Medical Marijuana: Unanticipated Legal Consequences and the Lessons Learned After More than a Decade of State Legalization

Thursday May 16, 2013

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Medical Marijuana: Unanticipated Legal Consequences and the Lessons Learned After More Than a Decade of State Legalization

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Medical Marijuana in New Mexico

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Non-Referendum State Medical Marijuana Laws as of 2001

Enacted Hawaii legislation in 2000 –
SB 319 (Maes) & HB 431 (Thompson); Duplicate bills which died on adjournment; HB 431 was on the Senate calendar waiting final passage; SB 319 died in the House Judiciary Committee. To be enforced by the New Mexico Department of Health.

New Mexico Legislature - [www.nmlegis.gov/lcs](http://www.nmlegis.gov/lcs) - See “Bill Finder” (last accessed May ______, 2013)
Summary of Original New Mexico Legislation - 2001

- Section 1. Short Title
- Section 2. Legislative Findings – Purpose
- Section 3. Definitions
- Section 4. Rulemaking by Secretary for Establishing Program
- Section 5. Statutory Requirements for Participation in Program
- Section 6. Lawful Activities
- Section 7. Participation by Person Who Has Not Reached His Eighteenth Birthday
- Section 8. Prohibitions. Restrictions and Limitations on the Medical Use of Marijuana.
- Section 9. Fraudulent Representation to Law Enforcement Officer Punishable as Petty Misdemeanor
- Section 10. Defense of Medical Use of Marijuana in Prosecutions for Marijuana Offenses
- Section 11. Amendment to Section 30-31-6 NMSA 1978 – Schedule I of the NM Controlled Substances Act
- Section 12. Amendment to Section 30-31-7 NMSA 1978 – Schedule II of the NM Controlled Substances Act
- Section 14. Severability
Enacted New Mexico Legislation - 2007

Enacted New Mexico Legislation - 2007

- Section 1. Short Title
- Section 2. Purpose of Act
- Section 3. Definitions
- Section 4. Exemption for Criminal and Civil Penalties for the Medical Use of Cannabis
- Section 5. Prohibitions, Restrictions and Limitations on the Medical Use of Cannabis – Criminal Penalties.
- Section 6. Advisory Board Created – Duties.
- Section 7. Registry Identification Cards – Department Rules-Duties
- Section 8. Amendment to Section 30-31-6 NMSA 1978 – Schedule I of the NM Controlled Substances Act
- Section 9. Amendment to Section 30-31-7 NMSA 1978 – Schedule II of the NM Controlled Substances Act
- Section 10. Temporary Provision (Procedures for registry identification cards, licensed producers, cannabis production facilities, distribution system and adequate supply prior to the promulgation of rules by the NM Department of Health)
- Section 11. Severability
- Section 12. Effective Date (July 1, 2007)
Implementing the Lynn and Erin Compassionate Use Act – [www.nmcpr.state.nm.us/nmac](http://www.nmcpr.state.nm.us/nmac)

7.34.2 NMAC – Advisory Board Responsibilities

NMAC- Registry Identification Cards

7.34.4 NMAC – Licensing Requirements for Producers, Production Facilities and Distribution
What did New Mexico Overlook?

- **Funding Mechanism for Program Administration** – See SB 240 (Laws of 2012, Chapter 42) creating the Medical Cannabis Fund in the New Mexico Department of Health.

- **“One Toke Over the DWI Line”** (apologies to Brewer and Shipley circa 1970-71 – *Albuquerque Journal* editorial, March 22, 2012 – “Drugged driving” laws have failed in NM; see, e.g. SB 405 (2011 New Mexico Regular Legislative Session) which died on adjournment in the Senate Judiciary Committee; would have allowed for therapeutic levels for standard Rx medication and disqualifying driving with an illegal drug on board.

- **“N.M. Must Get its Pot Driving Limits in Gear”** – *Albuquerque Journal* editorial, April 8, 2013 – Legal standard needs to be set by the NM Legislature (either a presumed level of intoxication, a blood level that can be challenged or a zero tolerance for THC).
Medical Marijuana and Public Health in the 21st Century

posted on Fri, Sep 2 2011 9:57 am by Cliff Rees

Legal developments move rapidly in the increasingly complex field of medical marijuana law. Since we first blogged on medical marijuana laws in May 2011, at least four significant events have occurred:

1) Delaware Governor Jack Markell signed SB 17 into law on May 13, 2011, making Delaware the 16th state to enact a medical marijuana law similar to other state statutes allowing limited distribution of medical marijuana by licensed nonprofit “compassion centers” for seriously ill persons recommended by their physicians.

2) The Drug Enforcement Administration of the U.S. Department of Justice (USDOJ) denied a petition on June 21, 2011, filed nearly 7 years previously, to initiate rulemaking proceedings to reschedule marijuana from Schedule I of the federal Controlled Substances Act (not accepted for medical use) to Schedule II, III, IV or V drug. Rescheduling marijuana would have made it less likely that users of marijuana for medicinal purposes would be subject to federal prosecution.

3) Arizona Attorney General Thomas C. Horne filed a federal suit in late May, 2011 on behalf of the State of Arizona and Governor Jan Brewer against USDOJ and several private marijuana dispensaries. The suit seeks a declaratory judgment that:
   - the Arizona Medical Marijuana Act (AMMA) complies with federal law and should be implemented and enforced in accordance with its terms, thereby avoiding the threat of federal prosecution of state employees implementing the law, or
   - the AMMA is preempted in whole or in part because of irreconcilable conflict with federal law (insert link to the complaint here), and

4) The USDOJ released its draft Guidance Memo for federal prosecutors considering enforcement in states with medical marijuana laws.
“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

Colorado Medical Marijuana Registry

Ron Hyman
State Registrar

Ann Hause
Director, Office of Legal and Regulatory Affairs
History

- Amendment 20 – November 2000
- Statute – C.R.S. § 25–1.5–106
- Regulation – 5 CCR 1006–2
- July 2001 – Registry established
- HB 10–1284 & SB 10–109
- HB 11–1043
- Amendment 64 – November 2012
Key Players

- **Patient** – person who has a debilitating medical condition
- **Physician** – doctor of medicine who maintains, in good standing, a license to practice medicine issued in CO
- **Primary Care-giver** – person, other than the patient and the patient’s physician, who is 18 years of age or older and has significant responsibility for managing the well being of a patient
Applying to the Department for registration with the program

- Application Form
  - Primary Care-giver (optional)
  - Medical Marijuana Care Center (optional)
- Physician Certification
- Patient’s ID
  - Primary Care-giver’s ID (if one selected)
- Registration Fee – $35
Physician

- Licensed to practice medicine in CO
- Good Standing
  - No restrictions or conditions
- Valid DEA License
- Bona-fide physician–patient relationship
- CDPHE can pursue physicians for financial improprieties
Reported Conditions*

- Severe Pain: 101,607 – 94%
- Muscle Spasms: 16,969 – 16%
- Severe Nausea: 11,495 – 11%
- Cancer: 2,879 – 3%
- Seizures: 1,853 – 2%
- Cachexia: 1,206 – 1%
- Glaucoma: 1,086 – 1%
- HIV/AIDS: 670 – <1%

*Does not add to 100% as some patients report more than one condition
Adding Debilitating Medical Conditions

- Patient or physician may petition to add debilitating medical conditions
- Review of peer-reviewed, published literature of randomized controlled trials
- Ad hoc medical advisory panel
- State Board of Health approval
- No additional conditions approved to date
Primary Care–givers

- Defined as a person 18 years of age or older – not a business/corporation
- Five patient cap – possible waiver
- Patient who has a primary care–giver cannot be a primary care–giver
- Care Centers (aka: dispensaries) – regulated by the Department of Revenue / Medical Marijuana Enforcement Division
Confidentiality

- Patients, primary care-givers and physicians all protected from identification by the Amendment

- Department may verify for a care center that an applicant has not been denied during the 35 day processing period

- Department may make referrals regarding physicians to the Colorado Medical Board
Sharing Info with Law Enforcement

- Colorado Constitution: allows LE access to verify lawful possession of a registry identification card
- CRS § 25–1.5–106(7)(d): 24/7 LE access regarding patient/PCG status
  - Can only release info consistent with the Constitution
  - Can confirm # of patients served by a PCG
- CRS § 25–1.5–106(14): Raising an affirmative defense waives confidentiality related to the condition(s) for which MM recommended
Amendment created an affirmative defense and exception in the context of state criminal law:

- Affirmative defense may be raised by a patient or PCG if at the time of the alleged violation he/she had with a physician recommendation for use after receiving a diagnosis of a debilitating medical condition and are in strict compliance with all other Amendment requirements.
- Exception from charges if they are in lawful possession of a registry identification card and in strict compliance with Amendment requirements.
Applicability to Criminal Law

- If convicted under Art. 18 of Title 18, subject to immediate renewal of MMR
  - Per state Board of Health rules, the patient must remit their registry identification card and reapply for the MMR
Active Registry Cards 2009–March 2013
Selected Patient Characteristics
March 31, 2013

<table>
<thead>
<tr>
<th>Gender</th>
<th>Percent on Registry</th>
<th>Average Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>68%</td>
<td>40</td>
</tr>
<tr>
<td>Female</td>
<td>32%</td>
<td>43</td>
</tr>
</tbody>
</table>
Challenges

- Fraud
  - How to police “significant responsibility”
  - No dedicated resources for investigation
- Number and frequency of changes
- Maintaining confidentiality
- Verifications for law enforcement
- Impact on MMR due to recreational marijuana approval (Amendment 64)
- Potential actions of Federal government
Contact Information

Medical Marijuana Registry
4300 Cherry Creek Drive South
Denver, CO 80246–1530

Medical.marijuana@state.co.us

www.cdphe.state.co.us/hs/medicalmarijuana

303–692–2184
Medical Marijuana in Michigan

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May 16, 2013
Disclaimers

• This is not legal advice.
• Everything I say is not necessarily the opinion of the Attorney General.
• If you have a specific legal question, then you should seek counsel from an attorney.
• State Departments and Legislative Representatives may request a formal Attorney General opinion.
Section 7211 of Michigan’s Controlled Substances Act

• The administrator (the Board of Pharmacy) shall place a substance in schedule 1 if it finds that the substance ...

• has high potential for abuse **and** ...

• has no accepted medical use in treatment in the United States **or** ...

• lacks accepted safety for use in treatment under medical supervision.
Section 802 of the Federal Controlled Substances Act

(1) Schedule I

   (A) The drug or other substance has a high potential for abuse.

   (B) The drug or other substance has no currently accepted medical use in treatment in the United States.

   (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Appeal to change schedule of marijuana to Schedule III-IV denied by D.C. Circuit on January 22, 2013 in Americans for Safe Access v Drug Enforcement Administration, Case No. 11-1265.
2008 Ballot Proposal 1

1. Permit **physician approved** use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.

2. Permit registered individuals to grow **limited amounts** of marijuana for qualifying patients in an enclosed, locked facility.

3. Require Department of Community Health to establish an **identification system** for patients qualified to use marijuana and individuals qualified to grow marijuana.

4. Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a **defense to any prosecution** involving marijuana.
2008 Election Results

- Totals 4,797,709
- YES: 3,006,820
- NO: 1,790,889
- Passed by 63%
The Marijuana Policy Project

MISSION AND VISION

Mission Statement

• Increase public support for non-punitive, non-coercive marijuana policies.
• Identify and activate supporters of non-punitive, non-coercive marijuana policies.
• Change state laws to reduce or eliminate penalties for the medical and non-medical use of marijuana.
• Gain influence in Congress.

(as approved by the board on December 1, 2008)

Vision Statement

• MPP and MPP Foundation envision a nation where marijuana is legally regulated similarly to alcohol, marijuana education is honest and realistic, and treatment for problem marijuana users is non-coercive and geared toward reducing harm.

http://www.mpp.org/about/mission-statement.html (emphasis added)
The patient and/or caregiver will not be subject to arrest, prosecution or penalty in any manner.
The Section 8 Affirmative Defense

The Section 8 defense depends on a person’s compliance with Section 7(b). It DOES NOT require compliance with Section 4.

*People v King* & *People v Kolanek*
Patients

- A qualifying patient is a person *diagnosed* by a physician as having a debilitating medical condition
- A physician must *certify* that the patient has been diagnosed with a debilitating medical condition
- The patient must submit an application, fee, and physician certification form to the MMP
- If the information is complete, then the patient will receive a registry identification card
- Once registered, a patient may possess 2.5 ounces of usable marijuana and 12 marijuana plants
Caregivers

• A patient may designate a caregiver to possess and cultivate plants on behalf of the patient
• A patient may terminate a caregiver at any time for any reason whatsoever and designate a new one
• A caregiver may only serve 5 other people as patients at one time: 12.5 ounces, 60 plants
• A person is allowed to be a caregiver and a patient at the same time: 2.5 ounces, 12 plants
• Total = 15 ounces of usable marijuana + 72 plants
Section 7(b)

• No negligence or professional malpractice while “under the influence”
• No possession on school bus, school grounds, or at a correctional facility
• No smoking marijuana on public transportation or in a public place
• No driving or controlling a car/boat/aircraft while “under the influence” (*People v Koon*)
• No using marijuana without a serious or debilitating medical condition
The Medical Marijuana Program

- Maintains a patient and caregiver registry
- Creates administrative rules
- Collects fees
- Distributes ID cards
- Does not enforce
- Does not investigate
- Does not inspect
- www.michigan.gov/mmp
As of April 30, 2012, there are 133,250 active registered patients and approximately 51,930 active registered caregivers.
Age of Registered Qualifying Patients
A physician shall not be subject to [any penalty] solely for providing written certifications, in the course of [1] a bona fide physician patient relationship and [2] after the physician has completed a full assessment of the qualifying patient’s medical history, or for otherwise stating that, in the physician’s professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient’s serious or debilitating medical condition or symptoms associated with the serous or debilitating medical condition, provided that...
...nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient’s medical condition or otherwise violating the standard of care for evaluating medical conditions.
Expectations for Physicians

• Written Certification = Bona Fide relationship + Full Assessment of Medical History

• Otherwise Stating = First Amendment Right *Conant v Walters*, 309 F3d 629 (9th Cir 2002).

• The Board of Medicine, Board of Osteopathic Medicine, and the Michigan State Medical Society issued guidelines on what constitutes a Bona Fide Physician-Patient Relationship.

Comparison with Prescriptions

- MAPS Report
- FDA Approval for drug
- DEA License for drug manufacturer
- DEA License for Physician
- DEA License for Pharmacist
- State License for Physician
- State License for Pharmacist
- State License for Nurse

- No MAPS Report
- No FDA Approval for drug
- No regulation for manufacturer
- No DEA License for Physician
- No Pharmacist
- No license for caregiver
- No requirement for physician to have contact with caregiver
Michigan Medical Marijuana Review Panel to add new conditions

• In December 2012, the MMRP met convened to consider petitions to add new conditions to the Michigan Medical Marijuana Act.
• The panel initially approved the petition to add Parkinson’s Disease.
• The panel initially denied the petition to add Post Traumatic Stress Disorder.
• A final determination will be made May 2013.
Changes to the Marijuana Act that take effect April 2013

- **HB 4834**
  - Patient/Caregiver must present photo ID along with card
  - MMP may hire a private contractor
  - Panel to review petitions for new conditions
- **HB 4851**
  - Defines “bona fide physician-patient relationship”
  - Defines “enclosed locked facility”
  - Prohibits most felons from becoming caregivers
- **HB 4853**
  - Marijuana in a vehicle must be enclosed and inaccessible
- **HB 4856**
  - Adds felony in Section 4(k) to the charging codes
People v King & People v Kolanek

• A “patient” or a “person” may assert the Section 8 affirmative defense.
• That person does not have to have meet the requirements of Section 4 (i.e. had less than 2.5 oz of usable marijuana or less than 12 marijuana plants in an enclosed locked facility.)
• The affirmative defense must be brought in a pretrial motion to dismiss and for an evidentiary hearing.
• If there is no question of fact, and the person meets all of the criteria, and doesn’t violate section 7(b) the charges shall be dismissed.
• If the person establishes prima facie evidence of all of the elements, but questions of fact still exist, then the defense must be submitted to a jury
• If the person fails to present evidence where a reasonable jury could conclude that the elements were met, and there are no questions of fact, then the motion must be denied. The defense should not go to the jury. The remedy for the person is to file an interlocutory appeal.
Section 8
Defense
Visualized

Pretrial motion to dismiss and for an evidentiary hearing.

Defendant presents prima facie evidence of all three factors.

**MOTION GRANTED.** If there is **no question of fact**, and the person meets all of the criteria, and doesn’t violate section 7(b) the charges shall be dismissed.

If the person establishes prima facie evidence of all of the elements, but **questions of fact** still exist, then the defense must be submitted to a jury.

If the person fails to present evidence where a reasonable jury could conclude that the elements were met, and there are no questions of fact, then...

**MOTION DENIED.** The defense should not go to the jury. The remedy for the person is to file an interlocutory appeal.
…a physician has stated...

- *People v King* & *People v Kolanek* also established that a physician’s statement must come after the passage of the MMA and **before the offense** that leads to prosecution.

- The Court referred to the Board of Medicine and Board of Osteopathic Medicine Guidelines in Footnote 30.

- Emphasized “a pre-existing and ongoing relationship with the patient as a treating physician.”
Footnote 45:
“[T]o provide some guidance, we note that courts considering whether a defendant’s plants were kept in an “enclosed, locked facility” should focus on whether the security device functions to “permit access only by a registered primary caregiver or registered qualifying patient.” MCL 333.26423(c) (emphasis added).”
State of Michigan v McQueen: SALES

- Overturned a Court of Appeals decision that stated patient-to-patient “sales” of marijuana are not allowed under the Marijuana Act.
- Supreme Court found that “sales” are covered under the Marijuana Act.
- BUT a sale is only allowed when it is between a caregiver and one of his or her five patients that he or she is connected to through the State registry system.
- FURTHERMORE no transfer is allowed unless it is between a caregiver and one of his or her five patients that he or she is connected to through the State registry system.
- Medical Marijuana “dispensaries” or other businesses where marijuana is sold are public nuisances subject to abatement.
- When there is no defense under the Marijuana Act, then Michigan public nuisance law applies.
- Buildings and businesses are not allowed to be used for the unlawful sale and distribution of controlled substances. MCL 600.3801 and 600.3825(1).
People v Koon

• What does “under the influence” mean?
• In Michigan presence of a schedule 1 substance means a driver is under the influence per se.
• Does not include marijuana metabolites. “We hold that 11-carboxy-THC is not a schedule 1 controlled substance under MCL 333.7212 and, therefore, a person cannot be prosecuted under MCL 257.625(8) for operating a motor vehicle with any amount of 11-carboxy-THC in his or her system.”
• People v. Feezel, 486 Mich. 184, 205 (Mich. 2010).
Future Developments

• 2013: HB 4271 introduced: Provisioning Center Act
• 2012: HB 5580: “Pharmaceutical Grade” Cannabis
• Bill to legalize similar to Colorado and Washington
• Local ballot initiatives
  – Successful in 2012 in five cities:
    • Detroit
    • Flint
    • Grand Rapids
    • Kalamazoo
    • Ypsilanti
Medical Marijuana Laws & Public Health

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Public Health Issues Raised by Lawful Use of Marijuana

- **Clean Indoor Air Laws**
  - Consider adding prohibition against smoking marijuana to clean indoor air laws.
  - See DC and CA as examples—prohibiting the smoking of marijuana anywhere smoking is prohibited.

- **Smokefree Housing**
  - Impact in public housing.
  - May landlords prohibit use in multiunit housing.
Public Health Issues Raised by Lawful Use of Marijuana

Youth and Medical Marijuana

- Consider prohibiting smoking of marijuana in presence of children.
- Consider special provisions related to child patients using marijuana. Pregnant women?
- Evaluate to determine whether law has had impact on youth access to marijuana.
Public Health Issues Raised by Lawful Use of Marijuana

- **Driving Under the Influence**
  - Consider suspension/revocation of medical marijuana card for DUI conviction (i.e. CO);
  - Evaluate to determine whether medical marijuana law has an impact on DUI prevalence.

- **State Employment Discrimination Laws**
  - Consider impact of medical marijuana use on employers’ drug-free policies.
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Please type your question in the Q & A panel