

# Medical Marijuana: What You Need to Know to Discuss it with Patients & Clients

**Jesse Stout, Esq.**

**May 11, 2018**

## Me

- Got involved in cannabis policy in 2002 because sick people need medicine
- Greenbridge Corporate Counsel – business law
- THC Staffing Group – diversity recruiting
- San Francisco Cannabis State Legalization Task Force – appointee

## Legal History

### U.S. Controlled Substances Act (1970)

21 U.S.C. § 812(b)(1):

“Schedule 1—

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.”

## In the Matter of Marijuana Rescheduling (1988)

DEA Chief Administrative Law Judge Francis Young ruled:

- “Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis marijuana can be safely used within a supervised routine of medical care.”
- “It would be unreasonable, arbitrary and capricious for DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record.”
- “The administrative law judge recommends that the Administrator conclude that the marijuana plant considered as a whole has a currently accepted medical use in treatment in the United States, that there is no lack of accepted safety for use of it under medical supervision and that it may lawfully be transferred from Schedule I to Schedule II.”

DEA rejected judge’s determination; Court of Appeals allowed DEA’s rejection.

## Compassionate Use Act (CA Prop 215, 1996)

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) 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 in the treatment of **cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.**

(B) 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.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, **no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.**

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

## Compassionate Use Act (CA Prop 215, 1996)

- Allows physicians to “recommend” cannabis
- Does not allow physicians to “prescribe” cannabis
- No one can “prescribe” whole-plant cannabis in USA

## Conant v. Walters, 309 F.3d 629 (9th Cir. 2002)

- Filed in 1997, a few months after Proposition 215 (CUA) passed
  - Dr. Marcus Conant was lead plaintiff among 9 doctors, several patients, Bay Area Physicians for Human Rights, and Being Alive: People with HIV/AIDS Action Coalition
  - (Dr. Conant was among the first to diagnose AIDS in 1981, and among the first to identify Kaposi’s Sarcoma in AIDS patients)
- Doctors cannot lose DEA license for recommending cannabis

Conant v. Walters, 309 F.3d 629 (9th Cir. 2002)

“The order enjoins the federal government from either revoking a physician's **license to prescribe** controlled substances or conducting an investigation of a physician that might lead to such revocation, where the basis for the government's action is solely the physician's **professional "recommendation"** of the use of medical marijuana.”

Conant v. Walters, 309 F.3d 629 (9th Cir. 2002)

“The Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship. See [Planned Parenthood of Southeastern Pennsylvania v. Casey](#), 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality) (recognizing physician's First Amendment right not to speak); [Rust v. Sullivan](#), 500 U.S. 173, 200, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (noting that regulations on physician speech may "impinge upon the doctor-patient relationship").”

## Medical Marijuana Program Act (SB 420, 2003)

### “Medical Marijuana Identification Card” (MMIC)

1. Patient obtains written recommendation from CA physician
2. Patient brings recommendation to county health department to obtain MMIC



## Medical Marijuana Program Act (SB 420, 2003)

Cal. Health & Safety Code § 11362.775(A):

“... persons with identification cards, who associate within the State of California in order **collectively or cooperatively** to cultivate cannabis for medicinal purposes, shall not solely on the basis of that fact be subject to state criminal sanctions...”

Medical Marijuana Program Act (SB 420, 2003)

Cal. Health & Safety Code § 11362.77(b):

“If a qualified patient or primary caregiver has a **doctor’s recommendation that this quantity does not meet the qualified patient’s medical needs**, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient’s needs.”

People v. Kelly, 47 Cal.4th 1008 (2010)

“In this sense, section 11362.77's quantity limitations conflict with—and thereby substantially restrict—the CUA's guarantee that a qualified patient may possess and cultivate *any amount of marijuana reasonably necessary for his or her current medical condition*” (italics in original).

## USDOJ Cole Memo (2013-2018)

DAG James M. Cole, "Guidance Regarding Cannabis Enforcement", Washington DC: Department of Justice (August 19, 2013) identified eight Federal enforcement priorities:

- sales to minors
- revenue to cartels
- interstate sales
- other drugs
- guns and violence
- drugged driving
- harming environment
- federal property

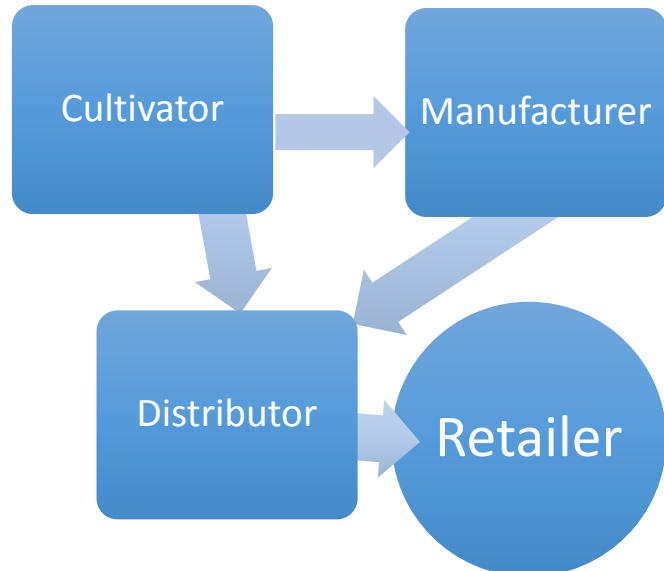
## Adult Use of Marijuana Act (Prop 64, 2016)

- Adults age 21+: 6 plants, 1 ounce flower, 8 grams concentrates
- Medical patients exempt from retail sales tax, but state ID required
- New wholesale taxes: \$9.25/oz flower, \$2.75/oz leaf, 15% excise



## Adult Use of Marijuana Act (Prop 64, 2016)

- State business license required
  - Retail
  - Cultivator
  - Manufacturer
  - Distributor
  - Testing Labs
- City/county permit required too



## Adult Use of Marijuana Act (Prop 64, 2016)

Cal. Health & Safety Code § 11362.712(a):

- “Commencing on January 1, 2018, a qualified patient must possess a physician’s recommendation that complies with Article 25 (commencing with Section 2525) of Chapter 5 of Division 2 of the Business and Professions Code...”

Cal. Business & Professions Code § 2525.1:

- “The Medical Board of California shall consult with the California Marijuana Research Program... on developing and adopting medical guidelines for the appropriate administration and use of medical cannabis.”

## California Medical Board

Approved guidelines on October 27, 2017 to guide physicians in recommending medical cannabis to their patients



### California Medical Board:

Physicians “will not be subject to investigation or disciplinary action by the Board if they arrive at the decision to make this recommendation in accordance with accepted standards of medical responsibility”

## Basis for Recommendation

Recommending cannabis is at the professional discretion of the physician acting within the standard of care, which is “the same as any reasonable and prudent physician would follow when recommending or approving any other medication.”

## Basis for Recommendation

Proposition 215 includes:

- cancer,
- AIDS,
- spasticity,
- arthritis,
- or **any other illness** for which cannabis provides relief
- chronic pain,
- anorexia,
- glaucoma,
- migraine,

## History and Physical

Particular attention to alcohol and substance abuse history

Family history with focus on substance use and psychotic disorders

Depending on severity, consider consult from (or referral to) pain specialist, psychiatry, addiction, or other mental health professionals

## Determination to be based on:

- Clinical trials
- Medical literature
- Experience of recommending physician
- Experience of other physicians
- Credible patient reports

“decision to recommend cannabis should be a shared decision between the physician and the patient”

**Counseling regarding** risks of:

- driving/DUI,
- exacerbation of psychotic disorder,
- cannabis use disorder,
- falls/fractures,
- pregnancy/breastfeeding,
- edibles children/pets

Unprofessional conduct to be employed by, or enter into any other agreement with, any person or entity dispensing cannabis for medical purposes

Does your patient need a state  
Medical Marijuana ID Card?

Hospice employees can be caregivers

Cal. Health & Safety Code § 11362.7(d)(1)

Primary caregiver: “qualified patient... receives medical care... from... a hospice... The owner or operator, or no more than three employees... If designated as a primary caregiver by that patient”

## Sales Tax

### PATIENTS & CAREGIVERS ARE EXEMPT

P64 / Cal. Business & Prof. Code § 34011(g)

“The sales and use tax... shall not apply to retail sales of *medical* cannabis... when a qualified patient (or primary caregiver)... provides his or her card”

## Possession

### PATIENTS CAN HAVE AS MUCH AS DOC SAYS

P64 / Cal. Health & Safety Code § 11362.3(f)

“Nothing in this section shall be construed or interpreted to amend, repeal, affect, restrict, or preempt laws pertaining to the Compassionate Use Act of 1996.”

Free samples

ONLY FOR PATIENTS & CAREGIVERS

16 CCR § 5411(b)(1)

“Free cannabis goods are provided only to a medicinal cannabis patient or primary caregiver”

Employment

PATIENTS CAN GET FIRED

Ross v. RagingWire, 42 Cal.4th 920 (2008)

California medical cannabis law protect patients from being criminally prosecuted, NOT from being fired by their employers.

BUT... AB 2069 (2018) would fix this!



Custodial/Parental Rights

PATIENTS ARE PROTECTED

P64 / Cal. Health & Safety Code § 11362.84

“The status and conduct of a qualified patient... shall not, by itself, be used to restrict or abridge custodial or parental rights to minor children”

[Jesse.Stout@GreenBridgeLaw.com](mailto:Jesse.Stout@GreenBridgeLaw.com)