Medical Marijuana Overview

The Law and Its Ambiguities

By David D. Diamond, Dmitry Gorin and Brad Kaiserman

DESPITE MEDICAL marijuana laws being on "the books" for fifteen years, prosecutions of dispensaries, its owners and employees have continued. The government pursues criminal prosecutions, arguing that entities are not operating within the parameters of the Compassionate Use Act.

So can a dispensary ever operate lawfully? Can patients use marijuana pursuant to a doctor's recommendation? Unfortunately, there is ambiguity in the medical marijuana laws. Law enforcement often takes a narrow reading of the law, even when that interpretation conflicts with the opinion issued by the California Attorney General's Office, to justify a criminal arrest and prosecution.

Now, after fifteen years of prosecution based on relatively ambiguous laws, Attorney General Kamala Harris has sent a letter to the State Legislature identifying several areas of the medical marijuana law that need immediate clarification, including how collectives and cooperatives should operate, how dispensaries should operate, what constitutes a non-profit operation and how edible medical marijuana products should be handled.

Hopefully the Legislature will provide guidance for caregivers and patients trying their best to comply with medical marijuana laws that have been described as vague and ambiguous, and yet still subject to criminal prosecutions.

For a trial attorney litigating marijuana cases, it is of the utmost importance to thoroughly understand the history of the medical marijuana laws, the role of the Attorney General-issued opinions, areas of vagueness in the law and the possible defenses justifying the cultivation and distribution of marijuana.

History of Medical Marijuana Laws

In 1996, California voters passed Proposition 215, commonly referred to as the Compassionate Use Act ("CUA"). Voters wanted to ensure that seriously ill Californians would have the right to obtain and use marijuana for medical purposes without criminal ramifications. However, after the passage of Proposition 215, a great deal of confusion arose.

Marijuana patients have been searched, arrested and prosecuted for marijuana violations, partly because the act has been interpreted in many different ways. As a result, the California Legislature passed Senate Bill 420, which became law on January 1, 2004. After SB 420 became law, there have been numerous decisions by both the Court of Appeals and the Supreme Court of California that have attempted to clarify the law.

Specifically, the Compassionate Use Act provided that *H&S* §11357 (Possession of Marijuana) and *H&S* §11358 (Cultivation of Marijuana) "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

Seven years later, in 2003, the California Legislature passed the Medical Marijuana Program Act, which enacted *H&S* §11362.7 *et seq*. Here, the express purposes of the act were to "[c]larify the scope of the application of the act and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers," to "[p]romote uniform and consistent application of the act among the counties within the state," and to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, §1(b)(1)-(3).)

Specifically regarding collectives and cooperatives, *H&S* §11362.775 provides that "[q]ualified patients, person with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fat be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570."

Further, the Medical Marijuana Program Act provided that "the Attorney General shall develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the Compassionate Use Act of 1996." (*H&S* §11362.81(d).)

Pursuant to this authorization, the Attorney General issued an opinion titled "Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use" in August of 2008.[1] Among the topics addressed in the opinion are what characterizes a cooperative or a collective and suggestions as to how cooperatives and collectives should operate.

Identifying the Ambiguities in Law

The use of marijuana for medical purposes has now become a highly debated issue in both the judicial and public forums. However, under the Federal Controlled Substances Act of 1970, marijuana use for any purpose is illegal. As such, Proposition 215 has put California law in direct conflict with federal law, and litigation has ensued.

As mentioned previously, on December 21, 2011, California Attorney General Kamala Harris, the state's chief law enforcement official, wrote a letter to the California Legislature "to identify some unsettled questions of law and policy in the areas of cultivation and distribution of physician-recommended marijuana that … are suitable for legislative treatment."

In the letter, she specifically raised questions about *H&S* §11362.775, which authorizes the cultivation of medical marijuana through collectives and cooperatives, and pointed to "significant unresolved legal questions regarding the meaning of this statute" and "the statute's ambiguity." She further pointed out that the Legislature has failed to "clarify what it means for a collective or cooperative to operate as a 'non-profit.'" A copy of this letter can be found at the website for the California Attorney General.

That the statutes surrounding medical marijuana laws are considered ambiguous should come as no surprise to any defense attorney who has represented a client on such matters. Accordingly, it is paramount in such cases to argue both the vagueness of the law as well as the contours of the law to the court.

Legal Defenses

Courts have held that the CUA does not afford qualified patients complete immunity from criminal charges, but, rather, provides an affirmative defense to prosecution, which must be raised as a defense at trial or by a motion to set aside an indictment or information prior to trial for lack of reasonable or probable cause. Again, two methods to assert the medical marijuana defense under the CUA are: (1) through a motion to set aside the indictment or information before trial under Penal Code §995 and/or (2) as an affirmative defense at trial.[2]

The vagueness of the medical marijuana laws can give rise to several possible defenses, either in a pre-trial motion to dismiss or in trial: due process violation for vagueness (pre-trial/post-trial only), mistake of law, mistake of fact and entrapment by estoppel. Certainly in light of the recent letter from the Attorney General, the ambiguities in the statute should be an excellent foundation for an argument based on a due process violation.

For the mistake of law defense, attorneys should refer to the CALJIC commentary to CALCRIM No. 2370, which cites *People v. Urziceanu* (2005) 132 Cal. App. 4th 747 as holding that "an honest mistake of law may be a defense to the charge of conspiracy to sell marijuana."

Since the *Urziceanu* court relies on the rationale that the honest mistake of law negates the specific intent of a conspiracy offense, the same reasoning can be used to apply to a charge of possession for sale. A mistake of fact defense can be framed similarly to a mistake of law defense, but rather than argue that the client believed the law was x, argue that the client believed his conduct fell within the parameters of the immunized conduct.

Entrapment by estoppel is a due process defense to criminal charges when an official has advised the client that the conduct is legal, and the defendant reasonably believed the official. (See *Raley v. Ohio* (1959) 390 U.S. 423; *United States v. Hsie Hui Mei Chen* (9th Cir. 1985) 754 F.2d 817.) It would also be beneficial to look at Corporations Code §31511, which prevents liability from being imposed on an individual who acted pursuant to an Attorney General opinion.

In arguing the contours of the medical marijuana laws, the Attorney General Opinion is the best source of guidance. Not only was this opinion specifically mandated and authorized by the California Legislature but it has already been relied upon in *People v. Hochanadel* (2009) 176 Cal. App. 4th. In addition to *Urziceanu* and *Hochanadel*, other cases that should be considered are *People v. Kelly* (2010) 47 Cal. 4th 1008 (quantity limits on medical marijuana that may be possessed by patients are unconstitutional); *People v. Mower* (2002) 28 Cal. 4th 457 (the medical marijuana laws may serve as a basis for a motion to set aside an indictment or information prior to trial); *People v. Mentch* (2008) 45 Cal. 4th 274 (who may qualify as a primary caregiver); and *County of Butte v. Superior Court* (2009) 175 Cal. App. 4th 729 (a civil case that addresses collective cultivation).

Even when a medical marijuana dispensary, cooperative or collective has done everything to be in full compliance with the law, law enforcement may still obtain a search warrant for the entities and seek to prosecute the entities and its patients. Until the Legislature provides further clarification, every patient participating in a dispensary, cooperative or collective needs to be aware of the risks involved. Accordingly, a defense attorney needs to be a ready advocate for the rights of patients and collectives provided by California's medical marijuana laws.

Retroactivity and Complaint Dismissal

Both the CUA and SB 420 are retroactive. The general rule is that a defendant in a criminal case is entitled to the benefit of a change in law, unless that law contains a savings clause.[3] Because neither the CUA nor SB 420 contains such a clause, one can argue successfully the law's retroactive application.[4]

The defendant may also "informally suggest" that the court dismiss the information or complaint "in the interests of justice" under Penal Code

Medical Marijuana Case Law

The following list summarizes important cases to review when attempting to prosecute or defend a medical marijuana case.

- *People v. Konow* (2004) 32 Cal. App.4th 995. The court can dismiss the complaint/information in the interest of justice.
- *People v. Kelly* (2010) 47 Cal.4th 1008. There is no longer a limit on the amount of medical marijuana patients can possess.
- *People v. Wright* (2004) 21 Cal.Rptr.3d 609. The Medical marijuana defense applies to transportation charges as well.
- *People v. Jones* (2003) 112 Cal. App.4th 341. Once the medical marijuana defense is raised by defendant's testimony that doctor recommended marijuana, the prosecution must disprove this claim by a reasonable doubt.
- *People v. Spark* (2004) 121 Cal. App.4th 259. There is no need to show a defendant was "seriously ill." The jury cannot second guess a valid prescription for medical marijuana.
- *People v. Chakos* (2007) 158 Cal. App.4th 357. Puts limitations on testimony from law enforcement if they are not qualified as medical marijuana expert.
- *People v. Peron* (1997) 59 Cal.App.4th 1383. A primary caregiver who consistently grows and supplies physician approved or prescribed medical marijuana for a Section 11362.5 patient is serving a heath need of a patient.

§1385.[5] Counsel can file this motion at any time, even as early as the arraignment, or with a demurrer to the complaint.

Trial Defense

The medical marijuana defense has four elements: (1) the medical use of marijuana has been recommended or approved by a physician; (2) the physician has determined that the person's health would benefit from the use of marijuana in the treatment of an illness for which marijuana provides relief; (3) the marijuana at issue was for the personal medical use of a qualified patient; and (4) the quantity of marijuana, and the form in which it was possessed, were reasonably related to the patient's current medical needs.[6]

The defendant must provide evidence of "the written or oral recommendation or approval of a physician."[7] In addition, despite public confusion, one does not need both a recommendation and a medical marijuana card.[8]

The Chakos Defense

A defense attorney must ask the court to "voire dire" the police expert as to his training in medical marijuana. Upon reversing a conviction, the Court of Appeals stated, "nowhere in this record do we find any substantial evidence that the arresting officer had any expertise in differentiating citizens who possess marijuana lawfully for their own consumption, as distinct from possessing unlawfully with intent to sell."[9] As such, once the defense is raised, law enforcement must show proper training.

Qualified Primary Caregiver

The CUA defines a "primary caregiver" as "the individual designated by [a qualified patient] who has consistently assumed responsibility for the housing, health, or safety of that person." Health & Safety §11362.5(e) (emphasis added). This creates two elements: (1) designation by a qualified patient, and (2) having assumed consistent responsibility for the housing, health or safety of the patient.[10]

Cooperatives

Prior to the enactment of SB 420, cooperatives and their suppliers received almost no legal protection in the courts. One court of appeal held that neither cooperatives nor the individuals who operate them qualified as primary caregivers, even if formally designated as such by the patient-members, because they did not consistently assume the responsibility for the health or safety of their members.[11] However, SB 420 has abrogated at least a portion of these holdings, exempting collectives and cooperatives formed in California for cultivating marijuana for medical purposes from prosecution for cultivation and distribution of marijuana.

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[1] A copy of the opinion can be found at: http://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf.

[2] *People v. Mower* (2002) 28 Cal.4th 457, 122 Cal.Rptr.2d 326.

[3] See *People v. Babylon* (1985) 39 Cal.3d 719, 722, 216 Cal. Rptr. 123; People v. Rossi (1976) 18 Cal.3d 295, 304 134 Cal. Rptr. 64.

[4] See *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532, 1544-45, 66 Cal.Rptr.2d 559, 567 (holding that CUA applies retroactively).

[5] http://www.losangelesmedicalmarijuanalawyer.com/Drug-Crimes/Sample-Motions.aspx

[6] See CALJIC 12.24.1; *People v. Trippett* (1st Dist. 1997) 56 Cal.App.4th 1532.

[7] Health & Safety Code §11362.5(d).

[8] Health & Safety Code §11362.71.

[9] *People v. Chakos* (2007) 158 Cal.App.4th 357, relying on *People v. Hunt* (1971) 4 Cal.3d 23

[10] See *People v. Mower* (2002) 28 Cal.4th 457

[11] *Lungren v. Peron* (1st Dist. 1998) 59 Cal.App.4th 1383

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