

It's for my glaucoma...

Weeding through medical marijuana issues


Cooper

By Miles B. Cooper

The lawyer sat in deposition, pondering. The collision occurred at 9:30 a.m. on a workday, and the defendant was headed home, feeling poorly. Why had the defendant pulled off at a tourist overlook, where the collision occurred?

"If you had not struck my client and his bicycle with your car, what had you planned on doing at the overlook?"

"I was going to smoke a bowl, watch boats, and hope I felt better." The defense lawyer immediately took a break. Upon return, the defendant switched to the phrase, "medical cannabis." But things did not improve. The lawyer learned the defendant had a regular regimen at the end of the day – sufficient to make the defendant's active THC levels potentially a problem…

Legalize it

Marijuana has proven medical benefits. Why the stigma? Well, it is still *technically* illegal under federal law. And when a lawyer starts parsing phrases, it means there's something to talk about. Decades of propaganda have taken their effect. And if you think current pro-marijuana legislation entirely altered that view in the jury pool, you're probably smoking something yourself.

Fifty-six percent of Californians approved legalizing recreational marijuana use in 2016, with higher percentages in urban areas. That means not everyone is against it. But 56 percent is not nine out of twelve on a jury, either.

I got five on it

Who is using it and when, are key issues in the case. Was the defendant toking just before impact? Evil weed. Has your client been regularly using since the incident? Miracle medicine. Examples oversimplified for dramatic effect? Perhaps. But as the Dude would say, "Well, that's just, like, your opinion, man."

Joint liability

If the client was using marijuana at the time of the incident and there's any way in which liability is contested or comparative negligence is a factor, it is an issue. THC is different than alcohol. The amount in the bloodstream does not directly correlate to functional impairment. A heavy user can have relatively high THC levels and pass field-sobriety exercises while a light user may fail field-sobriety tests with the same THC blood concentration.

An experienced toxicologist may be necessary to address the issue. That expert will need a good understanding of the client's use pattern to quantify the potential impact it may have had. And it is possible there may not be enough data to accurately quantify impairment.

The defense is likely to play on thematic elements in this situation, overtly or discretely. The person who ignores federal law is likely to bend other rules to suit one's purpose and is therefore undeserving of compensation. Tough issues, even if you can shut the defense down on the federal law argument with a motion in limine. It means taking the case where the plaintiff was using at the time has risks.

The same issue arises when the defendant was using. A toxicologist may not be able to nail, with precision, the impact that marijuana had on the defendant at the time of the incident. If this is going to be an issue, make sure to get a detailed list of questions for the defendant's deposition that the toxicologist wants covered.

I smoke two joints in the morning

More clients are turning to medical marijuana as part of their post-injury treatment. There are ways to soften the potential stigma with jurors. Disclose it in form interrogatories. Medical marijuana requires a physician's order. It is certainly better if the order is issued by one of the client's regular physicians. But many physicians are reluctant to get involved at this stage, so many clients turn to the new industry approving use. If it is part of the care, it should be disclosed. The client should also be cautious about what is filled in on the overly-simplified approval forms. Needed for headaches and insomnia that first started 10 years ago? Not great for the year-old collision and related TBI claim.

The use should not come as a surprise to the client's regular physicians, either. The client should make sure the use is disclosed. Discuss this with the treating doctors during the pre-deposition meeting as well. Many doctors, including those who may not be personally willing to issue medical marijuana referrals, are supportive of its use and benefits.

Puff, puff, pass on that juror

If marijuana use is an issue in your case, it should be brought up in jury selection. Typically, conservative jurors tend to disfavor its use, so it can be a tool to remove bad jurors for cause in cases where the client used it.

Outro

Back to our lawyer in deposition. Matters continued to go south for the defense. The defense took another break. After 15 minutes, the defense lawyer came back in.

"I've been on the phone with the adjuster. I presume the policy demand that you made last week is still open?" It was, and the case settled that day.

Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).

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