

EMPLOYMENT, ENTITLEMENT, AND MEDICAL MARIJUANA

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OVERVIEW

- Work-Related issues as it relates to MMJ
- Licensing issues including:
 - Drivers
 - Professional
 - Medical
- The Basics of Immigration Issues
- Student Aid
- Marijuana and Guns

OVERVIEW

- When and Where One May Use Medical Marijuana
- State-Issued ID Cards
- Past legal defenses abolished by the CUA and MMP
- Religious Use Of Marijuana
- Return of Property Motions
- Destruction of Records

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)



WORK RELATED ISSUES

- Plaintiff, a disabled veteran in chronic pain, whose physician recommended he use marijuana to treat that chronic pain, was fired when a preemployment drug test required of new employees revealed his marijuana use.
- Use was not during work, no allegation of impairment



WORK RELATED ISSUES

- Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions.
- (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 882-883.)

WORK RELATED ISSUES

- Under the Fair Employment and Housing Act, an employer may terminate an employee who tests positive for marijuana use
- “The Compassionate Use Act (Health & Saf. Code, § 11362.5) does not eliminate marijuana’s potential for abuse or the employer’s legitimate interest in whether an employee uses the drug.”

WORK RELATED ISSUES

- Dissent: This “disrespect[s] the will of California’s voters who, when they enacted the Compassionate Use Act, surely never intended that persons who availed themselves of its provisions would **thereby disqualify themselves from employment.**”

WORK RELATED ISSUES

- Kennard: “**In a decision conspicuously lacking in compassion**, however, the majority holds that an employer may fire an employee for such marijuana use, even when it occurs during off-duty hours, **does not affect the employee’s job performance**, does not impair the employer’s legitimate business interests, and provides the only effective relief for the employee’s chronic pain and muscle spasms.”

WORK RELATED ISSUES

- Federal law, however, continues to prohibit the drug's possession, even by medical users.
- (21 U.S.C. §§ 812, 844(a)); see *Gonzales v. Raich* (2005) 545 U.S. 1, 26-29; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491-495.)

WORK RELATED ISSUES

- SB 129 (Leno) Bill is “Inactive” as of 1 Feb 2012 – effectively dead
- Employers may continue to discriminate based upon your choice of medicine

PROFESSIONAL LICENSES

- Section 11362.8 states that a licensing body cannot take any action against professional licenses for being a medical marijuana caregiver or ID card holder pursuant to section 11362.72.
- Beware of *Ross v. Raging Wire*, *supra*, 42 Cal.4th 920, for other employment effects.

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).

DRIVER'S LICENSES



PROFESSIONAL LICENSES (DOCTORS)

- See *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629 – Relying upon 1st Amendment to give doctors the ability to recommend MMJ for their patients

PROFESSIONAL LICENSES (DOCTORS)

- “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.)

PROFESSIONAL LICENSES (DOCTORS)

- **Good Faith Examination Guidelines:**
- History and good faith examination of the patient
- Development of a treatment plan with objectives
- Provision of informed consent including discussion of side effects

PROFESSIONAL LICENSES (DOCTORS)

- Periodic review of the treatment's efficacy
- Consultation, as necessary
- Proper record keeping that supports the decision to recommend the use of medical marijuana

PROFESSIONAL LICENSES (DOCTORS)

- The mere receipt of a complaint that the physician is recommending medical marijuana will not generate an investigation absent additional information indicating that the physician is not adhering to accepted medical standards.

PROFESSIONAL LICENSES (DOCTORS)

- *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 reason physicians limit recommendations, on their face, to one year, is that the medical board recommends that they do so.

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)
- But beware pre-signed waivers and voluntary disclosures

STUDENT AID

- The Drug-Free Schools, and Communities Act (DFSCA) (20 U.S.C. 1145g)
- The federal government regulates drugs through the Controlled Substances Act (CSA) (21 U.S.C. A 811) which does not recognize the difference between medical recreational use of marijuana

STUDENT AID

- A student is ineligible for federal student aid if convicted, under federal or state law, of any offense involving the possession or sale of a controlled substance during a period of enrollment in which federal student aid was received.
- Many universities still maintain an no MJ policy notwithstanding a patient's rights

STUDENT AID

- Federal aid can be grants, student loans, and/or college work study. The period of ineligibility begins on the date of conviction and lasts until the end of a statutorily specified period. The student may regain eligibility early by completing a drug rehabilitation program or if the conviction is overturned.

MARIJUANA AND GUNS

- Marijuana and guns, taken together, often make law enforcement, prosecutors and judges extremely uneasy. If one possesses marijuana, one is well advised to not have any firearms accessible. There are certain circumstances under which marijuana and guns together can produce an enhanced sentence. (See, e.g., Pen. Code, § 12022.5.)

MARIJUANA AND GUNS

- Even so, nothing in California outlaws this, and in Oregon, where they tried to do so, the courts rejected it.
- Accordingly, think about it before you choose to exercise that right

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), not in a bar, not with a goat.



STATE ISSUED IDENTIFICATION CARDS

- In light of *People v. Kelly*, (2010) 47 Cal.4th 1008, the possession of the state issued ID 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

STATE ISSUED IDENTIFICATION CARDS

- Because cards are voluntary, there is no authority for the proposition that one **MUST** have a state-issued ID card, though many law enforcement agencies labor under this faulty assumption
- See 11362.781

IMMIGRATION

- Covering the most **basic of the basics**
- Always consult with an immigration lawyer before entering a plea
- I am **NOT** an immigration lawyer!

IMMIGRATION

- The Immigrant Legal Resource Center often charges in the neighborhood of \$200 to write a letter about the consequence of your plea and advise upon “safe pleas”
- <http://www.ilrc.org/>

IMMIGRATION

- *Carachuri-Rosendo v. Holder*, 560 U.S. ____, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010)
- The Court held that a minor drug possession (under 2oz of MJ) offense is not automatic grounds for deportation of a legal immigrant.

IMMIGRATION

- In *Carachuri-Rosendo v. Holder*, the Court additionally held that a second or subsequent conviction for simple possession of a controlled substance does not constitute an aggravated felony unless charged as a recidivist offense. 130 S. Ct. 2577, 2589 (2010)

IMMIGRATION

- *Carachuri-Rosendo v. Holder*, 130 S.Ct 2577 (2010) a second or subsequent conviction for simple possession of a controlled substance can qualify as a drug trafficking aggravated felony only if the fact of the first conviction is proven or admitted beyond a reasonable doubt in the course of the criminal proceeding regarding the second possession charge.

IMMIGRATION

- **Facts:** Petitioner, a lawful permanent resident of the United States, faced deportation after committing two misdemeanor drug offenses in Texas.
- For the first, possession of a small amount of marijuana, he received 20 days in jail. For the second, possession without a prescription of one antianxiety tablet, he received 10 days.

IMMIGRATION

- Under the INA, an alien is removable and ineligible for cancellation of removal if he has been “convicted of any aggravated felony.” 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3).
- Congress defined “aggravated felony” to encompass any “felony punishable under the [CSA].” 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2).

IMMIGRATION

- *Carachuri-Rosendo v. Holder*, 130 S.Ct 2577 (2010)
- Ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor. And here the critical language appears in a criminal statute, 18 U.S.C. 924(c)(2).

IMMIGRATION

- “Distribute” means “the actual, constructive, or attempted transfer of a controlled substance” except in certain authorized circumstances, 8 U.S.C. 802(8) and (11), and “need not be for remuneration or profit.” *United States v. Durham*, 464 F.3d 976, 981 n.7 (9th Cir. 2006).

IMMIGRATION

- New case to watch out for:
- **MONCRIEFFE v HOLDER**
- Issue presented:
 - Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal felony.

IMMIGRATION

- MONCRIEFFE v HOLDER
- Moncriffe had 3 joints of MJ, weighing 1.3 grams total
- He plead to possession with intent to distribute
- There is no evidence he received any remuneration

IMMIGRATION

- Possession for sale (Section 11359) is a federal aggravated felony.
- Transportation (Section 11360(a)) though potentially more serious, is not.
- (*People v. Bautista* (2004) 115 Cal.App.4th 229.)

IMMIGRATION

- Cultivation of marijuana is an aggravated felony for immigration purposes.
- (*U.S. v. Reveles-Espinoza* (9th Cir. 2008) 522 F.3d 1044, cert. denied 129 S.Ct. 247, 172 L.Ed.2d 188.)

IMMIGRATION

- The Supreme Court in *Padilla v Kentucky* 130 S. Ct. 1473 (2010), admonished defense counsel to negotiate favorable immigration consequences.
- Query: What will the courts do with the situations where DA's offices will not, as a policy, negotiate more favorable immigration consequences.

IMMIGRATION

- Carefully choose the language that will end up on the charging document
- *People v. Thoma* (2007) 150 Cal.App.4th 1096; *People v. French* (2008) 43 Cal.4th 36; *People v. Banuelos* (2005) 130 Cal.App.4th 60; *People v. Holmes* (2004) 32 Cal 4th 432

IMMIGRATION

- **N.B.: Bottom line:**
- **It is, in my opinion, a terrible idea for any person who is not a citizen to avail themselves of the MMP or CUA at the present time**

STATUTORY INTERPRETATION (IMPACT UPON PAST DEFENSES)

- 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)

RELIGIOUS USE OF MARIJUANA

- *People v. Trippet* (1997) 56 Cal.App.4th 1532 at pp. 1542-43: “I use [marijuana] for spiritual and meditative needs”
 - Insufficient to establish the **strongly held personal religious belief** that is **necessary** to trigger a consideration of the free exercise clause of First Amendment to the US Constitution, where religious freedom would be made a defense to charges of transporting and possessing marijuana.

RELIGIOUS USE OF MARIJUANA

- The use of marijuana must be an indispensable practice of one's faith and a central tenet of that faith. (*People v. Collins* (1969) 273 Cal.App.2d 486.)
- Typically only works for Rastafarians (See *United States v. Bauer* (9th Cir. 1996) 84 F.3d 1549, 1556; *People v. Mitchell* (1966) 244 Cal.App.2d 176, *People v. Peck* (1996) 52 Cal.App.4th 351; *Guam v. Guerrero* (9th Cir. 2002) 290 F.3d 12 10

PATIENT ISSUES (PROBATION AND PAROLE)

- 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**

PATIENT ISSUES (PROBATION AND PAROLE)

- 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.

PATIENT ISSUES (PROBATION AND PAROLE)

- “Finding that imposition of the condition was not an abuse of discretion, we shall affirm the judgment.”
- *People v Leal* (29 October 2012) _____
Cal.App.4th _____

PATIENT ISSUES (PROBATION AND PAROLE)

- We return to those issues and apply a three-step inquiry into limiting CUA use of marijuana by a probationer.
- First, we examine the validity of any CUA authorization;

PATIENT ISSUES (PROBATION AND PAROLE)

- second, we apply the threshold Lent test for interfering with such authorization; and
- third, we consider competing policies governing the exercise of discretion to restrict CUA use.

PATIENT ISSUES (PROBATION AND PAROLE)

- 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.**

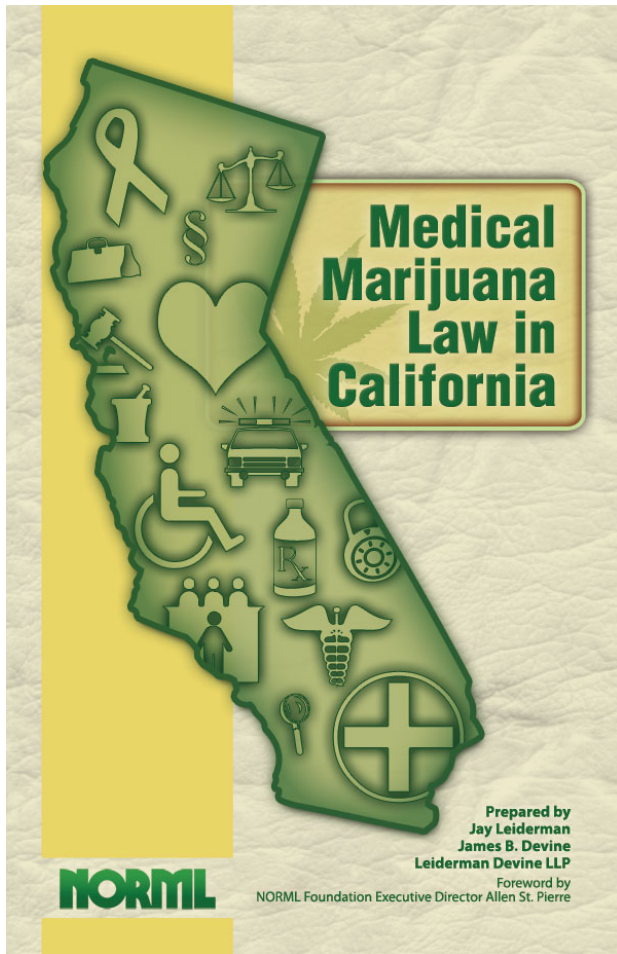
FINISH WHAT YOU STARTED

- **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)

FINISH WHAT YOU STARTED

- **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.)

SHAMELESS SELF PROMOTION



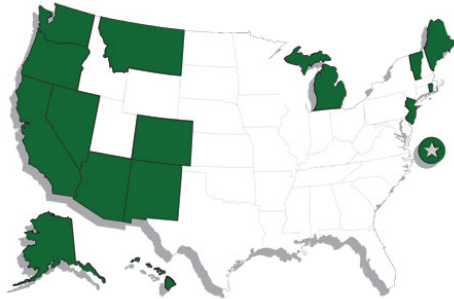
Medical Marijuana Law in California

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NORML

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

National Organization for the Reform of Marijuana Laws Foundation (NORML Foundation)
1600 K Street, Mezzanine
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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 – there is a link on our website
www.leidermandevine.com

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