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**SUMMARY OF CALIFORNIA'S MEDICAL MARIJUANA LAWS WITH HUMBOLDT  
COUNTY DISTRICT ATTORNEY OPINIONS REGARDING THE APPLICATION  
AND THE IMPLEMENTATION OF THOSE LAWS**

**September 7, 2011**

**Summary of California's Medical Marijuana Laws**

**The Compassionate Use Act of 1996**

On November 5, 1996, California voters passed Proposition 215, the Compassionate Use Act of 1996 ("the Act"), which decriminalized the cultivation and possession of marijuana by seriously ill individuals and their primary caregivers upon a physician's verbal or written recommendation. (*Health and Safety Code* § 11362.5(d).) The Act was enacted to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana," and to "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (*Health and Safety Code* § 11362.5(b)(1)(A)-(B).)<sup>1</sup>

Courts have found an implied defense under the Act to the transportation of medical marijuana when the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1551.) There is, however, no "unfettered right" for qualified patients or caregivers "to take their marijuana with them wherever they go, regardless of their current medical needs." (*People v. Wayman* (2010) 189 Cal.App.4th 215, 223.)

The Act does not grant immunity from arrest; it merely provides an affirmative defense to charges of unlawful cultivation or possession of marijuana. (See generally *People v. Mower* (2002) 28 Cal.4th 457, 474.) Finally, because the Act was adopted as an initiative statute, article II, section 10, subdivision (c) of the California Constitution prohibits the Legislature (or local governments) from amending its terms, or changing its scope and effect, without voter approval.

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<sup>1</sup> The possession, sale, cultivation, distribution, and transportation of marijuana are generally crimes under California law. (See, e.g., *Health and Safety Code* § 11357 [possession of marijuana is a misdemeanor]; *Health and Safety Code* § 11358 [cultivation of marijuana is a felony]; *Vehicle Code*, § 23222 [possession of less than 1 oz. of marijuana while driving is a misdemeanor]; *Health and Safety Code* § 11359 [possession with intent to sell any amount of marijuana is a felony]; *Health and Safety Code* § 11360 [transporting, selling, or giving away marijuana in California is a felony; under 28.5 grams is a misdemeanor]; *Health and Safety Code* § 11361 [selling or distributing marijuana to minors, or using a minor to transport, sell, or give away marijuana, is a felony].)

## **The Medical Marijuana Program Act**

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMPA),<sup>2</sup> became law. (*Health and Safety Code* §§ 11362.7-11362.83.) The MMPA, among other things, requires the California Department of Public Health (DPH) to maintain a program for the voluntary registration of qualified medical marijuana patients and their primary caregivers through a statewide identification card system. State medical marijuana identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest under specified conditions. (*Health and Safety Code* §§ 11362.71(e), 11362.78.) The MMPA also fixes possession limits for cardholders, and recognizes a qualified exemption from criminal liability for the collective or cooperative cultivation of medical marijuana. (*Health and Safety Code* §§ 11362.7, 11362.77, 11362.775.)

It is mandatory that all counties participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) maintaining certain records; (d) following state implementation protocols; and (e) issuing DPH identification cards to approved applicants and designated primary caregivers. (*Health and Safety Code* § 11362.71(b); *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825-828.) Participation by patients and primary caregivers in the identification card program is voluntary. However, because identification cards offer the holder protection from arrest, are issued only after verification of the cardholder's status as a qualified patient or primary caregiver, and are immediately verifiable, they represent one of the best ways to ensure the security and non-diversion of medical marijuana.

Information about the identification card program, as well as many useful links, may be found on DPH's website: [www.cdph.ca.gov/programs/MMP/Pages/Medical\\_Marijuana\\_Program.aspx](http://www.cdph.ca.gov/programs/MMP/Pages/Medical_Marijuana_Program.aspx).

### **Relevant Definitions**

**“Qualified Patient”:** A qualified patient is a person whose physician has recommended the use of marijuana to treat a serious illness, including cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (*Health and Safety Code* § 11362.5(b)(1)(A).)

**“Primary Caregiver”:** A primary caregiver is a person who is designated by a qualified patient and “has consistently assumed responsibility for the housing, health, or safety” of the patient. (*Health and Safety Code* § 11362.5(e).) The owner or operator of a licensed clinic, health care facility, residential care facility, or a hospice or home health agency also may be designated as a primary caregiver. (*Health and Safety Code* § 11362.7(d)(1).)

A person does not become a primary caregiver merely by having a patient designate him or her as such. California courts have emphasized the need for a substantive patient-caregiver relationship.

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<sup>2</sup> The MMPA's possession limits do not apply to individuals asserting a defense under the Act. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1043.)

Although a “primary caregiver who consistently grows and supplies . . . medicinal marijuana for a section 11362.5 patient is serving a health need of the patient,” someone who merely maintains a source of marijuana does not automatically become the party “who has consistently assumed responsibility for the housing, health, or safety” of that purchaser. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, 1400.)

To qualify as a primary caregiver, an individual must show 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.” (*People v. Mentch* (2008) 45 Cal.4th 274, 283.) In short, the person must show “a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need.” (*Id.* at p. 286.) A person may serve as primary caregiver to “more than one” patient if the patients and caregiver all reside in the same city or county, but may only serve as primary caregiver to one patient outside his or her own city or county of residence. (*Health and Safety Code* § 11362.7(d)(2)-(3).)

**“Recommending Physician”:** A recommending physician is a person who (1) possesses a license in good standing to practice medicine in California; (2) has taken responsibility for some aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient; and (3) has complied with accepted medical standards that a reasonable and prudent physician would follow when recommending or approving marijuana for the treatment of his or her patient.

**“Physician’s Recommendation”:** Physicians may not *prescribe* marijuana because the U.S. Food and Drug Administration regulates prescription drugs, and marijuana is not a prescription drug. Physicians may, however, lawfully issue a verbal or written *recommendation* under California law indicating that marijuana would be a beneficial treatment for a serious medical condition. (*Health and Safety Code* § 11362.5(d); *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 632.)

### **Humboldt County District Attorney’s Priorities under the Act and the MMPA**

The priorities of the Humboldt County District Attorney (“the Office”) as it relates to the Act and the MMPA are to:

1. Protect the rights of patients and primary caregivers who are lawfully cultivating, transporting, possessing and using marijuana under the Act;
2. Ensure that marijuana grown for medical purposes under the Act is grown, collected, transported and distributed in accordance with California laws including, but not limited to, all environmental, worker safety and consumer protection laws so that the rights of all citizens of the State of California are protected and public, worker and consumer health and safety is protected as provided by law;
3. Ensure that marijuana grown for medical purposes under the Act remains secure and does not find its way to non-patients or illicit markets;

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4. Assist local and state law enforcement agencies to perform their duties effectively and in accordance with the Act and California law.

### **The Federal Controlled Substances Act (CSA) and California Medical Marijuana Laws**

The Controlled Substances Act (CSA) provides that it is unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) The CSA reflects the federal government’s view that marijuana is a drug with “no currently accepted medical use.” (21 U.S.C. § 812(b)(1).) ***Accordingly, the growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities.*** (*Id.*, §§ 841(a)(1), 844(a).; see also, attached August 15, 2011, correspondence from Melinda Haag, United States Attorney, emphasis added.)

Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMPA, conflict with the CSA because, in adopting these laws, California did not attempt to legalize marijuana under federal law, but instead exercised the state’s reserved powers to exempt certain marijuana offenses from punishment under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355, 371-373, 381-382.) Further, California’s medical marijuana laws have been upheld against federal preemption challenges. (*County of San Diego, supra*, 165 Cal.App.4th at pp. 826-827; *Qualified Patients Ass’n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 759-760, 763.) Therefore, no legal conflict exists because state law and federal law treat marijuana differently and, while the federal government has the power to adopt and enforce its own standards, under the Tenth Amendment to the United States Constitution it cannot force a state to implement a federal regulatory program.

### **Additional Legal and Regulatory Issues Associated with California Medical Marijuana Laws**

#### **Taxability of Medical Marijuana Transactions**

The California State Board of Equalization (BOE) has adopted a policy of taxing medical marijuana transactions and requiring that businesses engaging in such transactions hold a Seller’s Permit. ([www.boe.ca.gov/news/pdf/medseller2007.pdf](http://www.boe.ca.gov/news/pdf/medseller2007.pdf).) According to BOE, the Seller’s Permit does not allow individuals to make unlawful sales, it merely provides a way to remit any sales and use taxes due. BOE clarified its policy in a June 2007 Special Notice ([www.boe.ca.gov/news/pdf/173.pdf](http://www.boe.ca.gov/news/pdf/173.pdf)), and again in a January 2010 Special Notice that focuses on payment of tax liabilities. ([www.boe.ca.gov/news/pdf/1245.pdf](http://www.boe.ca.gov/news/pdf/1245.pdf).) In February 2011, BOE ruled that the sale of medical marijuana is not exempt from sales tax as exempt medicine. ([www.boe.ca.gov/news/2011/32-11-H.pdf](http://www.boe.ca.gov/news/2011/32-11-H.pdf).)

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## **Medical Standards Applicable to Physician Recommendations**

The Medical Board of California licenses, investigates, and disciplines physicians. (See *Business and Professions Code*, §§ 2000-2521.) Although state law prohibits punishing physicians simply for recommending marijuana for treatment of a serious medical condition (*Health and Safety Code* § 11362.5(c)), the Board can and does take disciplinary action against physicians who fail to adhere to accepted medical standards when evaluating patients and recommending marijuana, or who violate rules against the corporate practice of medicine. The Medical Board has clarified that the standards that a physician must follow when recommending marijuana to a patient are the same ones that a reasonable and prudent physician would follow when recommending or approving any medication. According to the Board, a medical marijuana consultation should involve:

1. Taking a history and conducting a good faith examination of the patient;
2. Developing a treatment plan with objectives;
3. Providing informed consent, including discussion of side effects;
4. Periodically reviewing the treatment's efficacy;
5. Consultations, as necessary; and
6. Keeping proper records supporting the decision to recommend the use of medical marijuana.

Complaints about physicians may be lodged with the Medical Board by calling (800) 633-2322, or by visiting [www.mbc.ca.gov/consumer/complaint\\_info.html](http://www.mbc.ca.gov/consumer/complaint_info.html).

## **Primary Caregiver Liability**

Under the MMPA, primary caregivers cannot be held criminally liable for certain acts, including the receipt of reasonable compensation for their services. Specifically, it provides that a “designated primary caregiver who transports, processes, administers, delivers, or gives away” certain amounts of marijuana to his or her patient is not subject, on that sole basis, to criminal liability for marijuana possession, transportation, cultivation, distribution, or sales. (*Health and Safety Code* § 11362.765(a), (b).) It further provides that primary caregivers who receive “compensation for actual expenses, including reasonable compensation incurred for services provided to enable [a patient] to use marijuana,” or “payment for out-of-pocket expenses incurred in providing those services,” are not on that sole basis subject to criminal liability for marijuana distribution or sales. (*Health and Safety Code* § 11362.765(c).)

## **Location of Use**

Medical marijuana may not be smoked (a) where smoking is prohibited by law, (b) at or within 1000 feet of a school, recreation center, or youth center (unless the medical use occurs within a residence), (c) on a school bus, or (d) in a moving motor vehicle or boat. (*Health and Safety Code* § 11362.79.)

## **Use of Medical Marijuana in the Workplace or at Correctional Facilities**

The medicinal use of marijuana need not be accommodated in the workplace, during work hours, or at any jail, correctional facility, or other penal institution. (*Health and Safety Code* § 11362.785(a).) Furthermore, an employer may terminate an employee who tests positive for medical marijuana without violating the Fair Employment and Housing Act or subjecting itself to a cause of action for termination in violation of public policy. (*Ross v. Raging Wire Telecomms., Inc.* (2008) 42 Cal.4th 920, 929, 933.)

## **Collectives and Cooperatives**

The MMPA gives patients and caregivers a limited right to collectively and cooperatively cultivate marijuana. *Health and Safety Code* § 11362.775 provides that: 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 *Health and Safety Code* §§ 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

The MMPA does not define the terms collective or cooperative, but it is the opinion of the Office that any group that is collectively or cooperatively cultivating and distributing medical marijuana to its members should comply with California law, including environmental, worker safety and consumer protection laws; be organized and operated in a manner that ensures public and individual safety and welfare; the security of the crop; safeguards against diversion for non-medical purposes; and maintain accurate business records that record the business activities of the collective or cooperative.

## **Providers May Be Compensated but May Not Make a Profit**

For-profit sales are specifically forbidden under the MMPA. (*Health and Safety Code* § 11362.765(a) [“nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit”].) Therefore, distribution and sales for profit of marijuana – medical or otherwise – remain criminal under California law.

The Office’s opinion is that any monetary payment, or any provision of goods or services, in exchange for medical marijuana, whether it is a fixed membership fee or reimbursement for medical marijuana received, should be documented and carefully calculated to provide no more in value than the actual cost of cultivating and providing medical marijuana to members and that there be no profit for any person in the supply chain from cultivator to patient. If a dispensary, cultivator, delivery service, or other collective or cooperative enterprise is profiting from its activities, its members may be subject to prosecution under California’s marijuana laws.

California law prohibits profit but permits compensation. The extent to which reimbursement by members to a collective or a cooperative constitutes cultivation, distribution and sales that is exempt from criminal liability is an unresolved question. Therefore, it is the Office’s opinion that any compensation paid by a collective or cooperative to members who perform work for a dispensary (including marijuana cultivation), or who operate the dispensary, should not be excessive nor calculated to artificially diminish or hide profits. Generally, “reasonable compensation” is defined as reasonable wages and benefits paid to persons with similar job descriptions and duties, levels of education and experience, prior individual earnings histories, and number of hours worked. The payment of excessive bonuses should not be considered part of “reasonable compensation.” Therefore, the Office believes that collectives and/or cooperatives

should track and record each member’s contribution of labor, resources, or money to the enterprise. Failure to do so may result in prosecution under California’s marijuana laws.

### **“Cooperatives” Can Only Exist Pursuant to Law**

No business may call itself a “cooperative” (or “co-op”) unless it is properly organized and registered as such under the Corporations or Food and Agricultural Code. (*Corporations Code*, § 12311(b).) A cooperative must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. (*Id.*, §§ 12201, 12300.) Cooperative corporations are “democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons.” (*Id.*, § 12201.) The earnings of the business must be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. (*Ibid.*) Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from members each year. (See *id.*, § 12200, et seq.)

Agricultural cooperatives are likewise nonprofit corporate entities “since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.” (*Food and Agriculture Code*, § 54033.) Agricultural cooperatives share many characteristics with consumer cooperatives. (See, e.g., *id.*, § 54002, et seq.) Cooperatives that acquire marijuana from, or distribute it to, non-members may be prosecuted under California marijuana laws.

### **The Manufacture, Sale, Labeling, Advertising and Dispensing of Marijuana and Marijuana Food Products**

Many medical marijuana collectives and cooperatives offer food products to their members that contain marijuana or marijuana derivatives. The manufacture, sale, labeling, advertising, and dispensing of food and drugs are extensively regulated in California under the Sherman Food, Drug, and Cosmetic Law, which is codified in sections 109875-111915 of the *Health & Safety Code* (the “Sherman Law”). The advertising, labeling, and delivery of marijuana via food products is not addressed in the Act or the MMPA. However, neither do they exempt medical marijuana and related food products from the reach of the Sherman Law. The Office’s position is that, although California’s appellate courts have yet to apply the Sherman Law in the medical marijuana context, the manufacture, sale, labeling, advertising and dispensing of medical marijuana is regulated under the Sherman Law. Therefore, cooperatives and collectives that manufacture or offer edible marijuana products to their members, sell it to dispensaries, cooperatives, or collectives, or offer loose, unlabeled marijuana for sale, do so at their own risk, and should ensure that they are complying with applicable state and local food and drug safety and labeling laws, as well as the Act and the MMPA. Therefore, the Office’s position is that collectives and/or cooperatives should track and document the source of their marijuana.

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## **State and Local Governments May Place Restrictions on the Location of Collectives and/or Cooperatives.**

The MMPA provides, with certain exceptions, that “[n]o medical marijuana cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medical marijuana . . . shall be located within a 600-foot radius of a school.” (*Health and Safety Code* § 11362.768.) Local jurisdictions may place additional restrictions on the location of collectives and cooperatives because the MMPA “does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose.” (*Hill v. County of Los Angeles* (2011) 192 Cal.App.4th 861 at p. 4.)

## **Collectives and/or Cooperatives Should Cultivate Their Own Marijuana**

Collectives and cooperatives should cultivate their own marijuana, because only marijuana grown by a qualified patient (or a primary caregiver to a qualified patient) may lawfully be transported by, or distributed to, other members of that collective or cooperative. (*Health and Safety Code* §§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased or otherwise acquired from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. The Office does not believe that this requires the cultivation and the distribution to be in the same geographic location.

## **CONCLUSION**

The law is not static and the rapidity, scope and sheer amount of legislative and judicial alterations and/or modifications to existing criminal laws and procedure in any given time period is unmatched in any other area of law. Further, imprecise language and the wide variety of public opinion on the issues related to California’s medical marijuana laws makes ascertaining the appropriate course on many of these issues difficult to ascertain. However, the priorities of (i) protecting the rights of patients and primary caregivers who are lawfully cultivating, transporting, possessing and using marijuana under the Act; (ii) ensuring that marijuana grown for medical purposes under the Act is grown, collected, transported and distributed in accordance with California laws including, but not limited to, all environmental, worker safety and consumer protection laws so that the rights of all citizens of the State of California are protected and public, worker and consumer health and safety is protected as provided by law; (iii) ensuring that marijuana grown for medical purposes under the Act remains secure and does not find its way to non-patients or illicit markets; (iv) the general principles underlying the American system of criminal law and procedure and (v) a firm commitment to providing for the public safety and security of the People of Humboldt County have guided the stated opinions.

The opinions reflect only the position of the Humboldt County District Attorney. They are not binding on any other local, state or federal agency. Nor are they binding on the Humboldt County District’s Office. Rather, they are articulated guidelines in assessing issues that arise in interpreting and enforcing California’s medical marijuana laws. Persons using or considering the use of marijuana under the Act or the MMPA must be aware that the policies and opinions of

prosecutors and law enforcement throughout the State of California may and do differ. In some instances those differences are substantial. They must also be aware that the cultivation, transportation and sales of marijuana is a federal crime and neither the Act nor the MMPA is a defense to federal prosecution.