

Medical marijuana mayhem

California to the Feds: Follow our lead.

By Brian Brunkow

Medical marijuana: gateway drug, sly cover for criminal enterprise, or a cost-effective, homeopathic approach to ease the pain and suffering of sick and dying patients? The debate continues.

Marijuana is classified under the federal *Controlled Substance Act of 1970* as a Schedule I controlled substance (21 U.S.C. §§ 801-904, hereafter "CSA") which prohibits possessing or using marijuana for any purpose. It is so classified because Congress determined that marijuana provides no currently accepted medical benefits. Therefore, marijuana may not be prescribed by a physician, unlike methadone, for example.

A personal story

Jed Riffe, a Berkeley-based filmmaker, took an in-depth, objective look at the debate over the legalization of medical marijuana in his award-winning documentary film, "*Waiting to Inhale*." Says Riffe, "I served on the Board of Directors for a Bay-Area AIDS Foundation but it was later closed. Watching people die in so much needless pain became too much." Riffe continues, "So this documentary project grew from that experience – seeing the benefits that marijuana provides those suffering debilitating or terminal illnesses."


Riffe

In the movie, Waiting to Inhale, leading experts and researchers debate the medical benefits of marijuana. Drug Enforcement Agency ("DEA") representatives also contribute to the discussion concerning the dangers (increased criminal activity and drug dependence) surrounding this contentious issue.

What is gripping, however, are the film's anecdotal firsthand stories from those suffering incapacitating health problems. In one interview, Irvin Rosenfeld, a Florida-based stock broker, began using marijuana recreationally but discovered it served as an effective "muscle relaxing anti-inflammatory" for his illness – multiple congenital cartilaginous exostosis. Rosenfeld plainly explains, "Without it, I wouldn't be alive."

Valerie Corral, another interviewee who suffers epileptic seizures resulting from a severe auto accident, says, "Living under pharmaceuticals was like living under water," Corral continues, "but marijuana allows me to completely control my seizure activities without any pharmaceuticals."

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Corral is a medical marijuana patient, and she and her husband, Mike Corral, operate Wo/Men's Alliance for Medical Marijuana ("WAMM"), a marijuana-collective in Santa Cruz. WAMM, is one of many controversial California-based collectives that grows and distributes marijuana for medical use. The film documents a DEA raid and destruction of WAMM's medical marijuana crop and the Corrals' subsequent arrest on federal drug charges.

Distribution in California

The use of "collectives" or "cooperatives" in California is a very controversial aspect of the medical marijuana debate. California is one of 13 states (and the first of those 13 states) to provide an exemption from prosecution to qualified patients for possession and use of medical marijuana. However, the operation of collectives and cooperatives in California to cultivate and dispense marijuana to patients is unique among the states.

State of California regulations, described in further detail below, require that collectives and cooperatives only charge enough to cover overhead expenses; profits are not allowed. Unfortunately, some collectives or cooperatives are unaware of this requirement and others flatly ignore this requirement, resulting in federal law enforcement pressure across the board.

The temptation to profit is real: Jon Gettman, Ph.D, a drug-policy researcher, reported in *Marijuana Production in the United States* that in 2006 an estimated 21 million marijuana plants were grown in California with a street value of up to $14 billion. Now that's a lot of gardening!

Needless to say, law enforcement is concerned with criminals and drug cartels creatively piggybacking this state law exemption for illegal marijuana distribution as well as legitimate collectives and cooperatives turning a profit.

Procedural history

So how did we get here? Grab a cup of coffee because here we go. The state law vs. federal law debate in California over medical marijuana goes back more than a decade.

The CSA is federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain substances are regulated. Under the CSA, five classifications or "schedules" are set up in which these regulated substances fall into for classification. Schedule I contains substances determined to provide no accepted medical use in treatment, unlike Schedules II-V.

Marijuana, like heroin, is categorized under the CSA as a Schedule I controlled substance because it has been determined that marijuana has a high potential for abuse; provides no currently accepted medical use in treatment; and lacks acceptable safety standards for use under medical supervision. (21 U.S.C. § 812(b)(1).) As a Schedule I drug, there is no exception under the CSA which would allow a physician to prescribe marijuana to a patient. (21 U.S.C. § 812(c).)

In response to federal drug policy concerning marijuana, California voters passed Proposition 215 in 1996, known as the Compassionate Use Act ("CUA"). (Health & Saf. Code, § 11362.5.)

California's CUA does not "legalize" marijuana. The CUA does provide an exemption from California state law sanctions for the possession and use of marijuana to treat illnesses including cancer, anorexia, AIDS, chronic pain, glaucoma or any other illness for which marijuana provides relief. Key provisions from the CUA follow:

- Medical marijuana must be recommended by a physician;
- Patients and their primary caregivers who obtain and use marijuana for medical purposes are not subject to state criminal sanctions;
- Federal and state governments are encouraged to implement a plan to provide for the safe and affordable distribution of marijuana to patients;
- Physicians shall not be punished for recommending marijuana to patients for medical purposes; and
- "Primary Caregiver" is defined under the CUA as the individual designated by the person exempted (patient) who has consistently assumed responsibility for the housing, health, or safety of that person.

However, the CUA was vague in certain respects: Most importantly, it did not create a means for identifying those eligible to *transport, possess and use* medical marijuana thus creating confusion for local and state law enforcement. To address this concern, in 2003, the California Legislature passed the Medical Marijuana Program Act ("MMP"), under SB 420. (Health & Saf. Code, §§ 11362.7-11362.9.)

Through the MMP, California counties became obligated to provide identification cards to medical marijuana patients upon request, verifying patients' exempt status under the CUA. A key goal of the MMP was to "facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of those individuals and provide needed guidance to law enforcement officers." (*People v. Wright* (2006) 40 Cal.4th 81, 93.)

In 2006, Counties of San Diego, San Bernardino and Merced ("Counties") filed a consolidated suit against the State of California, et al., in Superior Court of San Diego County. Counties argued that because the CSA (federal law) prohibits possessing or using marijuana for *any* purpose, that certain parts of the California medical marijuana statutory scheme were preempted under the Supremacy Clause of the United States Constitution.

Specifically, Counties argued, in part, that the MMP created an obstacle

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



to the CSA intent and was thus pre-empted. Counties maintained they could not issue medical marijuana authorization cards to their residents under state law when federal law prohibited marijuana for any purpose.

The trial court rejected Counties' claim and concluded the MMP and county-issued medical marijuana authorization cards do not pose an obstacle to the CSA. This ruling required Counties to issue identification cards to those persons qualified for and requesting these cards under the CUA. (Persons eligible for medical marijuana are not required to apply for and carry authorization cards but are encouraged to do so to facilitate prompt identification and avoid unnecessary arrest.)

In 2008, County of San Diego ("San Diego"), and County of San Bernardino ("San Bernardino"), (collectively "San Diego") appealed. The Court of Appeal, Fourth Appellate District affirmed the trial court's decision. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798.)

The Court of Appeal reasoned that "[w]hen Congress legislates in a field which the States have traditionally occupied…we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. (*Rice v. Santa Fe Elevator Corporation* (1947) 331 U.S. 218, 230.) Because the MMP…address[es] fields historically occupied by the states – medical practices (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485) and state criminal sanctions for drug possession (*City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 383-386) – the presumption against preemption informs our resolution of the scope to which Congress intended the CSA to supplant state laws, and cautions us to narrowly interpret the scope of Congress's intended invalidation of state law. (*Medtronic, supra.*)" (*County of San Diego, supra,* at p. 823.)

The Court of Appeal also stressed that "the purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices." (*County of San Diego, supra,* at p. 826, citing *Gonzalez v. Oregon* (2006) 546 U.S. 243, 270-272.)

In October 2008, the California Supreme Court denied review of San Diego's appeal. Undeterred, San Diego then appealed to the United States Supreme Court ("USSC"). In May 2009, the USSC also denied review of San Diego's appeal.

At the end of this 13-year marijuana-fueled odyssey after California voters passed the CUA, we have the following result: Every holdout California county, including San Diego and San Bernardino, must now issue medical marijuana identification cards to persons qualified for and voluntarily requesting these cards under the MMP.

Lawyers on the battleground

So what is the actual impact of the USSC's decision to deny review of San Diego's appeal? Opinions vary among California attorneys and advocacy groups familiar with the territory.


Todd

Tamar Todd, a Bay-Area staff attorney for the Drug Policy Alliance, an advocacy group for national drug policy changes, says, "This is a significant victory for medical marijuana patients. It reaffirms, once again, that state medical marijuana laws are legal and valid." Todd continues, "This, coupled with the Department of Justice's decision to respect state-level medical marijuana laws and cease interfering with their implementation, means that patients and providers can breathe easier and states are now free to move forward with passing and implementing medical marijuana programs without undue fear of federal interference."

However, William G. Panzer, an East-Bay attorney and a co-author of the CUA, is not impressed. Panzer argues, "There is no change. The courts left California exactly where it started before this nonsensical lawsuit brought by San Diego and San Bernardino Counties." Panzer continues, "We're still faced with the same dilemma that medical marijuana is illegal under federal law."

Todd and Panzer agree that attorneys and clients are now in "wait and see" mode regarding federal law enforcement. U.S. Attorney General Eric Holder stated at a press conference on February 25, 2009, that ending raids on medical marijuana facilities (such as WAMM) is the "new American policy." Todd states, "Hopefully the statement of the Department of Justice that the federal government will stop interfering with patients and providers in compliance with state-level medical marijuana laws is not an empty promise."

Todd, like Panzer, is unsure how President Obama's position will actually play out. Todd cautions, "It's not entirely clear what the Obama Administration's approach will be." She continues, "President Obama promised a practice of non-interference during his campaign and his Department of Justice has stated that this promise will be honored, but it's not yet clear what in practice that will mean."

Todd emphasizes, "There are more than two-dozen pending federal cases left over from the Bush Administration arrests in which the new administration has failed to signal any strategy change. As recently as June 2009, one of these defendants, Mr. Charles Lynch, who was acting in full compliance with California law, was sentenced to one year in prison for federal violations."

In the Lynch matter, the federal government successfully argued that Lynch, who operated a medical marijuana dispensary in Morro Bay, violated state law because he was not his customers' "primary caregiver," and he provided no medical services beyond the medical sales.

Panzer, who lectures nationally on medical marijuana laws, explains, "Collectives and cooperatives provide med-

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



ical marijuana and emotional support so it's difficult to establish evidence of consistency as a primary caregiver for the responsibility of a patient's health. This issue needs to be remedied."

Another difficult area for attorneys defending clients such as Lynch is the inability to mount an effective defense in federal court. Todd illustrates, "The current law prohibits defendants from entering evidence of compliance with state medical marijuana laws as part of their defense in federal court. So most of these defendants, like Mr. Lynch, are left defenseless."

Reuven Cohen, defense counsel for Lynch, says, "It's absurd. Mr. Lynch checked at the federal level before opening a dispensary. He was told it was a matter for state and local law enforcement and to check with those officials. Mr. Lynch did and was still convicted on federal drug charges." When asked what changes he'd like to see with medical marijuana laws, Cohen comments with amusement and frustration, "I'm not an active medical marijuana advocate. I do federal criminal defense work but this isn't right; it doesn't work. Any change is welcome."

Cohen points out that in sentencing Lynch, Judge George H. Wu sympathetically reduced the federal mandatory five-year sentence to one-year after no loophole could be found to avoid a one-year sentence.

State Attorney General Guidelines

The definition of "primary caregiver" and whether a medical marijuana collective or cooperative or dispensary may qualify as a patient's primary caregiver under the CUA is unclear in practice. To clarify this issue and other ambiguities for law enforcement, patients and caregivers, State Attorney General Jerry Brown issued *Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use* ("Guidelines"), in August 2008 (see www.ag.ca.gov).

The Guidelines define and clarify that storefront "collectives" and "cooperatives" are legal providing they comply with local and state law. Collectives and cooperatives must meet strict state requirements including the following: entity formation, organization and record keeping, maintaining facility security measures, patient verification and not operating for profit.

Dispensaries, unlike collectives and cooperatives, are not recognized and operators may be subject to criminal prosecution under California law. The Guidelines provide an example: "Dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for 'cash donations' are likely unlawful."


Hermes

Kris Hermes, an Oakland-based spokesman for Americans for Safe Access, a medical marijuana patient-advocacy group, explains, "There's no black and white dividing line between a collective and dispensary; it's a matter of facility size and professionalism." Hermes continues, "It's the 'neighborhood storefront' aspect that causes concern. And the larger the size of the facility, the more patients they treat and the tighter law enforcement scrutiny they'll receive."

Hermes provides the following advice for attorneys: "Lawyers should advise client-facilities to verify patient eligibility, create policies and procedures to ensure medical marijuana is not diverted to non-patients, charge patients only enough to cover facility overhead and to maintain solid record-keeping."

Comprehensive Federal Policy

On June 8, 2009, California Senator Mark Leno (D – San Francisco), introduced Senate Joint Resolution 14 ("SJR 14"). SJR 14 asks the President and Congress to clear up existing confusion between federal law and the various state laws regarding medical marijuana.

SJR 14 urges an end to federal raids, intimidation and interference with state medical marijuana laws; an affirmative defense (compliance with local and state law) to medical marijuana charges in federal court; and a comprehensive federal policy that ensures safe and legal access to medical marijuana.

Americans for Safe Access is a co-sponsor of SJR 14. Says Hermes, "It sends a clear message that the people of California want an end to the federal tactics of interference with state law and urges a sensible federal policy."

Both Todd and Panzer agree that SJR 14 is an important, effective and necessary resolution. Todd emphasizes, "The reality is that medical marijuana is illegal under federal law. This means that patients and providers still remain at risk, and if arrested, have little defense to federal charges."

Todd provides one final big picture to take away: "The framers of our Constitution had it right when they designated the states to be laboratories of experiment. The public overwhelmingly supports medical marijuana and state-level medical marijuana laws are being refined and gaining more acceptance. Ultimately federal law needs to follow the states' lead and change."


Brunkow

Brian Brunkow is a freelance writer and the creative director of Mind Venue, a San Diego-based copywriting and brand development service for California and Washington law firms.
brian@mindvenue.com, www.mindvenue.com.

Copyright © 2009 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**