LEGAL OVERVIEW OF STATE AND FEDERAL LAW RELATING TO THE USE OF MEDICAL MARIJUANA

California State Law

The Compassionate Use Act of 1996 (Health and Safety Code Section 11362.5)

On November 5, 1996, California voters approved an initiative measure known as the Compassionate Use Act of 1996, which is now codified in the Health and Safety Code. The initiative measure declared three primary purposes:

1. To ensure that seriously ill citizens have the right to obtain and use cannabis for medical purposes where medical use has been approved by a licensed physician;
2. To ensure that patients and their primary caregivers who obtain and use cannabis for medical purposes are not subject to criminal prosecution or sanction; and
3. To encourage the federal and state governments to implement a plan to provide for safe and affordable distribution of cannabis to all patients in medical need.

At least eight other states have since passed similar laws (Alaska, Arizona, Colorado, Hawaii, Maine, Nevada, Oregon and Washington).

Elements of Health and Safety Code Section 11362.5

- Provides "seriously ill" Californians and their "primary caregivers" the right to possess and cultivate cannabis for the patient's personal medical purposes when the patient has a recommendation from a physician.
- The Code defines a "primary caregiver" as the individual who has consistently assumed responsibility for the housing, health, or safety of the medical cannabis user.
- Although "seriously ill" is not defined, the statute contemplates "the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain,

glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief."

The Compassionate Use Act left open a number of questions relating to transportation, use, sales, amount one can possess, and liability of physicians. The Act also had a very narrow definition of a primary caregiver. The Act was left open to debate and interpretation by the Courts.

California Cases Interpreting the Compassionate Use Act

- Earliest cases construing the Act interpreted the law to create an "affirmative defense" which could be asserted by a patient at trial. (*People v. Trippet* (1997) 56 Cal.App.4th 1532)

- *People v. Peron* (1997) 59 Cal.App.4th 1383 interpreted "primary caregiver" in relation to the sale of cannabis at a club in San Francisco. The Court held that the sale and possession for sale of marijuana continue to be proscribed by Health & Safety Code sections 11360, subdivision (a), and 11359, following enactment of Prop. 215, and the lack of profit to the seller does not exempt such activities from prosecution. The Court further held that the thousands of persons who patronized the club, and who designated the marijuana sellers in the club as "primary caregivers" at the time of sale, did not thereby confer that status on the sellers. Prop. 215 defines "primary caregiver" as an individual "who has consistently assumed responsibility for the housing, health, or safety" of a patient for whom medical marijuana has been prescribed (Health & Saf. Code § 11362.5, subd. (e)), and the "consistency" of these sellers' purported primary caregiving was a myth.

- *People v. Mower* (2002) 28 Cal.4th 457. The Court held that Health & Safety Code section 11362.5, subdivision (d), does not confer complete immunity from arrest and prosecution, but rather confers a limited immunity that entitles a defendant to raise the defense at trial.

  Although the *Mower* Court recognized that the limited immunity from prosecution conferred by the Act could be asserted by a defendant to prevent prosecution, the Court noted that the statute did not confer immunity from arrest. Thus, a legitimate patient with a physician's authorization could still be subjected to arrest, if the arresting officer had probable cause to believe that the authorization was invalid or the amount possessed exceeded the patient's needs. ("Tell it to the judge")

  This anomaly was finally addressed in the 2003 enactment of SB 420 (Medical Marijuana Program), which added Sections 11362.7 through11362.83 to the Health and Safety Code.

- *People v. Urziceanu* (2005) 132 Cal.App.4th 747. The Third District Court of Appeal affirmed the legality of collectives and cooperatives, and held that SB 420 provides for a defense to marijuana distribution for collectives and cooperatives.

- *People v. Wright* (2006) 40 Cal.4th 81. The California Supreme Court concluded that SB 420 specifically provides an affirmative defense to the crime of transporting marijuana to a qualified patient or a person with a state identification card who transports or processes marijuana for his or her own personal medical use. In addition, the Court found that the amounts of marijuana described in SB 420 (8 ounces of dried marijuana and 6 mature or 12 immature plants) constitute a floor, not a ceiling, on the amount of marijuana a qualified patient may possess.

- *People v. Mentch* (2008) 45 Cal.4th 274. A caregiver whose only role consisted of supplying marijuana was not entitled to jury instructions on the primary caregiver affirmative defense.

- *City of Claremont v. Darrel Kruse* (2009) 177 Cal.App.4th 1153. The Second Appellate District upheld a city's moratorium on marijuana dispensaries. After essentially accepting the city's argument that Proposition 215 and SB 420 address the criminal process, but not the civil land use regulations, the Court held that neither Proposition 215 nor SB 420 compels local governments to accommodate medical marijuana dispensaries.

- *Qualified Patients Association, et al. v. City of Anaheim* (Feb. 17, 2009, G040077) (Cal.App. 4 Dist.) [2009 WL 872518]. This case centers around the validity of the City's ordinance banning medical marijuana dispensaries. At issue is Health & Safety Code section 11570 (which bars as a nuisance the use of premises for manufacturing, storage, or distribution of controlled substances) and its relation to Health & Safety Code sections 11362.765 and 11362.775 which decriminalizes activity that is unlawful under section 11570.

- *People v. Kelly* (2010) 47 Cal.4th 1008. On January 21, 2010, the California Supreme Court ruled on *People v. Kelly*. The decision invalidated the limits set forth in SB 420, which was passed in 2003 by the California State Legislature, on the grounds that the law imposed stricter standards on medical marijuana than is allowed under Proposition 215, the Compassionate Use Act. Under the ruling, the state government is no longer allowed to impose any legal limits on the amount of marijuana that medical marijuana users can grow or possess.

Elements of Health and Safety Code Sections 11362.7 through 11362.9

- Voluntary ID cards
- Expands the definition of "primary caregiver" to include clinics, healthcare facilities, residential care facilities, and hospices
- Can be a primary caregiver of more than one (1) qualified patient
- Allows transportation by those with ID cards
- Prohibits cultivation or distribution for profit, but allows primary caregivers to get compensated for actual expenses
- Limits amounts of cannabis patients can possess (8 oz. dried marijuana, and 6 mature plants or 12 immature plants) but allows cities and counties to pass guidelines exceeding limits (see *Kelly)*
- Permits qualified patients and/or caregivers to associate within state to collectively or cooperatively cultivate medical marijuana for medical purposes
- No need to accommodate to smoke at work or in jail (but may)
- No authorization to smoke where prohibited by law, or in school, car, boat
- No professional licensing board may impose a civil penalty against a licensee for acting as a primary caregiver

Federal Law – Controlled Substances Act ("CSA")

- 21 U.S.C. section 801 et seq. provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1).
- CSA categorizes all controlled substances into five schedules, based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. 21 U.S.C. §§ 811 & 812.
- As a Schedule 1 drug, marijuana cannot be prescribed. The only explicit exception to the prohibition on its use is that the Attorney General may allow the use of medical cannabis in research projects if such use would be in the public interest. 21 U.S.C. § 823(f).
- Relevant U.S. Supreme Court Cases: *Oakland Cannabis Buyers Cooperative* (no implied medical necessity defense under Federal Law); *Gonzales v. Raich* (application of CSA provisions criminalizing marijuana distribution and possession does not violate the Commerce Clause).

- US Supreme Court did not strike down Compassionate Use Act or SB 420.

- Section 885(d) of CSA provides for immunity for local government officials. "No civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia,. or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances."

- Immunity for lawful distribution of medical marijuana by local government officials has been rejected in *U.S. v. Rosenthal*, 445 F.3d 1239, (9th Cir. (Cal.) Apr. 26, 2006), and *County of Santa Cruz v. Ashcroft* 279 F. Supp. 2d 1192 (ND Calif. 2003).