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Medical Marijuana Practice The Tension Between State's Rights and Federal Law

By Jay Leiderman and James B. Devine

The dichotomy between state and federal marijuana law has been even more askew than usual lately. While states such as Rhode Island, Washington, Arizona and others tried to move forward with dispensary models and medical marijuana programs that involved state participation, the Federal Government shot back by having United States Attorneys write warning letters, and in some cases, the Drug Enforcement Agency (DEA) conducted raids on the eve of new legislation. The warning letters essentially stated what we already knew: that marijuana remains an unlawful, Schedule I drug, and that the Federal Government has the will and the ability to prosecute marijuana crimes as they see fit. So what does this mean for California?

California was the first state to pass a medical marijuana law with the enactment of the Compassionate Use Act (CUA) in 1996. Qualified patients, caregivers and collective participants have been in various forms of legal limbo since. This is largely due to two things. First, local law enforcement and the courts routinely try to frustrate the will and intent of the voters. Second, there is an unsettled and often fluctuating Federal policy.

President Obama's administration's policy statement was released on October 19, 2009. Much has been made of a policy that purportedly states that the Federal Government will not interfere with state medical marijuana business. Nothing could be further from the truth. Indeed, the memo simply states that these prosecutions, such as "[f]or example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources." A careful reading of the memo will illuminate the reader that a federal prosecution remains a distinct possibility. The so-called Ogden Memo, named for its author, states unequivocally that: "The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels."

Ogden Goes on to state that:

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of

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After law school, Jay joined the Office of the Public Defender in Ventura, California. He worked there for almost six and one-half years before venturing into private practice. Jay is now a partner in Leiderman Devine LLP, a Ventura, California based law firm. He has dedicated himself to providing a hard hitting, vigorous, thorough and artful defense while still remaining open and accessible to his clients. Those that know Jay's work describe him as a "true believer," willing to go to the mat for his clients.

Jay also serves on the board of the Ventura County Criminal Defense Bar Association Board of Directors, and was President of the Ventura County Criminal Defense Bar Board of Directors in 2004-2005 and again in 2007-2008. Jay has also lectured locally and statewide on various topics including Medical Marijuana.

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James currently litigates both criminal and civil law cases. A considerable amount of his time is devoted to counseling clients on business formation and operation. He has become an expert in the formation and operation of Medical Marijuana Collectives, and is one of the most knowledgeable attorneys in the state on civil Medical Marijuana law. James has also argued civil and criminal appeals before the Appellate Court of California and bankruptcy appeals before the United States District Court.

Jay and James are the authors of NORML's Legal Guide to Medical Marijuana Law In California.

cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of Federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce Federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on Federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of Federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with State law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

To show how far the gulf is between the State and Federal approach, consider the California view of the issue. In June, 2009, the California State Senate introduced Senate Joint resolution 14 ("SJR 14"). SJR 14 asks the Federal Government to stay out of California's medical marijuana business:

> "WHEREAS, United States Attorney General Eric Holder said on March 18, 2009, that ending raids on medical marijuana facilities is the "new American policy;" now, therefore, be it
>
> Resolved by the Senate and the Assembly of the State of California, jointly, that the Legislature respectfully memorializes the President of the United States and the Congress to move quickly to end Federal raids, intimidation, and interference with state medical marijuana law; . . ."

It is clear that we have seen a great schism in the State and Federal views. While State law continues to develop, Federal law on the issue is fairly clear.

There are two leading cases on this topic: *Gonzales v. Raich* (2005) 545 U.S. 1 and *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483. Raich said that the Controlled Substances Act of 1971 (CSA) is a rational law within the power of congress. Whereas the minority (Justice Scalia) said marijuana regulation is a state's rights issue, the *Raich* majority says it is time to revise the CSA; so 8 of the 9 justices, Scalia being the potential exception, would agree that the DEA action was not justified for one reason or another. Scalia subscribed to the view that the DEA raids are justified under the Constitutional provision for "necessary and proper" laws made by Congress.

Recently, certiorari was denied in *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, cert. denied 129 S.Ct. 2380, 173 L.Ed.2d 1293, enhancing the position that states have the ability to make their own marijuana laws, but failing to take the opportunity to speak to the DEA's continued raids on medical marijuana. In *San Diego NORML*, the counties of San Diego and San Bernardino sought injunctive relief and a declaration that the county did not have to comply with state law because it was in conflict with Federal law. They lost and appealed and sought review of that appeal from the U.S. Supreme Court. Review was denied, leaving in place the law and logic of *Raich*, while still mandating that these counties, and all other California counties, follow existing state law.

The *Raich* majority states:

"Our case law firmly establishes Congress' power to regulate purely local activities that are part of an

economic 'class of activities' that have a substantial effect on interstate commerce. (citation omitted); *Wickard v. Filburn*, 317 U.S. 111, 128-129, 63 S.Ct. 82, 87 L.Ed. 122 (1942). As we stated in *Wickard*, 'even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.' *Id.* at 125, 63 S.Ct. 82." (545 U.S. at 17.) ... "Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, [ ] we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard [v. Filburn*, (1942) 317 U.S. 111], when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.' U.S. Const., Art. I, §8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme." (Id. at p. 22.) ... "We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs. But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion. It is so ordered." (545 U.S. at 33.)

Over the years, several people have sued the DEA to re-classify marijuana from Schedule I (no accepted medical use) to Schedule III (accepted medical uses). One such litigant was Carl Olsen from Iowa. Excerpts from a 2009 DEA memo to litigant Olsen make it clear that the DEA has not softened its position:

> "In *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001) ('OCBC'), the Court held that no medical necessity exception existed to the CSA's prohibition on manufacturing and distributing marijuana. Notwithstanding California State law authorizing possession and cultivation of marijuana for claimed medical purposes, Congress' clear determination that all schedule I controlled substances, including marijuana, have no currently accepted medical use forecloses any argument as to whether such drugs can be dispensed and prescribed for medical use. *Id.* at 493. The Court in OCBC was explicit in stating that 'for purposes of the [CSA], marijuana has 'no currently accepted medical use' at all.' *Id.* at 491. Similarly, in *Raich*, 545 U.S. 1, the Court held that, even in a state that had legalized marijuana activity for claimed medical use, Congress' Federal commerce clause power extended to prohibit purportedly intrastate cultivation and use of marijuana in compliance with the state law. 'Limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach.' *Id.* at 29."

Later in that memo, from January 2009, the DEA tells Olsen:

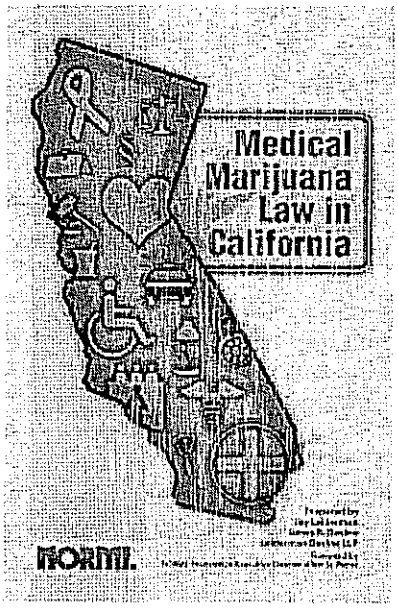
"Your argument that there is no Federal definition of 'currently accepted medical use' also fails. In order to determine whether a substance has a 'currently accepted medical use,' the Administrator applies a five-part test: 1) the drug's chemistry must be known and reproducible; 2) there must be adequate safety studies; 3) there must be adequate and well-controlled studies proving efficacy; 4) the drug must be accepted by qualified experts; and 5) the scientific evidence must be widely available. (*Alliance for Cannabis Therapeutics v. DEA* (D.C. Cir. 1994) 15 F.3d 1131, 1135.)"

California law harmonizes that point. Prohibiting possession of marijuana is not unconstitutional on the theory that there has been no determination that the use of marijuana is harmful. (*People v. Irvin* (1968) 264 Cal.App.2d 747; see also *Gonzales v. Raich, supra.*) Although Raich's additional claims were rejected in a subsequent decision by the Ninth Circuit, the court noted: "We agree with Raich that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well. But that legal recognition has not yet reached the point where a conclusion can be drawn that the right to use medical marijuana is 'fundamental' and 'implicit in the concept of ordered liberty.' (citations omitted.) For the time being, this issue remains in 'the arena of public debate and legislative action.'" (500 F.3d. at 866 (citations omitted).)

However, California, in recent years, has enacted Section 11362.9, which, if accepted by the Regents of the University of California, will establish the testing of the medical efficacy of marijuana at the University of California. Thus, even though courts have denied that marijuana is beneficial to the health of patients, there is hope for patients that studies will emerge to counter these negative opinions.

Even so, one is still not necessarily "safe" from Federal prosecution even with assurances from local or state governments. 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

The National Organization for the Reform of Marijuana Laws (NORML) Foundation has published a new book entitled 'Medical Marijuana Law in California', researched and written by NORML Legal Committee lawyers from Ventura, CA James Devine and Jay Leiderman.



While the name of this new legal guide implies exclusivity to California, the reality is that the legal information found in this guide is applicable to the other fourteen states and the District of Columbia that now have legal protections for qualified patients who've received a physician's recommendation to posses and use medical cannabis.

Topics include:

- Who can use medical marijuana and how much can they possess?
- Medical marijuana in the workplace
- Driver's Licenses
- Paraphernalia
- Collectives
- Immigration
- Guns
- Probation and Parole concerns
- Concentrated cannabis products like hash, oils and 'medibles'
- Numerous other legalisms and case studies regarding medical marijuana

Single copies of the 170-page legal guide retail for $15 (two copies for $25) are available online: https://secure.norml.org/catalog/BOK009.html

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Oakland].) Rosenthal claimed he was deputized by the City of Oakland, and an ordinance passed by the City, as an agent charged with the distribution of marijuana, and thus he was immunized from prosecution pursuant to 21 U.S.C. § 885, subdivision (d). "In conclusion, we reject the premise that an ordinance such as the one Oakland enacted [one that authorizes dispensaries licensed by the city] can shield a defendant from prosecution for violation of Federal drug laws. *Rosenthal* cannot avail himself of the immunity provision of § 885(d)." (454 F.3d at 948 (italics in original).)

Moreover, as of the writing of this article, things are in motion. Governor Chris Gregoire of Washington has reportedly said that she will use her position as the Chair of the National Governor's Association to seek to influence Congress and the President to respect State's rights. Perhaps it has already begun to work. On May 25, 2011, Congressman Barney Frank introduced a bill into Congress that would reclassify marijuana from Schedule I to Schedule III. Called the "States' Medical Marijuana Patient Protection Act," Representative Frank's bill would do what it purports — it would protect patients in medical states from Federal intervention. Perhaps most significantly, Representative Frank's bill provides a defense for lawful state medical marijuana users in Federal Court. It is the statute that will supersede the *Rosenthal* decisions, if it becomes law.

On that same day, two companion bills were also introduced to Congress. One would authorize banks to deal with people involved in medical marijuana transactions and the other exempts medical marijuana businesses from Internal Revenue Code section 280(e). That provision disallows deductions for business that deal in controlled substances that are unlawful under Federal law.

California has not yet been hit by a wave of new DEA raids. With the pressure from the National Governor's Association and these new bills in Congress, it is hard to say if it ever will. Even so, clients are well advised to proceed with caution. All too often those involved in so-called "Cannabusinesses" feel as though they are free from any potential prosecution. The Federal Government has proven time and time again that they will rise up and strike at will. With Delaware recently joining the party as the sixteenth "Green State" (The District of Colombia makes 17 territories), the numbers of Americans who live in medical states are growing. There is new momentum on both sides of the struggle to legalize or demonize this plant. The future is uncertain, but with a new legalization measure to be on the ballot in California in 2012, voters in Ohio poised to go to the polls and potentially vote in favor of "medicalization," and the logjam in the Illinois legislature broken, the future appears brighter than the past.

Dare we dream — America, one Nation, united under a hemp flag, no longer incarcerating those that choose to ingest this plant? Dream we must, as the freedom of this action and the failure of prohibition is at the root of American freedom of speech, thought, and choice! The time appears near that we may end prohibition and break the shackles of unreasonable incarceration. Dream, but proceed with caution until dreams become a reality. ▲