have this touted benefit of pain management, anxiety, you know additional stuff like that. How do HR professionals think about that, maybe potential benefits and pitfalls and kind of navigating that right approach because there's so many legal things to consider and especially like the different types of jobs. I mean there's obviously jobs that have zero tolerance for safety reasons. So I'm not necessarily talking about those ones, but as more and more people kind of talk about it as a health benefit how should HR professionals start to navigate that?

- You still have to follow the laws that are out there. The laws will guide you about how the HR person should do it. If you have a law that says that an employee who uses medical marijuana, is deemed disabled, and protected by our recreational marijuana law or our disability law or discrimination law, then you don't really have a choice as an HR person but to follow the law. If you do have a choice and you wanna create a policy that's more lax, maybe you have the doctor more involved in what's going on with the employee periodic reports about whether this being truly being beneficial or how long do they stay on this. And there's research out there that talks about the benefits of use of cannabis for a variety of disorders and ailments and there's studies out there that show that chronic use can cause some issues as well. So, you know, it's a fine line between using cannabis for health benefits using cannabis in a chronic way and using cannabis, we end up having cannabis use disorder. So it's a fine line.

- So Mary, as we end up our discussion I'm curious if you have one piece of advice or insight that you would like to pass on to HR professionals and how they navigate this green wave. Anything that we

haven't talked about but that they should definitely think about.

- Make a notebook, go and do research or work with your lawyer people and get a copy of all of the applicable laws related to marijuana use in the workplace. Have your recreational marijuana law there. Have your medical marijuana law there. Have your disability statute law there. Have your discrimination statute law there. Have your appellate cases law there. And make sure that you, if there's any testing parameters that your state has developed or your city, sometimes the cities do it, that you are aware of the testing parameters as well. And update that or have the attorneys update that periodically to make sure that things haven't changed. And, oh, one more thing. I'd like to say December 1st through 3rd is a cannabis symposium. You can get more information about that symposium, You can go to the National Interdisciplinary Cannabis Symposium. We do have a couple of panels that will be relative to HR people.

- Mary what great advice and thank you so much for taking a few minutes of your day to chat with me.

- Okay, thanks Shari. Have fun. Bye-bye.

- I hope you enjoy today's episode. You can find show notes and links at thehrmixtape.com. Come back often and please subscribe, rate and review.