

Proposition 19: Will we all get high if this initiative passes?

A look at the legal history of marijuana use and a discussion of the legal implications of Prop 19

By Donna Bader

As the November election approaches, proponents and opponents of Proposition 19 (The Regulate, Control and Tax Cannabis Act of 2010), the initiative that would legalize marijuana in the State of California, are gearing up for battle. If Proposition 19 is passed, then California will be the third state to vote on whether marijuana should be legalized and taxed, and may become the first to pass this legislation. So, what are the legal implications of the passage of Proposition 19? Before we get into that, let's put this initiative into historical perspective.

A brief, very brief, history on marijuana

Marijuana has been around for centuries, dating back to 2737 B.C. when it was recognized as an effective treatment for various ailments. It was used in ancient China, Egypt, India, Rome and Greece. America's first law on marijuana was enacted in 1619 at the Jamestown Colony, Virginia, and mandated that all farmers grow Indian hemp seed. At that time, the value of cannabis was



primarily in the use of its fibers. Hemp products continue to be manufactured to this day and the industry is growing.

The Narcotic Drug Import and Export Act was passed by Congress in 1922. Its intent was to eliminate the use of narcotics except for legitimate medical use. The Marijuana Tax Act was passed in 1937, which placed a tax on marijuana and effectively destroyed the hemp industry.

The Comprehensive Drug Abuse Prevention and Control Act (Controlled Substances Act) was passed by Congress in 1970.[1] It deleted the Marijuana Tax Act of 1937 and made marijuana an illegal drug under Schedule I. This means it has no medical value and has the highest potential for abuse. This Act remains in effect to this day.

In 1996, 56 percent of California voters approved Proposition 215 or the "Compassionate Use Act of 1996," which added Health & Safety Code section 11362.5 That section lists three major purposes: (1) to provide medical marijuana to seriously ill Californians; (2) to ensure that patients and their primary caregivers are not subject to criminal prosecution or sanction, and (3) to "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (Health & Saf. Code, §11362.5, subds. (b)(1)(A)-(C).)

In *People v. Mower* (2002) 28 Cal.4th 457, the California Supreme Court concluded that Health and Safety Code section 11362.5(d) does not confer a complete immunity from prosecution, but it "reasonably must be interpreted to grant a defendant a limited immunity

Copyright © 2010 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



from prosecution, which not only allows a defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial, but also permits a defendant to raise such status by moving to set aside an indictment or information prior to trial on the ground of the absence of reasonable or probable cause to believe that he or she is guilty." (*Id.* at p. 464; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433.)

The California Legislature then enacted the Medical Marijuana Program Act (S.B. 420), which provided for identification of qualified patients and their caregivers so as to avoid arrest and prosecution and to provide additional guidance to law enforcement officers. (*County of San Diego v. San Diego NORML* (2009) 165 Cal.App.4th 798, 810.) To implement these purposes, Health and Safety Code sections 11362.7 and 11362.71, et seq. were enacted.

The California Attorney General also issued "Guidelines for the Security and Non-diversion of Marijuana Grown for Medical Use" in 2008. These guidelines were intended to serve as a guide for law enforcement agencies and medical marijuana patients.

Together these statutes and guidelines provide the framework for organizing and operating medical marijuana dispensaries in the state of California.

Practical implications of the use of medical marijuana

Every good intention is often accompanied by a potential for abuse. While legislation for medical marijuana dispensaries requires that they be "non profit" entities, others have found ways to make the operation of a dispensary extremely profitable, and sometimes, even illegal. The ability to become a medical marijuana patient member can often differ from one dispensary to the next but many agree that if marijuana can be recommended for medical symptoms such as anxiety, lack of appetite or ability to sleep, and depression, then many people could benefit from its use. That translates into a belief that anyone can become a qualified patient.

With the growth of medical marijuana dispensaries and the ever increasing number of qualified patients, some have reasoned that the use of medical marijuana might as well be legal so that the state and local governments could regulate it, and reap the financial benefits through taxes, permits, fees, etc. It would also free up law enforcement so it could turn to other, more serious crimes.

Certainly one can argue that the need for medical marijuana will increase. As the baby boomers age, our view of ourselves as "energetic and active" is being replaced by the reality that we are facing more aches, pains, and medical bills.

Proposition 19 confronts another reality . . . we are a nation of self-medicators. We use drugs – legal and illegal – to manipulate our brains and bodies. If we can't jump out of bed in the morning, there is always coffee to entice us into being alert. A cigarette may calm us down (or stimulate us). If we experience too much anxiety, depression and nervousness, we can always take a pill for that. How about a glass of wine or two at the end of the day to wind down after work? And if we can't fall asleep on command, well, there is always something we can do about it. Marijuana is just one of the substances we use (and sometimes, abuse), but it comes with a lot fewer side effects and is generally not considered addictive.

What Proposition 19 provides

Proposition 19, also known as the Regulate, Control and Tax Cannabis Act of 2010, purports to do the following:

- Allows people 21 years of age or older to possess, cultivate, or transport marijuana for personal use
- Permits local governments to regulate and tax commercial production and sale of marijuana
- Prohibits people from possessing marijuana on school grounds, using it in public, smoking it while minors are present, or providing it to anyone under 21
- Maintains current prohibitions against driving a vehicle while impaired.[2]

Proposition 19's findings make for fascinating reading. The initiative acknowledges that laws criminalizing cannabis have failed, millions are using it, and the percentage of U.S. citizens using it is double that of the percentage of Netherlands citizens, who can legally buy marijuana. In essence, criminalization has had no effect on usage. These findings also note that cannabis has fewer side effects than alcohol or cigarettes, California wastes millions in trying to enforce laws against it, and its illegality has spawned an illegal drug trade that makes over $15 billion a year in California, some of which could be collected by state and local agencies if marijuana was decriminalized.

While the initiative addresses the implementation of a "legal regulatory framework," certain activities are left to the cities. If a city decides not to tax and regulate the sale of cannabis, then buying and selling – not possessing and consuming – would remain illegal. If the city decides it is willing to tax and regulate the buying and selling of cannabis, then it must implement "a strictly controlled legal system" to oversee and regulate cultivation, distribution and sales. It would also allow the state Legislature to adopt a "statewide regulatory system for a commercial cannabis industry." The initiative proposes a number of activities that a local government may regulate. Finally, it permits amendment either by a subsequent initiative or statute, but only to further the purposes of the Act."

The supporters of Proposition 19 seem to fall into two general camps: The first camp includes those who would like to use cannabis and want it be available to others, possibly because they believe it

Copyright © 2010 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



to be harmless, no different than alcohol (with less damage to the body), and that criminalizing it has not worked. The second camp is composed of individuals who do not use cannabis and are generally not in favor of its use, but they, too, recognize the war on drugs has failed, and given the critical financial condition of our State, would welcome a thriving business that would put money into government coffers.

And if Proposition 19 passes . . .

If passed, California will be the first state to broadly decriminalize personal possession and use of marijuana while regulating it. It will have a major impact on tax revenues and will save large sums of money now used for law enforcement. Some studies have suggested that California expends over $200 million to enforce marijuana laws.

One major question that arises if Proposition 19 passes is what the federal government will do. Possession of marijuana is still illegal under the federal Controlled Substances Act. The passage of the Proposition 19 won't make the recreational use of marijuana entirely legal. California can refuse to make any laws against marijuana, and state law enforcement officers are not required to enforce federal laws.

If passed, the initiative would put California in conflict with federal law. In the past, the Obama administration has indicated it would not prosecute medical marijuana dispensaries that comply with California and local law, preferring to save its energy to go after major drug traffickers. But that policy generally applies to medical use of marijuana and not recreational use. In a memorandum written by Deputy Attorney General David W. Ogden on October 19, 2009, he confirmed the administration's view that "marijuana is a dangerous drug, and as such, the illegal distribution and sale of marijuana is a serious crime" which no state can authorize its citizens to violate.[3]

The policy outlined in this memo is intended to provide "clarification and guidance to federal prosecutors." It confirms the Department of Justice's commitment to enforcing the Controlled Substances Act. Abstaining enforcement of this Act against medical marijuana dispensaries is not being done on moral grounds nor should it be considered as reflecting a more tolerant stance by the federal ground. Rather, the Department is attempting to make "efficient and rational use of its limited investigative and prosecutorial resources." The memo establishes a priority in prosecuting those involved in marijuana, and small dispensaries are rather low on that list.

Insofar as the medical use of marijuana, Deputy Attorney General David W. Ogden, writes:

> As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. *On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department.*

(Emphasis added.)

Passage of Proposition 19 will dramatically increase the commercial and business opportunities to produce and sell marijuana. That position could change with a new administration. Because the initiative covers commercial production and sale, the federal government may intervene and attempt to enjoin enactment of the measure. It could also amend the Controlled Substances Act and eliminate any non-pre-emption statements, expressly stating that it intends to occupy the field. However, the federal government will not want to spend the time and resources on enforcing the CSA on a small level, and indeed, the public probably wouldn't stand for such a diversion of resources.

The second question is how passage of Proposition 19 will affect other areas of law. Here are just a few areas:

Zoning and regulation: Counties and cities will have to scramble to make decisions on where they stand and how they want to regulate cannabis under the law.

Taxation: Taxing agencies, such as the Board of Equalization, will have to prepare for taxing marijuana. One analysis suggests that taxing marijuana at $50 per ounce could generate over $1.4 billion annually in revenues.

Interstate commerce: Proposition 19's impact on interstate commerce has to be considered, especially if legal marijuana is purchased here and then taken over the border into a state that forbids it.

Attorneys' ethical concerns: How are attorneys to represent those individuals and businesses that want to engage in marijuana-related activities? How do they advise them to do something that is legal under one statutory scheme and illegal under another?

Land use: Land use issues will have to be addressed, including how counties and cities will deal with retail outlets, onsite consumption, such as coffee shops and cafes, and zoning.

Civil rights and anti-discrimination laws: Proposition 19's passage could impact child welfare, private property, juvenile dependency, and parental rights.

Employment law: Issues of wrongful termination may be involved, especially where the employer promotes itself as a "drug-free workplace." If an employer requires drug testing, is a positive test for marijuana enough to terminate or penalize an employment without any showing of impairment? Who decides the level of impairment and will it differ depending on the type of job performed?

Copyright © 2010 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Landlord-tenant: Leases and rental agreements will have to be revised. Can a landlord allow or prohibit the use and growing of marijuana? What about increased water and electrical use for growing? How will it impact homeowner's associations?
Criminal law: What will happen to prior convictions and pending cases involving marijuana?
Medical marijuana: Will Proposition 19 affect the current laws permitting use of medical marijuana?
Insurance: The insurance industry will be impacted by Proposition 19, including homeowners and health insurance.
Federal funding: Proposition 19 may impact federal support for local law enforcement.

In a study conducted by the Rand Corporation,[4] its Drug Policy Research Center concluded that if the initiative passes, the pretax retail price of marijuana now legally sold in California is likely to drop to under $40 per ounce, compared with the illicit market prices of $300 an ounce and more. Some argue that it would fuel a national illicit market, because our California product would be so much cheaper than current black-market prices. In addition, if the taxes imposed are too high, users might still turn to the black market.

Richard Lee, the sponsor of Proposition 19, has faced resistance from the medical marijuana dispensaries. He believes they simply don't want marijuana to be freely available to all and would prefer to keep it in the hands of the dispensaries. Lee contends Proposition 19 was written very carefully and is not intended to affect current medical marijuana laws or reduce the rights of the qualified patients or dispensaries.

Keith Stroup, legal counsel for NORML, a non-profit, public interest lobby, agrees. "Growers and distributors are ripping people who purchase medical marijuana. Marijuana could cost about $25 per ounce if the seller has no risk of prosecution; the added amount is in the nature of a prohibition tax, which is paid because of the high risk. Those growers who oppose it are afraid of losing their profit margin." He concludes that if the initiative passes, the sale of marijuana will be tightly controlled and licensed so that growers will not be able to ask such high prices.

UCLA public policy professor Mark Kleiman recently wrote an article for the Los Angeles Times on why *California Can't Legalize Marijuana*.[5] He argues that California cannot legalize marijuana; it can only repeal its marijuana laws, because growing and selling cannabis is still illegal under the Controlled Substances Act. Kleiman also suggested that Proposition 19 would fuel a national illicit trade because even a legal California product would be cheaper than current black-market prices.

His article was met with a fierce response by Hanna Liebman Dershowitz,[6] an attorney in Los Angeles and a member of the Proposition 19 legal subcommittee. She notes that if Proposition 19 passes, it would shift the sole responsibility and expense of enforcing marijuana laws to the federal government, which would result in a huge burden on federal agents, courthouses, and prisons. It might also put pressure on the federal government to keep pace with the decisions of various states to make a hasty exit from the war on drugs.

The Legislative Analyst's Office report of July 12, 2010, concluded the measure would result in savings up to "several tens of millions of dollars annually" as well as a reduction in state and local costs for enforcement and prosecution of marijuana-related offenses.[7] The report also notes that state and local entities could make money from taxes and fees. It concludes, "To the extent that a commercial marijuana industry developed in the state, however, we estimate that the state and local governments could eventually collect hundreds of millions of dollars annually in additional revenues."

One Southern California attorney, Anthony Curiale, who represents medical marijuana dispensaries and is the appellant's attorney in *Qualified Patients Association v. City of Anaheim*[8], is concerned. He believes the issues of cultivation, transport and distribution should be left to the state, not to the cities or counties. He says, "Allowing cities or counties to ban the distribution of medical marijuana removes from the state its historic role in regulating the manufacturing, processing, transporting and distribution of drugs and would create, at the very least a patchwork of laws inconsistent from one jurisdiction to another."

But Keith Stroup believes that going forward with the initiative is a positive move. He says that demanding "perfection is the enemy of the good." He notes that five states have introduced bills to legalize marijuana and its time has come. Waiting for the perfect law, he says, which seems hardly possible with the differing viewpoints, will result in over 800,000 arrests per year on marijuana charges. This month former Mexican president Vicente Fox joined the growing chorus of those in support of legalizing drugs, stating "radical prohibition strategies have never worked."[9]

Conclusion

For much of our world's history, marijuana was legal and widely accepted. Some have referred to it as the "perfect analgesic." The youths of today did not grow up with the scare tactics employed in *Reefer Madness* and the public is embracing medical marijuana for the relief of an ever-growing variety of ailments. Our current economic climate is also making legalization of marijuana a positive step so we can save the millions of dollars now spent on law enforcement and also rake in millions, if not billions, of dollars in taxes and revenues for a state that is badly in need of the

Copyright © 2010 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**




Bader

infusion of cash to solve its problems.

Donna Bader is a Certified Appellate Specialist and is the author of California Motions to Terminate Civil Cases Before Trial, *published by Thomson/West. Ms. Bader is also the former editor-in-chief of both Plaintiff and Advocate magazines. Donna is the appellate attorney representing appellants, Lake Forest Wellness Center and Collective and the Independent Collective of Orange County, in their challenge to a ban on medical marijuana collectives by the City of Lake Forest in Orange County, California. See www.donnabader.com. She blogs at www.anappealtoreason.com.*

Endnotes

[1] http://uscode.house.gov/download/pls/21C13.txt
[2] http://www.taxcannabis.org/index.php/pages/initiative/
[3] http://blogs.usdoj.gov/blog/archives/192
[4] http://www.rand.org/pubs/occasional_papers/2010/RAND_OP315.pdf
[5] http://www.latimes.com/news/opinion/commentary/la-oe-kleiman-marijuna-legalization-20100714,0,6502857.story
[6] http://www.latimes.com/news/opinion/opinionla/la-oew-dershowitz-20100728,0,527914.story
[7] http://www.lao.ca.gov/ballot/2010/19_11_2010.pdf
[8] A decision by the Fourth Appellate District, Division Three in Case #G040077 is highly anticipated by the medical marijuana community and should be filed before this article is published.
[9] http://www.newsweek.com/2010/08/10/ex-mexican-president-adds-his-voice-to-calls-to-legalize-drugs.html?GT1=43002

Copyright © 2010 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**