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CALIFORNIA EDITION

**A LEGAL GUIDE TO
OPENING A BREWERY**

Candace L. Moon, Esq.

 &

Stacy Allura Hostetter

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★ **PREFACE** ★

*“Beer is proof that God loves us and
wants us to be happy.”*

—Benjamin Franklin

How many times over have we of the craft beer community heard that adage? It magically melds our cherished brews with a sense of antiquity and even patriotism; it lends a veneration that the beverage has not always enjoyed as much as it deserves. And yet, relatively speaking, it is a lie. Such were not the words of our esteemed founding father. To the contrary, he was speaking of wine when he said, “Behold the rain which descends from heaven upon our vineyards; there it enters the roots of the vines, to be changed into wine; a constant proof that God loves us, and loves to see us happy.”¹ That is not to say that beer was not beloved by our country’s finest. President George Washington was an avid beer drinker and, out of love of the craft, seems to have even had his own homebrew recipe. But, if you are reading this book, I feel confident that Franklin’s love for wine does not in any way detract from your love of hops and malt.

In fact, if you are reading this book, at some level you must be interested in the intricacies of opening a

¹ Walter Isaacson, ed., *A Benjamin Franklin Reader* (New York: Simon & Schuster, 2003), 295. For some interesting thoughts on elbows, read the entire letter.

craft brewery. Perhaps you have been dreaming of that perfect tasting room since college, maybe you had an epiphany over a pint mid-unaffiliated-career, or possibly friends and family up to their ears in homebrew think you need to vacate the garage and set up shop already. No matter your inspiration or your current circumstances, this book is designed to map the path to opening a craft brewery from a legal and industry-specific business perspective. A plethora of titles are available about how to design recipes, build tanks, experiment with yeast, and generally become entrepreneurs. There are also a number of texts currently gracing our bookshelves from various successful brewers about the industry and their experiences starting up. Many of these are excellent reads that we recommend. But texts addressing the *legality* of the process, of which there are many, sadly (and surprisingly) seem nonexistent. What is more, it is a lack deeply felt considering the many—and frequently nonsensical—laws gracing our beautifully boozy industry. Accordingly, this book aims to fill that gap. Why? Simply put, because we love good beer as much as you do. Every time I see a brewer pouring in hops or tenderly adjusting a temperature control, I see it as proof that people can love each other and generally want to make each other happy. 'Tis a noble calling indeed, and one that we aim to help prosper.



Two chapters in this book would not have been possible without the assistance, expertise, and hard work of William Camacho and Jessica Hardacre-Gianas.

William E. Camacho—Chapter 4: Location. William has been assisting breweries and breweries-in-planning for over four years. As Vice President of Planning and Pre-Construction for Urban CM Group, William guides breweries from conceptual planning to physical reality. Some of his most recent projects include the Ale-Smith and Ballast Point expansions, as well as assisting in the opening of newer breweries Rip Current and Half Door.

Jessica M. Hardacre-Gianas, Esq.—Chapter 9: Employment Basics. Jessica Hardacre-Gianas is a San Diego native whose developed her business to serve many of the community business owners she met over the years. She has practiced in employment law since 2008. In 2012, she started her own firm assisting small business employers in implementing policies and procedures that comply with state and federal laws while maintaining the flexibility necessary to operate efficiently and successfully. While maintaining her own practice, Jessica also serves the craft beer industry as “Of Counsel” to The Craft Beer Attorney, APC.

Additionally, many thanks to the remarkable individuals who graciously contributed their invaluable insight into the craft beer industry as a part of this project: Tomme Arthur, Scott Goyne, John Martin, Tom McCormick, Collin McDonnell, Jeremy Raub, Ting Su, Joyce Clark Turner, Jamil Zainasheff, Peter Zien.

From Candace

This book would never have been finished without the dedication of the entire Craft Beer Attorney team—Alicia Altenau, our newest member, who helped proof many chapters (some of which she had no experience with, making her the perfect guinea pig); Tanya Corriveau, who coordinated all aspects of getting this thing into print, as well as marketing and promotion (put down the whip, Tanya!); Jessica Hardacre-Gianas, who took it upon herself to rewrite the employment law chapter (five times?), because we attorneys are nothing if not perfectionists; Finn for offering puppy kisses to all of us when we were too stressed out (OK, or just anytime at all); and most of all Stacy Allura Hostetter, who somehow managed to take everything in my head, organize it, and make it useful, readable, and—I hope—entertaining for those of you reading it now! Also, a special shout-out to honorary team members William Camacho and John Couvillion of the Urban CM Group; I’m still not sure I understand half of what is in the location chapter—thank goodness for your help!

On a personal level, I would like to thank my many clients for giving their old Hamilton’s bartender a chance at becoming their attorney. This business would never have grown as it has without your trust, support, and referrals over the years. A special thank-you to those who truly encouraged me to go down this untraveled path of craft beer law back when I first started out: Scot Blair, Tom McCormick, and Jamil Zainasheff—your support has been invaluable. And last, but certainly not least: thanks to Jessica for keeping me sane and helping to make this dream a reality and to my family, Adrian and Cooper—you make it all worthwhile.

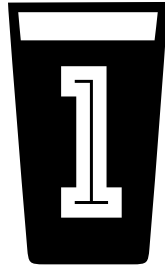
From Stacy

Endless thanks and love to my incredibly supportive and inspiring family—Dada, Amanda, Grandma Dorothy, Mama, Shane. None of this would have been possible without you, of course. Thank you for always pushing me to dream a little bigger than I am wont to allow myself. To Candace and the entire Craft Beer Attorney team for bringing me into this beautifully boozy world and somehow deciding that letting me write a book was a good idea. There was surely a good deal of beer that went into those decisions, so my thanks also go to the San Diego beer community for creating that hoppy elixir, which not only inspired this text but fueled it.

To Aaron French, Dave McGaffey, Frankie Mejia, Peter Lee, and Alex Ho, for supporting me throughout this impressively emotional and lengthy endeavor as well as the law school abyss generally. To Rita Heller, Shaun Rehmani, and Jen Morris, without whom I would never have made it past the first year of law school to begin with. And to Meredith Luze, who has been with me since this journey began. Little did we know it at the time, in a dingy underground pub singing “Don’t Stop Believing” with a pint raised high, but we were beginning an odyssey. A wise woman once told me that friends are the family that we choose, and I think I could not have chosen better had I endless worlds and time at my fingertips.

Here is to each of you—tequila for my family, a West Coast-style IPA for the team, whiskey for the guys, champagne for the Thai boxers, and cider for Mer—but may there be many beers in our future!

Honi soit qui mal y pence.



★ INTRODUCTION ★

So where to begin in opening a craft brewery? Assuming you already have the beer front covered, we recommend starting with a little soul-searching.

What Do You Want to Create?

There are several options as far as the *type* of brewery you might open. As a general overview, the Brewers Association has defined an American Craft Brewer as “small, independent and traditional.”

- *Small* refers to an annual production of six million barrels of beer or less (with beer production attributed via the rules of alternating proprietorship).
- *Independent* refers to the idea that less than 25 percent of a craft brewery is owned or controlled by a beverage alcohol industry member that is not itself a craft brewer.

- *Traditional* means a craft brewery generates a majority of its total alcoholic beverage volume from beers that derive flavor from traditional or innovative brewing ingredients and their fermentation. Specifically, flavored malt beverages are excluded from this definition of beers.

Craft beers have been gaining an ever-increasing market share, and Big Beer companies seem compelled to try to tap into the trend. By defining a craft brewery as independent, the Brewers Association has excluded these brands, and the craft brewing industry can focus on the smaller businesses catering to local markets. Also, a sense of community, while not part of the Brewers Association's definition per se, is an ever-present necessity to earn the title of **craft brewery**. The other hallmark of craft brewing can fairly be termed innovation; craft breweries utilize historic recipes, unprecedented flavor profiles, and adaptive brewing processes to create their beers. These are things the industry, and its customer base, respect and cherish.

The **brewpub**, though related, is a distinct breed. Brewpubs operate both a brewery and a restaurant on a single site. Importantly, to gain the title, a brewpub must sell a minimum of 25 percent of its beer on-site. **Packaging breweries**, on the other hand, produce beer mostly for sale through retail outlets that the brewery does not own, such as bars, restaurants, liquor stores, and grocery stores. Packaging breweries that produce less than 150,000 barrels per year are deemed **micro-breweries**; packaging breweries that produce more than 150,000 barrels per year are deemed **regional breweries**. Any company selling over 6 million barrels per year is considered Big Beer.

Contract brewing companies do not own a brick-and-mortar brewery at all. Rather, these brewers utilize the resources of other breweries to create their product. The contracting company is generally responsible for everything except the actual making of the beer (think recipe formation, marketing, sales, distribution, etc.). This setup generally finds the “brewery” having a wholesaler license (depending on your state) and distributing the product to various locations. Contract brewing has become more prevalent as breweries find themselves at full capacity in terms of production yet want more product nonetheless. The stigma that originally attached to the model is almost nonexistent now, as the practice has allowed breweries to show expansion potential to investors desiring a larger business. It is also easier to find investors of any kind when you have something to show them. Furthermore, contract brewing allows for getting started in the industry with very little capital. You can get some traction on your brand and see if people are willing to pay for your beer before investing your life savings in a brewery.

Related, but distinct, is the concept of an *alternating proprietorship*. Alternating proprietorships essentially allow for one brewery to rent space from another. This has the upside of enabling the tenant brewer to own a “brewing license” (as opposed to the wholesale license that generally accompanies contract brewing). More importantly, perhaps, it lets the tenant brewer be the one brewing the beer. The tenant brewer is also responsible for the labeling of the beer, obtaining the necessary label approval, and paying taxes on the beer upon its removal from the brewery. The tenant brewer has title to the beer at all stages of the brewing process. Both contract brewing and an alternating proprietorship can be profitable ventures, and they pay homage to the sense of community that craft brewing has sustained.

Additionally, tasting rooms have become almost a hallmark of craft breweries in the last decade or so. Tasting rooms come in a variety of shapes and sizes but universally offer a brewery the opportunity to showcase its beers to the local community. Tasting rooms are highly regulated at the local level, and these regulations will be covered in more depth later in the book. At this point, it is simply worth noting that if you intend to have a tasting room in your brewery, then it is important to start planning that aspect early on. Tasting rooms play a huge role in terms of how the public will perceive your company and your brand, so be sure to give due consideration to whether and how a tasting room will be used in your business.

Scale is, admittedly, always tricky when starting out, but it is important to think ahead as much as possible because even those craft breweries that start small can grow into behemoths in a surprisingly short time. So, regardless of whether you are envisioning a classic brewery and tasting room combination or a pizza-centric brewpub, the next question is . . .

How Much Does It Cost?

Brewing equipment, ingredients, rent, wages, licensing fees, business formation costs . . . the expenses involved in opening and maintaining a craft brewery may be lower than in some industries, but by no means do they add up to a paltry sum. Brewing is expensive and, to borrow some time-honored wisdom, it takes money to make money. Before you build the dream too big, it is key to calculate the amount of capital you will need to get the brewery up and running.

Where Will You Get Capital?

Chances are, no matter what number you came to in the step above, it is not sitting in your bank account conveniently awaiting investment. Consequently, you will have to find means for raising capital. To begin, there are three general approaches to raising capital: bootstrapping, friends and family, and outside investors.

Bootstrapping entails what we just wrote off three sentences ago, essentially funding the project yourself.

There are certainly breweries that began by cracking open a nest egg; many of them are successful and many are not. It comes down to your economic reality and capacity for risk taking. As an entrepreneur considering opening your own brewery, you likely have a healthy capacity for risk taking, but no two brewers are made the same. Loans can be had, mortgages leveraged, etc. As with every approach outlined here, it is simply a matter of what allows you to sleep at night.

The **friends and family** approach, as we like to call it, acknowledges a need for outside funds but hedges the investment bet by limiting those who input capital to those individuals you trust most. On the one hand, by limiting the investment pool, you limit the amount of money that you can raise. Friends and family tend to have smaller amounts sitting aside just waiting to hear your big, bright idea. On the other hand, by limiting the investment pool, you are able to control expectations and tailor compensation schemes to whatever makes you feel comfortable and secure.

Raising capital will be addressed in much greater depth in Chapter 3, but for now a quick overview should suffice to get the wheels turning.

Lastly, like it sounds, the *outside investors* approach takes a more traditional path by seeking out investors from a community of people who make a living off new ventures. Investors can be a blessing and a curse. Outside investors thrive on finding profitable ideas and bringing them to fruition, so their advice can be invaluable in the start-up phase, especially from a pure business perspective. But those same investors also know how to guarantee the results they want. Outside investors frequently make demands (think *equity*, structured payouts, etc.) that less savvy investors do not think of. That is not to say that you should avoid outside investors, of course—simply be aware of what may be involved.

Now do some digging and see how attainable that amount of needed capital is through the various sources. While we always recommend planning for expansion, you need to gauge your comfort level with each source and the long-term responsibilities that each source entails. If that comfort level is making you hit rock bottom in your sleep cycle, then circle back to the original question of what it is you want to create. Maybe you will start out with a three-barrel system instead of a ten-barrel system; whatever it is, keep cycling through that plan until you find the right fit at each level.

How Well Do You Play with Others?

On a related note, before we move on to the details, another important aspect of opening a brewery is whether or not you plan to go it alone as a sole *founder*. Countless breweries are the dream child of college buddies, partners in crime, and even actual couples; they act as *cofounders* and share in the adventure together. It is indescribably important to honestly evaluate how you want decisions to be made, whether you want someone

else's input, and whether you are willing to let someone else have veto power. Other important considerations are how much time each individual has to dedicate to the endeavor, what role they will play, their financial expectations and needs, what they see as the brewery's objective, and so on.

To put it as simply as possible, if you do not play well with others, then perhaps you should not have a cofounder. If, on the other hand, you decide that you and that special someone, whoever they may be, will pursue the dream together, we recommend a **founders' agreement**, which should outline the expectations touched on above and ensure that everyone is on the same page for the broad strokes. Like all contracts, a founders' agreement obviously cannot cover every possible issue that might arise. However, if you can articulate the overall objective of the brewery, as well as each party's general responsibilities, then in our experience the likelihood for success down the road is greatly improved. Alternatively, in the worst-case scenario, should things not go as planned and the dream team decides to split up and go its separate ways, there is a written, signed agreement you can turn to while divvying up the assets.

Founders' agreements, when well prepared, act as prenuptial agreements for businesses. Going into business with someone is much like marriage, so choose your partner wisely!