

# Defense of Medical Marijuana Cases

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# I. THE APPLICABLE STATUTES

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- Health & Safety Code § 11362.5: also known as **Proposition 215**, the **Compassionate Use Act** and/or the CUA
- Health & Safety Code §§ 11362.7 – 11362.83: also known as **SB 420**, the **Medical Marijuana Program Act**, or the “MMP”

# I. THE APPLICABLE STATUTES - 11362.5

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- To ensure that **seriously ill Californians** have the right to access and use MMJ
- The CUA's purpose is to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes upon the recommendation of a physician. (Health & Saf. Code, § 11362.5, subd. (b)(1)(A); *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1436.)

# I. THE APPLICABLE STATUTES - 11362.7

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- Definitions - including “**Attending Physician**”
- “**Qualified patient**” is a person who is entitled to the protections of Section 11362.5, but who does not have an identification card
- “**Identification card**” is a document issued by the State (through the counties) and ID’s a person authorized to medically use of marijuana and the person's designated primary caregiver, if any.

# I. THE APPLICABLE STATUTES - 11362.7(h)

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- “**Serious Medical Condition**” Defined:
- AIDS, Anorexia, Arthritis, Cachexia, Cancer, Chronic Pain, Glaucoma, Migraine, Persistent Muscle Spasms (including MS), Seizures (Incl. Epilepsy), Severe Nausea
- AND

# I. THE APPLICABLE STATUTES - 11362.7(h)(12)

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(12) **Any other chronic or persistent medical symptom** that either:

(A) Substantially limits the ability of the person to conduct one or more major life activities as defined in the Americans with Disabilities Act of 1990 (Public Law 101-336).

(B) If not alleviated, may cause serious harm to the patient's safety or physical or mental health.

# I. THE APPLICABLE STATUTES - 11362.765

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- Section 11362.765 provides exemptions for marijuana charges for qualified patients, identification card holders and caregivers and those aiding patients, specifically from violations of code sections 11357, 11358, 11359, 11360, 11366, 11366.5, and 11370.

# I. THE APPLICABLE STATUTES - 11362.775

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- Section 11362.775 makes exemptions from cultivation, transportation, and furnishing for a valid collective or cooperative.
- Key phrase: “In order **collectively or cooperatively** to cultivate marijuana for medical purposes.”



## II. STATUTORY INTERPRETATION

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- “Medical marijuana” is an affirmative defense
- The defendant is required to assert the affirmative defense and **raise a reasonable doubt** that the possession was unlawful. (*People v. Mower* (2002) 28 Cal.4th 457, 473)

## II. STATUTORY INTERPRETATION

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- The affirmative defense per *Mower* (2002) 28 Cal.4th at 473 can be raised at the preliminary hearing or any time after the filing of an information
- The defendant has a “fundamental right” to raise the defense at a preliminary hearing. (*People v. Konow* (2004) 32 Cal.4th 995)

## II. STATUTORY INTERPRETATION (CONCENTRATED CANNABIS)

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- The meaning of the term “marijuana,” as used in the CUA, also includes concentrated cannabis or hashish. (Ops.Atty.Gen. 03-411 (October 21, 2003.)
- See also Penal Code section 11018
- Federal law has a similar definition of marijuana. (21 U.S.C. § 802(16))

## II. STATUTORY INTERPRETATION (CONCENTRATED CANNABIS)

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- See also (*People v. Bergen* (2008) 166 Cal.App.4th 161, 167.) The statutory definition of “marijuana” includes its resin containing the tetrahydrocannabinol (THC).
- *Bergen* stands for the proposition that using the butane method of extracting hash could subject one to H&S 11379.6; not just 11358 (processing marijuana).

## II. STATUTORY INTERPRETATION (IMPACT UPON PAST DEFENSES)

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- The defense of **Medical Necessity** was abolished by the CUA. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1162.)
- The defense of “**Religious Use**” was NOT abolished by the CUA. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1542)

# II. STATUTORY INTERPRETATION (STATE V. FEDERAL LAW)

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- The “Ogden Memo” is illusory and weak
- It did not say the Feds cannot or will not prosecute MJ cases in MMJ states
- It said “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.”

## II. STATUTORY INTERPRETATION (STATE V. FEDERAL LAW)

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- There are two leading cases on this topic: *Gonzales v. Raich* (2005) 545 U.S. 1, 26-29 and *United States v. Oakland Cannabis Buyers' Cooperative* ["OCBC"], (2001), 532 U.S. at 491-495.)

## II. STATUTORY INTERPRETATION (STATE V. FEDERAL LAW)

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- *Raich* said that the Controlled Substances Act of 1971 (“CSA”) is a rational law within the power of congress.



## II. STATUTORY INTERPRETATION (STATE V. FEDERAL LAW)

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- In *OCBC*, 532 U.S. 483, 493, the Court held that no medical necessity exception existed (**IN FEDERAL LAW**) to the CSA's prohibition on manufacturing and distributing marijuana.

## II. STATUTORY INTERPRETATION (STATE V. FEDERAL LAW)

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- There is no right in a Federal court to an instruction of government estoppel, or “entrapment by estoppel” even if you are operating with a business license authorized by a municipality. (*U.S. v. Rosenthal* (9th Cir. 2006) 454 F.3d 943 [City of Oakland].)

# III. PATIENT ISSUES (WHO MAY USE MARIJUANA)

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- Only the seriously ill may use medical marijuana.
- Only a doctor may determine if a patient is seriously ill, not a trier of fact (a judge or a jury). (*People v. Spark* (2004) 121 Cal.App.4th 259 [back pain])

# III. PATIENT ISSUES (WHO MAY USE MARIJUANA)

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- A recommendation or approval to use medical marijuana may be **oral or written** (Health & Saf. Code, § 11362.5 subd. (d).) The word “prescription” is not used in medical marijuana cases or statutes – one receives a **recommendation** or an **approval**. (*People v. Jones* (2003) 112 Cal.App.4th 341, 347.)

# III. PATIENT ISSUES (WHO MAY USE MARIJUANA)

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- Jones' testified that his doctor told him that use of marijuana for migraine headaches "might help, go ahead"
- This was sufficient evidence to raise a CUA defense at trial on a charge of cultivating marijuana, even though his doctor would not admit to having approved of Jones's marijuana use.

# III. PATIENT ISSUES (WHO MAY USE MARIJUANA)

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- A recommendation or approval must be obtained prior to lawful use.  
(*People v. Rigo* (1999) 69 Cal.App.4th 409, 414 [post-arrest approval is insufficient to allow application of the compassionate use statute])

# III. PATIENT ISSUES (WHO MAY USE MARIJUANA)

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- Even so, an after acquired recommendation or approval from a physician is often useful in mitigating the crime or even having the case dismissed in the interests of justice, (Pen. Code, § 1385) if the client suffered from the ailment at the time of the arrest.

# III. PATIENT ISSUES (WHO MAY USE MARIJUANA)

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- A recommendation or approval does not expire after one year. (*People v. Windus* (2008) 165 Cal.App.4th 634, 641 (“Based on our examination of the CUA, we see nothing in the statute that requires a patient to periodically renew a doctor's recommendation regarding medical marijuana use. The statute does not provide, as the Attorney General asserts, that a recommendation ‘expires’ after a certain period of time.”).)



# III. PATIENT ISSUES (HOW MUCH CAN THEY HAVE)

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- “[A] person may assert, as a defense in court, that he or she possessed or cultivated an amount of marijuana reasonably related to meet his or her current medical needs.” (*People v. Kelly* (2010) 47 Cal.4th 1008, 1049.)

# III. PATIENT ISSUES (HOW MUCH CAN THEY HAVE)

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- *People v. Kelly* (2010) 47 Cal.4th 1008 invalidated the limits imposed by H&S 11362.77
- Now, if you have no more than 8 oz. dried MJ, 6 mature or 12 immature plants you are presumptively immune from arrest if you have a state issued identification card.

# III. PATIENT ISSUES (PROBATION AND PAROLE)

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- The court cannot automatically prohibit probationers, parolees or the like from using or possessing medical marijuana. (See *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433.)
- See also **H&S 11362.795**

# III. PATIENT ISSUES (PROBATION AND PAROLE)

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- The use of medical marijuana while on probation can be banned when it is reasonably related to the defendant's rehabilitation. (*People v. Moret* (2009) 180 Cal.App.4th 839)  
That decision can be revisited at any time.

# III. PATIENT ISSUES (PROBATION AND PAROLE)

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- In *People v. Beaty* (2010) 181 Cal.App.4th 644, the court determined that **without proof that the medical marijuana caused Beaty to not participate in earnest in his Prop 36 treatment or that a doctor believed him to be using it abusively Beaty was not unamenable to treatment.**

# IV. PRIMARY CAREGIVER ISSUES

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- Primary caregiver defenses were largely excoriated by *People v. Mentch* (2008) 45 Cal.4th 274

# IV. PRIMARY CAREGIVER ISSUES

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- “[A] defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided **caregiving**, (2) **independent of** any assistance in taking **medical marijuana**, (3) **at or before the time** he or she assumed responsibility for assisting with medical marijuana.” (*Id.* at p. 284.)

# IV. PRIMARY CAREGIVER ISSUES

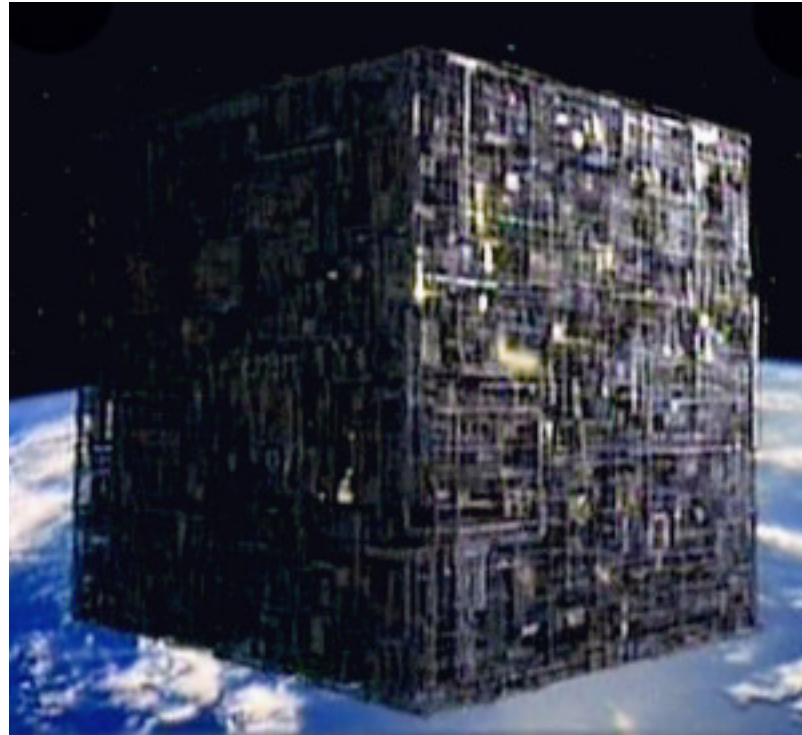
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- So, unless it is a true caregiver situation, evaluate the problem in terms of **collectives** and **cooperatives**, not in terms of “**caregivers**”



# V. COLLECTIVES

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# V. COLLECTIVES

## Statutory and Case Authority for Collectives

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- “Qualified patients, persons 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 fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.” (**Health & Saf. Code, § 11362.775.**)

# V. COLLECTIVES

## Statutory and Case Authority for Collectives

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- In the MMP, the Legislature **exempted** those “qualifying patients” and “primary caregivers” who collectively or cooperatively cultivate marijuana for medical purposes **from criminal sanctions** for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage or distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance. (**People v. Urziceanu (2005) 132 Cal.App.4th 747.**)

# V. COLLECTIVES

## Definitions

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- No definition in Section 11362.775
- “collective...refers to **any association of patients**, caregivers, and persons with identifications cards **who collectively or cooperatively cultivate medical marijuana in compliance with the CUA, the MMP and the Guidelines.**” – *Medical Marijuana Law in California*, Jay Leiderman and James B. Devine

# V. COLLECTIVES

## Definitions

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- “California law does not define collectives, but the dictionary defines them as ‘a business, farm, etc., jointly owned and operated by the members of a group.’ (Random House Unabridged Dictionary; Random House, Inc. © 2006.)....a collective should be an organization that merely facilitates the collaborative efforts of patient and caregiver members – including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities.”
  - California Attorney General’s Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (“Guidelines”)

# V. COLLECTIVES

## Definitions

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- collective (n) 1: a collective body : group; 2: **a cooperative** unit or **organization**; specifically : collective farm; 3: a helicopter control system governing lift – Merriam-Webster Online Dictionary
- “**A collective enterprise is the operation of a business by a group with equal, or near equal levels of, control.** 5 Cal. Transactions Forms--Bus. Entities § 26:17, Lottie Wolfe Cohen, Westlaw. © 2009 Thomson Reuters

# V. COLLECTIVES

## Appellate Court Examinations of Collective Operations

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- ***People v. Urziceanu, supra*, 132 Cal.App.4th 747, 786**

The appellate court determined that a jury presented with the defendant's evidence could find that the defendant's cooperative complied with Section 11362.775

# V. COLLECTIVES

## Appellate Court Examinations of Collective Operations

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- Defendant and his co-defendant were both **qualified patients with valid physician's recommendations**
- The policies and procedures for the collective included **verification** of the patients' identities and recommendations and payment of **membership fees**
- Members **reimbursed the operators for the cultivation costs** through donations
- Members **volunteered** at the cooperative



# V. COLLECTIVES

## Appellate Court Examinations of Collective Operations

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- ***People v. Frazier (2005) 128 Cal.App.4th 807, 813-814***

Defendant was denied a new trial on grounds that he was not permitted to assert a medical marijuana defense

# V. COLLECTIVES

## Appellate Court Examinations of Collective Operations

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- “[T]he jury...concluded he **did not raise even a reasonable doubt** that he and his proffered patients (his wife, stepson, and ex-sister-in-law) were **qualified patients** or that he was a primary caregiver.”
- Defendant was growing and possessing marijuana, **not assisting in administering it to anyone**
- No evidence adduced that he was **acquiring the skills** to cultivate marijuana

# V. COLLECTIVES

## Legality of Dispensaries

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- “[S]torefront dispensaries that qualify as ‘cooperatives’ or ‘collectives’ under the CUA and MMPA, and otherwise comply with those laws, may operate legally....”  
***People v. Hochanadel (2009) 176 Cal.App.4th 997, 1002***

# V. COLLECTIVES

## Legality of Dispensaries

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- **Health & Safety Code Section 11362.768** – discussion of location requirements for a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider

# V. COLLECTIVES

## Possible Business Forms

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- Associations
- Clubs
- Partnerships
- Non-profit mutual benefit corporations (no 501(c)(3) status)
- Cooperative corporations
- **Labels are not as important as actual conduct**

# V. COLLECTIVES

## Consumer Cooperatives

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- Corporations Code sections 12201, et seq.
- “Real” corporation
- Needs articles, bylaws, meeting minutes, securities law compliance
- Governed by a board of directors, operated by officers

# V. COLLECTIVES

## Consumer Cooperatives

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- Exist solely for the consumer needs of its membership
- One share = one vote
- Financial reports to members if more than 25
- Extra money goes back to the members on a pro rata basis

# V. COLLECTIVES

## Consumer Cooperatives – Why They Work as Collectives

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- Not for profit operation
- Exclusive membership
- Statutes governing membership changes



# V. COLLECTIVES

## Consumer Cooperatives – Why They Work as Collectives

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- Tracking transactions between the collective and the member that exceed \$1,000 in the aggregate
- Tax benefits
- Capitalization and initial cash flow

# V. COLLECTIVES

## Agricultural Cooperatives

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- Food and Agricultural Code sections 54002, et seq.
- Another “real” corporation with articles, bylaws, meeting minutes, directors and officers
- Similar to consumer cooperatives, but purpose is to benefit members as producers instead of consumers
- Not for profit operation

# V. COLLECTIVES

## Agricultural Cooperatives

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- Ability to control members production/distribution of marijuana
- Disparate voting based on amount of crop put into cooperative
- Similar tax benefits

# V. COLLECTIVES

## Complying with the Guidelines – Why It is Important

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- “It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that **do not substantially comply** with the [Guidelines]...are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be **subject to arrest and criminal prosecution** under California law.”

# V. COLLECTIVES

## Complying with the Guidelines – Why It is Important

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- **“deviations from the guidelines...may give rise to probable cause for arrest and seizure.”**

# V. COLLECTIVES

## Complying with the Guidelines

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- **(1) Not-for-Profit Operation**
- First suggested practice in the Guidelines
- Refer to Section 11362.765, subdivision (a), no profit language
- Profit does not equal costs of production being reimbursed, including labor, despite what law enforcement alleges in their police reports

# V. COLLECTIVES

## Complying with the Guidelines

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- **(2a) Business Licenses**
- ***City of Corona v. Naulls (2008) 166 Cal.App.4th 418, 420*** – operated a nuisance per se because the dispensary opened with a business license obtained under false pretenses

# V. COLLECTIVES

## Complying with the Guidelines

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- ***City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153, 1158-61*** – appellate court upholds shut down of dispensary because there was no business license issued despite the defendant's demand that the city create one
- ***Qualified Patients Ass'n v. City of Anaheim (2010) 187 Cal.App.4th 734*** – did not decide whether a city could outright ban dispensaries on a business license basis



# V. COLLECTIVES

## Complying with the Guidelines

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- **(2b) Sales Tax and Sellers' Permits**
- Board of Equalization claims sales tax is due on all “sales” of marijuana
- BOE also says all dispensaries should obtain sellers' permits
- Most DAs and law enforcement contend all sales are illegal
- Is the transaction a sale? **Let me bake you some cookies to explain....**

# V. COLLECTIVES

## Why A Collective Does Not Sell Marijuana



# V. COLLECTIVES

## Complying with the Guidelines

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- **(3) Membership Application and Verification**
- Written membership applications
- Verification of recommendation
- Verification of the physician
- Managing the members for expiration of recommendations

# V. COLLECTIVES

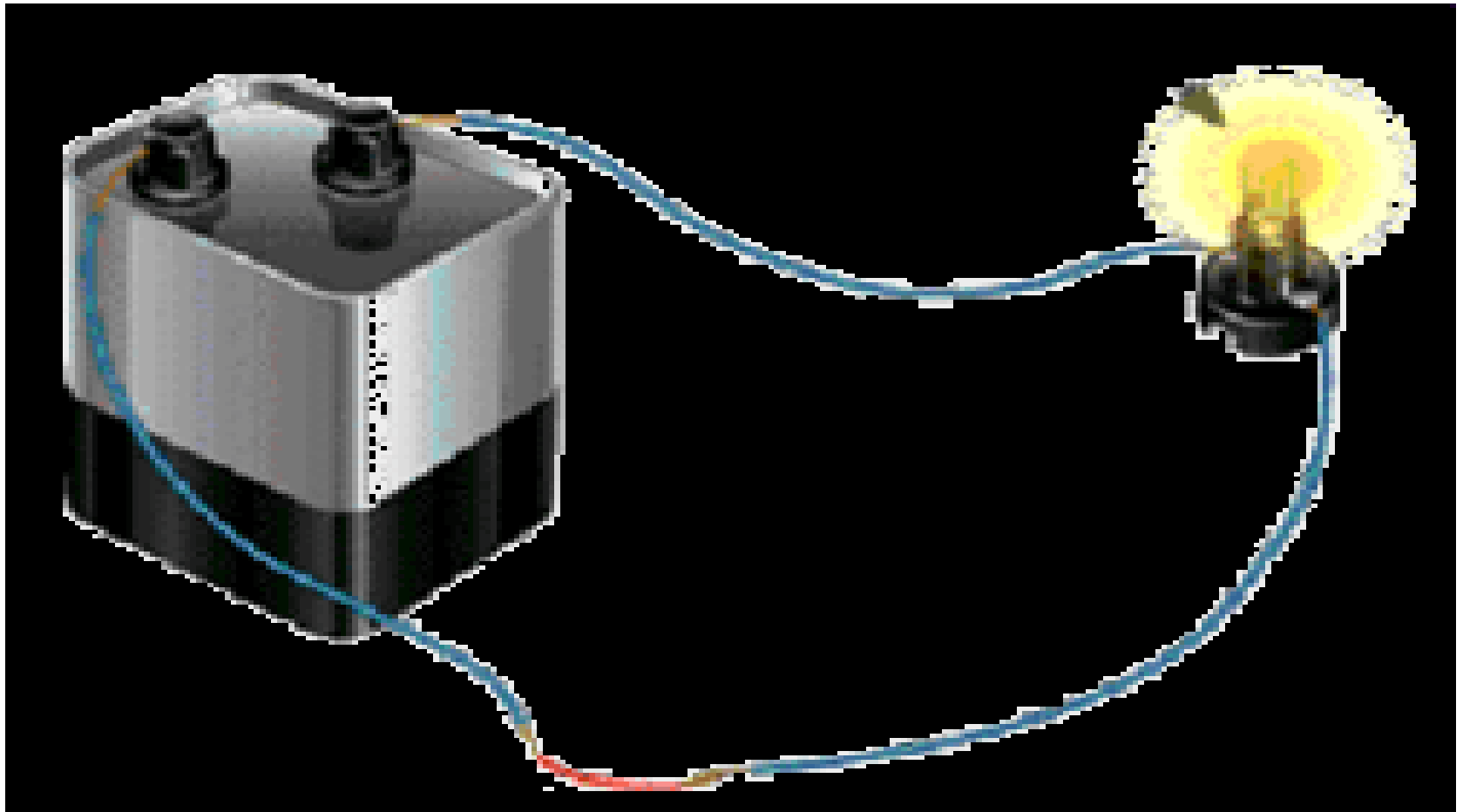
## Complying with the Guidelines

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- **(4) Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Marijuana and**
- **(5) Distribution and Sales to Non-Members are Prohibited**
- “Collectives and cooperatives should **acquire marijuana** only **from** their constituent **members**, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative.”

# V. COLLECTIVES

## The Closed Circuit



# V. COLLECTIVES

## The Closed Circuit

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- Three types of people all of whom are members
- **Cultivators** provide marijuana
- **Consumers** (patients and caregivers) use the marijuana
- **Administrators** operate the collective

# V. COLLECTIVES

## Complying with the Guidelines

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- **(6) Permissible Reimbursements and Allocations**
- “[m]arijuana grown at a collective or cooperative for medical purposes may be: a) Provided **free** to qualified patients and primary caregivers who are members of the collective or cooperative; b) Provided in exchange for **services** rendered to the entity; c) Allocated based on **fees** that are **reasonably calculated to cover overhead costs and operating expenses**; or d) **Any combination of the above.**”

# V. COLLECTIVES

## Complying with the Guidelines

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- (6) Permissible Reimbursements and Allocations
- Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. **Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses.**



# V. COLLECTIVES

## Reimbursement of Overhead Costs and Operating Expenses

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- Cultivation – lights, nutrients, water, power, clones/seeds, lease, labor
- Administration – salaries, insurance, benefits, member management, **legal fees** 😊
- Dispensary – lease, utilities, labor, property insurance
- Deliveries – insurance, mileage reimbursement, labor

# V. COLLECTIVES

## Complying with the Guidelines

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- **(7) Possession and Cultivation Guidelines**
- If a person is acting as primary caregiver to more than one patient under section 11362.7(d)(2), he or she may **aggregate** the **possession** and cultivation limits for each patient. For example, applying the MMP's basic possession guidelines, if a caregiver is responsible for three patients, he or she may possess up to 24 oz. of marijuana (8 oz. per patient) and may grow 18 mature or 36 immature plants.

# V. COLLECTIVES

## Complying with the Guidelines

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- Similarly, **collectives** and cooperatives **may cultivate and transport marijuana in aggregate amounts tied to its membership numbers.**
- Any patient or primary caregiver exceeding individual **possession** guidelines should have supporting records readily available when: a) Operating a location for **cultivation**; b) **Transporting** the group's medical marijuana; and c) **Operating a location for distribution** to members of the collective or cooperative.

# V. COLLECTIVES

## Complying with the Guidelines

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- **(8) Security**
- “[c]ollectives and cooperatives should provide adequate security to ensure that **patients are safe** and that the **surrounding homes or businesses are not negatively impacted by nuisance activity** such as loitering or crime.

# V. COLLECTIVES

## Complying with the Guidelines

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- Further, to maintain security, prevent fraud, and deter robberies, collectives and cooperatives should keep **accurate records** and follow accepted **cash handling practices**, including regular bank runs and cash drops, and maintain a **general ledger of cash transactions.**”

# V. COLLECTIVES

## Law Enforcement Guidelines

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- “It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that **dispensaries that do not substantially comply with the guidelines** set forth in sections IV(A) and (B), above, **are likely operating outside the protections of Proposition 215 and the MMP**, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. **For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for cash ‘donations’ – are likely unlawful.**”

# V. COLLECTIVES

## Signs of Mass Production or Illegal Sales

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- Excessive amounts of marijuana
- Excessive amounts of cash
- Failure to follow local and state laws applicable to similar businesses, such as maintenance of any required licenses and payment of any required taxes, including sales taxes

# V. COLLECTIVES

## Signs of Mass Production or Illegal Sales

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- Weapons
- Illicit drugs
- Purchases from, or sales or distribution to, non-members
- Distribution outside of California



# V. COLLECTIVES

Collectives are NOT Caregivers

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- ***People ex rel. Lungren v. Peron (1997)***  
**59 Cal.App.4th 1383**, says NO
- Collectives are not primary caregivers in the sense the CUA intended, but rather, are “associations” within the meaning of the MMP

# VI. IMPACT OF THE CUA & MMP ON SEARCH AND SEIZURE

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- The limited immunity contemplated in *Mower* is not immunity from search and seizure where an officer has probable cause to search
- (*People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1060, as modified, rev. denied, cert denied 128 S.Ct. 672, 169 L.Ed.2d 527)

# VI. IMPACT OF THE CUA & MMP ON SEARCH AND SEIZURE

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- Is *Strasburg* still good law?
- Strasburg was sitting in his parked car smoking.
- The officer located some marijuana in the cockpit fairly quickly.
- He searched the whole car to see if Strasburg had more than 8 oz.
- Strasburg had 13 oz.

# VI. IMPACT OF THE CUA & MMP ON SEARCH AND SEIZURE

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- Because *Strasburg* turned upon whether or not the officer could continue searching Strasburg's car to see if he had more than the legal 8 ounces of marijuana, there are questions about how this case and the principle for which it stands survives the California Supreme Court's ruling in *People v. Kelly, supra*.

# VI. IMPACT OF THE CUA & MMP ON SEARCH AND SEIZURE

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- Has *Strasberg* also been abrogated by the federal decision in *United States v. \$186,416.00* (9th Cir. 2009) 583 F.3d 1220?
- Because the LAPD failed to inform the magistrate of the facts relating to MMJ when seeking a warrant to raid a collective, the search was without probable cause. (*Id.* at 1225.)
- *\$186,416.00* turned a on state law probable cause analysis

# VI. IMPACT OF THE CUA & MMP ON SEARCH AND SEIZURE

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- The police cannot enter homes without a warrant or exigent circumstances for minor crimes like Section 11357, subdivision (b). *People v. Hua* (2008) 158 Cal.App.4th 1027.

# VII. PROCEDURAL ISSUES IN MEDICAL MARIJUANA DEFENSE

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- Evidence - *Opinion of the police officer*
- Must an officer who qualifies as an expert in marijuana possession for sales also qualify as an expert in MMJ to render an opinion that the MMJ was unlawfully possessed or sold?
- Split of authority: *People v. Chakos* (2007) 158 Cal. App. 4th 357; *People v. Dowl* (2010) 183 Cal.App.4th 702

# VII. PROCEDURAL ISSUES IN MEDICAL MARIJUANA DEFENSE

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- **Defenses**
- A **good faith belief in the medical marijuana defense** is a defense to conspiracy to sell marijuana, since that offense requires a specific intent to violate the law. (*People v. Urziceanu, supra*, 132 Cal.App.4th 747).



# VII. PROCEDURAL ISSUES IN MEDICAL MARIJUANA DEFENSE

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- **Defenses**
- **Entrapment by estoppel** “applies when an official tells the defendant that certain conduct is legal and the defendant believes the official.” (*U.S. v. Chen* (9th Cir. 1985) 764 F.2d 817, 825,)
- How about when the city licenses your business? The Federal courts say no, (See *U.S. v. Rosenthal*, *supra*, 454 F.3d 943), but the issue has not been decided in California.

# VII. PROCEDURAL ISSUES IN MEDICAL MARIJUANA DEFENSE

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- **Jury Instructions and Verdict Issues**
- A defendant is entitled to a jury instruction on a good faith belief in the medical marijuana defense if the facts of the case so warrant.
- (*People v. Urziceanu*, *supra*, 132 Cal.App.4th at 747)

# VII. PROCEDURAL ISSUES IN MEDICAL MARIJUANA DEFENSE

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- **Jury Instructions and Verdict Issues**
- A defendant must seek a special verdict on whether transportation was for personal use or for sale.
- (See *People v. Harris* (2009) 171 Cal.App.4th 1488. [Not an MMJ Case])

# VIII. MISCELLANEOUS APPLICATIONS

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- **Work-Related Issues**
- One can be fired (or not hired) from work for being a medical marijuana patient.
- (*Ross v. Raging Wire Telecommunications, Inc.* (2008) 42 Cal.4th 920)
- New bill in the legislature now to statutorily negate *Raging Wire*

# VIII. MISCELLANEOUS APPLICATIONS

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- **Driver's Licenses**
- The DMV will not take action against a driver's license based upon the responsible use of physician recommended medical marijuana and will treat marijuana as it does all prescription drugs (or so it says).

# VIII. MISCELLANEOUS APPLICATIONS

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- **Professional Licenses**
- Section 11362.8 states that a licensing body cannot take any action against professional licenses for being a medical marijuana patient.
- Beware of *Ross v. Raging Wire, supra*, 42 Cal.4th 920, for other employment effects.

# VIII. MISCELLANEOUS APPLICATIONS

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- **Professional Licenses: *Doctors***
- See *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629 – **Relying upon 1<sup>st</sup> Amendment**
- “An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts ....” (309 F.3d at 636.) **Physicians may not aid patients in actually obtaining marijuana.** (*Id.* at p. 635.)

# VIII. MISCELLANEOUS APPLICATIONS

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- **Medical Privacy Rights**
- A person does not forfeit his or her right to medical privacy if he or she shows an MMJ recommendation, nor does a patient's doctor have to turn over the patient's private records without patient consent. (*Bearman v. Superior Court* (2004) 117 Cal.App.4th 463)



# VIII. MISCELLANEOUS APPLICATIONS

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- **When and Where One Can Use Medical Marijuana**
- **Not in jail unless previously approved.** See *People v. Harris* (2006) 145 Cal.App.4th 1456 and H&S 11362.795
- **You cannot toké where you cannot smoke;** not in a car that is *being operated*, not in a boat that *you are operating*. (Health & Safety Code, § 11362.79).

# VIII. MISCELLANEOUS APPLICATIONS

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- **State Issued Identification Cards**
- In light of *People v. Kelly, supra*, 47 Cal.4th 1008, the possession of the card operates as a protection from arrest for those that possess less than 8 oz. of MMJ or other quantities discussed in section 11362.77. (See 11362.781)
- Cards are voluntary

# IX. FINISH WHAT YOU STARTED

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- **Return of Property**
- After winning in court on a CUA/MMP defense, it is proper to move for an order from the court to get your or your client's medicine back.
- (*City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355)

# IX. FINISH WHAT YOU STARTED

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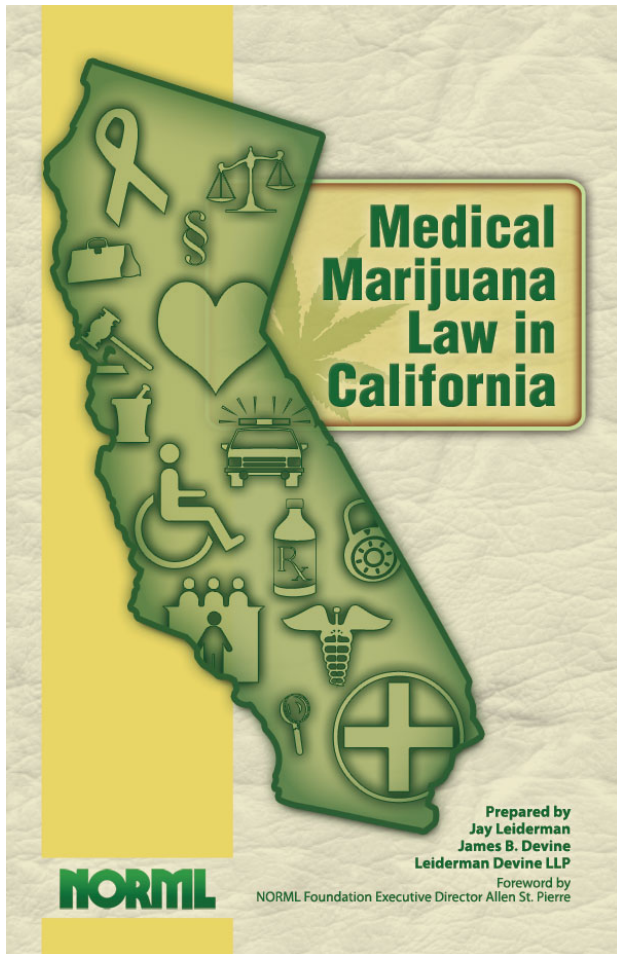
- **Destruction of Records**
- All records regarding an action under sections 11357(b), (c), (d), or (e [sort of]), or 11360(b), **must be destroyed after two years from the date of conviction**, or arrest if there was no conviction.” (Health & Saf. Code, § 11361.5.)
- **No record subject to destruction is accurate or relevant**, and that the person involved can deny being arrested or convicted. (Health & Saf. Code, § 11361.7.)

# TAKE THESE CASES TO TRIAL

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- Juries acquit in MMJ cases, and DA's know it.
- Push these cases to trial, so cops stop arresting and DA's stop filing technical "gotcha's" and law and jury "test cases."
- Good luck!

# SHAMELESS SELF PROMOTION



**Medical Marijuana Law in California**

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Foreword by  
NORML Foundation Executive Director Allen St. Pierre

**NORML**  
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**Fifteen States and Washington DC Have Legalized Medical Marijuana Use**



States That Have Passed Medical Marijuana Laws Since 1996:

Alaska, Arizona, California, Colorado, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington and the District of Columbia.

Visit us on the web at [norml.org](http://norml.org)

**NORML**

National Organization for the Reform of Marijuana Laws Foundation (NORML Foundation)  
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# SHAMELESS SELF PROMOTION

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- Buy our book: “*The NORML Legal Guide to Medical Marijuana Law in California*”  
By Jay Leiderman and James B. Devine
- Published by the NORML Legal Committee
- Available at [NORML.org](http://NORML.org) – there is a link on our website  
[www.leidermandevine.com](http://www.leidermandevine.com)

# Defense of Medical Marijuana Cases

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**LD**  
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