



**CITY OF LODI
COUNCIL COMMUNICATION**

AGENDA TITLE: Adopt Uncodified Interim Urgency Ordinance to Establish a Moratorium on 1) the Outdoor Cultivation of Medical Marijuana within the City of Lodi, and 2) the Indoor Cultivation of Medical Marijuana that Creates a Public Nuisance

MEETING DATE: November 7, 2012

PREPARED BY: Deputy City Attorney

RECOMMENDED ACTION: Adopt Uncodified Interim Urgency Ordinance to establish a moratorium on 1) the cultivation of medical marijuana within the City of Lodi, and 2) the indoor cultivation of medical marijuana that creates a public nuisance.

BACKGROUND INFORMATION: A lengthy presentation on the options for regulating the cultivation of medical marijuana in the City of Lodi was heard by the Council at the Shirtsleeve meeting of October 16, 2012. Following public comment and discussion, staff is bringing Council a proposed ordinance that would protect against the public nuisance and crime-related concerns that are associated with the cultivation of medical marijuana, while balancing the rights of medical marijuana patients under state law.

Because there is insufficient time for staff and the Council to study and discuss the complicated legal and practical issues involved in regulating the cultivation of marijuana for medical use, staff recommends that the Council adopt an interim urgency ordinance banning the outdoor cultivation of medical marijuana within the City of Lodi and the indoor cultivation of medical marijuana within the City of Lodi that creates a public nuisance resulting from the visibility of marijuana from the public right-of-way or the smell of marijuana beyond the property line of the property where indoor cultivation is taking place. If adopted as an urgency ordinance, under the provisions of Government Code section 65858, the proposed ordinance would become effective immediately upon a four-fifths (4/5) vote of the Council. The proposed ordinance would remain in full force and effect for 45-days from the date of adoption, unless terminated earlier or extended by vote of the Council, as discussed below.

Currently the City has no explicit regulations governing the cultivation of marijuana for medical use. Cultivation of marijuana for any purpose remains illegal under the federal Controlled Substance Act; but under California's Medical Marijuana Program Act, cultivation of marijuana by a Qualified Patient (defined by Health & Saf. Code, §11362.7(f)) or a Primary Caregiver (defined by Health & Saf. Code, §11362.7(d)) is expressly allowed. However, state law does not set out a regulatory scheme for the cultivation of medical marijuana, leaving it to cities and counties to adopt ordinances governing where and how marijuana for medical purposes should be grown.

The Lodi Police Department is aware of numerous medical marijuana cultivation sites within the City. Lodi has experienced burglaries, robberies, violent crimes, and electrical utility thefts associated with the cultivation of marijuana, both for medical and non-medical uses. In all likelihood there have also been unreported thefts and physical confrontations between marijuana growers and suspects. Because marijuana is the target of theft, some growers have armed themselves to protect their plants. In addition, the City has received complaints of the odors and visible nuisance created by the outdoor cultivation of

marijuana. All of these circumstances negatively affect the health, safety and welfare of the City's residents and businesses.

Unless adopted as an interim urgency ordinance, the cultivation of marijuana will continue without any regulatory framework, thereby perpetuating the serious health, safety and welfare hazards posed by the continuation of unregulated cultivation.

The proposed interim urgency ordinance will allow time for staff and the Council to continue to study and discuss the complicated legal and practical issues involved in the regulation of the cultivation of marijuana for medical purposes, while protecting the health, safety and welfare of the community. A ban on the outdoor cultivation of marijuana and the indoor cultivation of medical marijuana that causes a nuisance (i.e. can be seen or smelled from the property line) is necessary and appropriate to maintain and protect the public health, safety and welfare of the citizens of the City of Lodi which allowing for the research, drafting, public input and adoption of a permanent ordinance addressing the regulation of the cultivation of medical marijuana.

The proposed interim urgency ordinance does not conflict with the federal Controlled Substance Act (21 U.S.C. §841) or permit any activity that is prohibited under the CSA. Further, nothing in the proposed interim urgency ordinance should be construed as allowing persons to engage in activities that endanger others or causes a public nuisance, allows the use of marijuana for other than medical grounds as set forth under the Compassionate Use Act (Health & Saf. Code, §11362.5), or allows any activity associated with the cultivation, harvesting, distribution, or consumption of marijuana that is illegal under the CSA.

Under Government Code section 65858, the Council, with a minimum four-fifths (4/5) vote, may, to protect the public safety, health, and welfare of the community, "adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body...is considering or studying or intends to study within a reasonable time." As proposed, the recommended urgency interim ordinance would place a 45-day moratorium on the outdoor cultivation of medical marijuana within the City of Lodi and the indoor cultivation of medical marijuana within the City of Lodi that creates a public nuisance resulting from the visibility of marijuana from the public right-of-way or smell of marijuana beyond the property line of the property where indoor cultivation is occurring. Although staff will do its best to complete its study, analysis, and drafting of a proposed ordinance within the 45-day timeframe, staff may ultimately bring forward an ordinance to extend the proposed moratorium for consideration at the Council's meeting on December 19, 2012. Government Code section 65858 provides that the Council, may, after notice to the public pursuant to Government Code section 65090 and a public hearing, extend an urgency ordinance beyond the initial 45-days for a period for 10 months and 15 days. The extension requires a minimum four-fifths (4/5) vote to be adopted. Thereafter a final one-year extension is permissible under Section 65858(a).

Without the proposed 45-day moratorium, the City has very limited means to control the outdoor or indoor cultivation of medical marijuana within the City of Lodi.

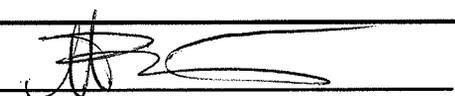
FUNDING: None.



Janice D. Magdich
Deputy City Attorney

Attachments: Proposed Interim Urgency Ordinance
cc: Mark Helms, Police Chief

APPROVED: _____


Konradt Bartlam, City Manager

ORDINANCE NO. 1867

AN UNCODIFIED INTERIM URGENCY ORDINANCE OF
THE CITY COUNCIL OF THE CITY OF LODI IMPOSING A
MORATORIUM ON 1) THE OUTDOOR CULTIVATION OF
MEDICAL MARIJUANA WITHIN THE CITY OF LODI AND
2) THE INDOOR CULTIVATION OF MEDICAL MARIJUANA
THAT CREATES A PUBLIC NUISANCE

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WHEREAS, in 1996, the voters of the State of California approved Proposition 215, which was codified as Health and Safety Code section 11362.5, ~~et seq.~~ and entitled the Compassionate Use Act of 1996 (“the Act”); and

WHEREAS, the intent of Proposition 215 was to enable persons who are in need of marijuana for medical purposes to obtain and use it under limited, specified circumstances; and

WHEREAS, on January 1, 2004, Senate Bill 420 (Medical Marijuana Program Act) became effective to clarify the scope of the Act and to allow cities and counties to adopt and enforce rules and regulations consistent with SB 420 and the Act; and

WHEREAS, Health and Safety Code section 11362.83 expressly allows cities and counties to adopt and enforce ordinances that are consistent with SB 420; and

WHEREAS, under the federal Controlled Substances Act (21 U.S.C. §841), marijuana is classified as a Schedule 1 drug, meaning it has no accepted medical use; and

WHEREAS, Government Code section 65858 authorizes cities to adopt moratoriums on land use entitlements in order to study any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal; and

WHEREAS, Government Code sections 65850(a) and 65850(c)(4), provide the authority of the City of Lodi to regulate by ordinance the uses of land and the intensity of land use; and

WHEREAS, the City of Lodi Police Department and residents of the City of Lodi have reported adverse impacts from the outdoor cultivation of medical marijuana within the City of Lodi, including offensive odors detectable beyond the property boundaries, increased risk of trespassing, violent crime, burglary, and theft; and

WHEREAS, the strong odor of marijuana plants, which increases in intensity as the plants mature, is highly offensive to many individuals and creates an attractive nuisance, alerting people to the presence and location of marijuana plants, creating an increased risk of burglary, robbery or armed robbery because of the monetary value of the plants; and

WHEREAS, the presence of marijuana plants is an attractive nuisance to minors, creating a potential hazard in areas frequented by minors, such as schools, parks, recreation centers, and similar facilities; and

WHEREAS, the cultivation of medical marijuana raise issues of first impression for the City, which currently does not address or regulate in any manner the cultivation of medical marijuana in its Municipal Code; and

WHEREAS, there is not sufficient time for the City of Lodi to adopt a regular, non-urgency ordinance regulating the outdoor and indoor cultivation of medical marijuana; and

WHEREAS, it is the intention of the City Council of the City of Lodi that nothing in this Ordinance be deemed to conflict with the federal Controlled Substances Act (21 U.S.C. §841), by permitting or otherwise allowing any activity which is prohibited under the Act; and

WHEREAS, the City Council of the City of Lodi is aware that the cultivation and possession of marijuana for medical purposes by Qualified Patients and Primary Caregivers as defined under California law (Health & Saf. Code, §§11362.7(f) and 11362.7(d), respectively), it is the intention of the Council that nothing in this Ordinance be construed, in any way, to expand the rights of anyone to cultivate, possess or use marijuana under state law, engage in any public nuisance, violate the federal Controlled Substance Act, or engage in any activity regarding the cultivation, distribution, use or consumption of marijuana that is otherwise prohibited by law; and

WHEREAS, it is the purpose and intent of this Ordinance to ensure that marijuana grown for medical purposes remains secure and does not find its way to persons other than Qualified Patients or Primary Caregivers or illicit markets; and

WHEREAS, it is the purpose and intent of this Ordinance to assist law enforcement personnel to perform their duties effectively and in accordance with California law; and

WHEREAS, this Ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to Government Code section 15060(c)(2) (the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment) and Section 15060(c)(3) (the activity is not a project as defined in Section 15378) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential for resulting in physical change to the environment, directly or indirectly; it prevents changes in the environment pending the completion of the contemplated General Plan adoption and zoning ordinance review; and

WHEREAS, for the protection of the public's health, safety, and general welfare, the City desires to adopt this moratorium to provide time for the City to consider that adoption of regulatory standards and conditions to be imposed on the outdoor and indoor cultivation of medical marijuana; and

WHEREAS, the City desires that such moratorium take effect immediately upon its adoption in accordance with Government Code section 36934.

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NOW, THEREFORE, BE IT ORDAINED BY THE LODI CITY COUNCIL AS FOLLOWS:

Section 1. Imposition of Moratorium.

A. In accordance with Government Code section 65858, from and after the date of this Ordinance, the outdoor cultivation of marijuana, for any purpose, within the incorporated area of the City of Lodi is hereby prohibited for a period of forty-five (45) days. Further, any indoor cultivation of medical marijuana by a Qualified Patient or Primary Caregiver within the incorporated area of the City of Lodi that creates a public nuisance resulting from the visibility of marijuana from the public right-of-way or the odor of marijuana beyond the property line of the property where the indoor cultivation is taking place is prohibited for a period of forty-five (45) days.

B. Any property found to be in violation of this Ordinance shall be declared to be a public nuisance and may be summarily abated by the City of Lodi pursuant to Civil Code Section 731. Nothing in this Ordinance shall be deemed to prevent the city attorney from bringing a civil action for injunctive relief and civil penalties pursuant to Lodi Municipal Code Chapter 1.10. In any civil action brought under Chapter 1.10, a court of competent jurisdiction may award reasonable attorneys fees and costs to the prevailing party.

C. For purposes of this Ordinance, the terms "Primary Caregiver" and "Qualified Patient" shall have the same meaning as that set forth in Health and Safety Code Sections 11362.7(f) and 11362.7(d), respectively.

D. This Ordinance is an interim urgency ordinance adopted pursuant to the authority granted to the City of Lodi by Government Code section 65858 and is for the immediate preservation of the public health, safety, and welfare. The City Council of the City of Lodi hereby finds and declares that there is a need to enact an urgency interim ordinance establishing a moratorium banning the outdoor cultivation of medical marijuana within the City of Lodi and the indoor cultivation of medical marijuana by a Qualified Patient or Primary Caregiver within the City of Lodi that creates a public nuisance resulting from the visibility of marijuana from the public right-of-way or the odor of marijuana beyond the property line of the property where indoor cultivation is taking place, based upon the findings set forth hereinabove and incorporated herein.

Section 2. Severability. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance or any part thereof is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this Ordinance or any part thereof. The City Council of the City of Lodi hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional or invalid or ineffective.

Section 3. No Mandatory Duty of Care. This Ordinance is not intended to and shall not be construed or given effect in a manner which imposes upon the City, or any officer or employee thereof, a mandatory duty of care towards persons or property within the City or outside of the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

Section 4. Conflict. All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

Section 5. Effective Date. This urgency Ordinance shall be published one time in the "Lodi News Sentinel," a daily newspaper of general circulation printed and published in the City of Lodi, and shall be in force and take effect immediately from and after its passage and approval by at least four-fifths vote of the City Council and shall be in effect for forty-five (45) days from the date of adoption unless extended by the City Council as provided for in Government Code section 65858.

Approved this 7th day of November, 2012



JOANNE MOUNCE
Mayor

ATTEST:



RANDI JOHL, City Clerk
State of California

County of San Joaquin, ss.

I, Randi Johl, City Clerk of the City of Lodi, do hereby certify that Ordinance No. 1867 was adopted as an urgency ordinance at a regular meeting of the City Council of the City of Lodi held November 7, 2012, and was thereafter passed, adopted, and ordered to print by the following vote:

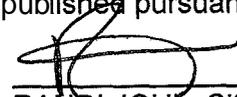
AYES: COUNCIL MEMBERS - Hansen, Johnson, Katzakian, and Mayor Mounce

NOES: COUNCIL MEMBERS - None

ABSENT: COUNCIL MEMBERS - Nakanishi

ABSTAIN: COUNCIL MEMBERS - None

I further certify that Ordinance No. 1867 was approved and signed by the Mayor on the date of its passage and the same has been published pursuant to law.



RANDI JOHL, City Clerk

Approved to Form:



JANICE D. MAGDICH
Deputy City Attorney

I-1

Americans For Safe Access

AN ORGANIZATION OF MEDICAL PROFESSIONALS, SCIENTISTS
AND PATIENTS HELPING PATIENTS

CALIFORNIA LEGAL MANUAL



Advancing Legal Medical Marijuana Therapeutics and Research

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Americans For Safe Access

AN ORGANIZATION OF MEDICAL PROFESSIONALS, SCIENTISTS
AND PATIENTS HELPING PATIENTS

INTRODUCTION

Mission of Americans for Safe Access

Americans for Safe Access (ASA) is the largest national member-based organization of patients, medical professionals, scientists and concerned citizens promoting safe and legal access to cannabis for therapeutic uses and research. ASA provides legal training and medical information to patients, attorneys, health and medical professionals and policymakers throughout the United States. We also organize media support for court cases, rapid response to law enforcement raids, and capacity-building for advocates. Our successful lobbying, media and legal campaigns have resulted in important court precedents, new sentencing standards, and more compassionate community guidelines.

The mission of Americans for Safe Access is to ensure safe and legal access to cannabis (marijuana) for therapeutic uses and research.

Patients' Rights Project

ASA's Patients' Rights Project is a result of the outcry for accessible and current legal information on medical marijuana. Medical cannabis patients and their providers suffer pervasive discrimination in employment, child custody, housing, public accommodation, education and medical care because of misinformation about the medical efficacy of cannabis and a lack of statutory legal protections. Furthermore, patients and their care providers are vulnerable to federal and state raids, arrest, prosecution, and incarceration. ASA's Legal Affairs Department creates, protects, and expands the rights of medical cannabis patients through direct support, extensive monitoring, proactive litigation, education, organizing attorneys, and the drafting of legislation.

The information found in this booklet specifically, and our legal support efforts in general, are meant to educate patients, caregivers, attorneys, and medical professionals on state law, assist them with bringing their activities in line with existing state law,

as well as providing the tools for protecting themselves from local and federal law enforcement.

This manual is specific to California law. While some information, like the Law Enforcement Encounters section, may be applied to all states, the laws and regulations concerning medical marijuana are specific to each state. Please contact ASA for more information regarding medical marijuana law outside of California.

As part of the Patients' Rights Project, ASA documents law enforcement encounters and helps guide patients through the legal system. If you have been harassed, detained, arrested, or had your property confiscated by city, county, or state law enforcement, please call 1-888-929-4367. Visit our website for more on the many aspects of ASA's Legal Affairs Department: www.AmericansForSafeAccess.org/Legal.

CHAPTER 1- MEDICAL MARIJUANA LAW

California's medical marijuana law aims to have local governments adopt guidelines regarding patient and caregiver conduct has led to unequal application of the law, selective enforcement, and different interpretations of the law. By familiarizing yourself with the following information, you will be better equipped to handle a law enforcement encounter if that should ever happen.

California's Medical Marijuana Law

The Compassionate Use Act of 1996 (CUA)

In 1996, the California voters enacted Proposition 215, codified as Health & Safety Code 11362.5:

(a) This section shall be known and may be cited as the CUA.

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

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the 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 Act 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 rights 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 the 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 act who has consistently assumed responsibility for the housing, health, or safety of that person.

If any provision of this measure or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

The major protection for patients and caregiver within the CUA is offered by Section (d) of the CUA, which exempts those qualified from Sections 11357 and 11358 of the California Health and Safety Code. Here is the definition of those sections:

<i>Health & Safety Code Section-</i>	<i>Generic Description of Offense</i>
11357(a) - Felony/Misdemeanor	Possession of Any Concentrated Cannabis
11357(b) - Misdemeanor	Possession of 28.5 grams or less of Marijuana
11357(c) - Misdemeanor	Possession of more than 28.5 grams of Marijuana
11358 - Felony	Cultivation of Any Marijuana

Concentrated Cannabis

On October 21, 2003, Calif. Attorney General Bill Lockyer issued an opinion addressing the legality of concentrated cannabis, which states that concentrated cannabis or hashish is included within the term "marijuana" as it is used in the CUA. This means that a patient who possesses or produces concentrated cannabis with natural ingredients should be afforded the protections of the state's medical marijuana laws; however, there is a serious question whether the manufacture of concentrated cannabis through chemical processes, such as a butane torch, is covered under the medical marijuana laws.

California Legislature Passes SB 420

In 2003, the state legislature passed SB 420 in an attempt to implement the CUA. SB 420, also known as the Medical Marijuana Program Act, went into effect January 1, 2004. While SB 420 has not prevented all harassment of patients by law enforcement, it has allowed for greater protection in the courts.

SB 420 attempted to further define the CUA in a variety of ways:

- a) SB 420 established guidelines for appropriate personal use. State law carves out "protection" for patients and caregivers who cultivate as many as **six mature or twelve immature plants and possess as much as eight ounces of dried marijuana**. While localities can establish higher personal use amounts, they may not go lower than the guidelines in SB 420. While guidelines establishing "acceptable" quantities were meant to be thresholds, they have been interpreted by law enforcement and by the court in *People v. Kelly* (2008) as limits. Higher quantities are certainly necessary for many patients, and SB 420 extends the same protections to patients with a physician statement stating such a need, which can be helpful if a case goes to court. (ASA encourages patients to keep up to date on your local guidelines and be active in the process of developing guidelines in your area.)
- b) SB 420 established "protection" from arrest and prosecution for cultivation, use, possession and transportation for those who are in compliance with their local or state guidelines.
- c) SB 420 authorizes medical marijuana collectives and cooperatives. This is an important expansion of legal rights for medical marijuana dispensing collectives and cooperatives serving large numbers of patients.
- d) The Compassionate Use Act defines the role of "caregiver" as "the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person." While there is no limit to how many patients a

caregiver may assist in his or her own county, SB 420 sets a limit of one patient residing outside the caregiver's county for each primary caregiver. The role of caregiver does allow for "reasonable compensation incurred for services provided." A patient need not be a caregiver to be part of a patient collective or cooperative, as these are legally distinct concepts.

SB 420 also mandated a statewide voluntary ID card program and the participation of all California counties in this program. This State Department of Public Health program provides a confidential identification system to help protect patients from law enforcement interference and aid law enforcement in the implementation of medical marijuana law. A list of counties participating in the ID card program can be found at www.AmericansForSafeAccess.org/CACountyIDCards. Patient participation in the ID card program is not a requirement for "protection" under the law. **However, though some voice concerns about releasing private information to state officials, the ID card program offers several benefits to patients that recommendations do not, such as:**

- Recommendations offer less protection from arrest, since SB 420 explicitly provides for immunity from arrest upon the presentation of a valid state ID card
- Because of the standardized format of the ID card (in contrast to a doctor's recommendation), it is more difficult for law enforcement agents to claim your documents are fraudulent
- Your photo appears on the state ID card, making your ownership of the document easily verifiable (unlike a doctor's recommendation)
- Your state ID card does not include your name

Seizure of Medicine and Return of Property

The Fourth Appellate District Court of Appeal held in *Garden Grove v. Superior Court* (2007) that trial courts must return medical marijuana improperly seized by the police to qualified patients. Otherwise, there would be a violation of due process. Because the California and United States Supreme Courts denied review of this issue, this case is binding on all trial courts in this State, unless a different court of appeal holds to the contrary.

California Highway Patrol Policy Change

On February 15, 2005, ASA filed a group lawsuit against the California Highway Patrol (CHP) to challenge the CHP's former policy of mandatory confiscation of medicine from patients. The CHP had been the worst violator of the CUA and SB 420, accounting for more than one-quarter of all reports to ASA of patient

arrests and seizures across the state. As a result of ASA's lawsuit, the CHP adopted a new policy on August 22, 2005, regarding patient and caregiver encounters. This new policy discourages CHP officers from confiscating medicine from patients and caregivers, and provides officers with instructions on how to verify valid medical marijuana documentation. A memo issued to all CHP Command Centers defines for CHP personnel what the new policy means, including this example scenario of a traffic stop:

An officer initiates an enforcement contact on a vehicle at 0200 hours for a mechanical violation and observes (sic) a small baggie of what appears to be marijuana sitting on the seat next to the driver. The driver claims 11352.7 (sic) H&S and presents a note from a physician recommending medical marijuana. The officer should contact the local communication/dispatch center to attempt to verify the validity of the claim. If the claim is valid, and the individual is within the state/local limit, no enforcement action should be initiated regarding the medical marijuana.

Since CHP officers are instructed to honor doctor's recommendations that they can verify, it is important to keep these documents on you when you're in possession of medicine. Caregivers should also always have a copy of their caregiver's agreement. If officers find pay/owe sheets, large amounts of marijuana, packaging for sale, or large amounts of cash, they can decide that any marijuana they find is for non-medical use and may confiscate your medicine and arrest you. It is safest to abide by the state or local guidelines. A complaint form that can be submitted to CHP when its officers violate the medical marijuana policy can be found at: www.chp.ca.gov/CCP/index.html

Case law

For details on relevant case law, please refer to the Appendix.

Conflict between State and Federal law

As of this printing, the federal government claims that marijuana is not medicine and in *Gonzales v. Raich* (2005), the US Supreme Court held that the federal government has the constitutional authority to prohibit marijuana for all purposes. Thus, federal law enforcement officials may prosecute medical marijuana patients, even if they grow their own medicine and even if they reside in a state where medical marijuana use is protected under state law. The Court indicated that Congress and the Food and Drug Administration should work to resolve this issue.

The *Raich* decision does not say that the laws of California (or any other medical marijuana state) are unconstitutional; nor does it invalidate them in any way. Also, it does not say that federal officials must prosecute patients. Decisions about prosecution are still left to the discretion of the federal government.

According to a post-*Raich* statement by California Attorney General Bill Lockyer, the ruling does not overturn California law permitting the use of medical marijuana. Lockyer also underscored the role of local law enforcement in upholding state, not federal, law. The Court of Appeal rejected the County of San Diego's claim in *San Diego v. NORML* (2008) that California's medical marijuana laws are preempted by federal law, and the California and United States Supreme Courts denied San Diego's requests for review.

States have recognized marijuana's medical value and have either passed laws through their legislatures or adopted them by initiative. In support of the states that have taken responsibility for the health and welfare of their people by implementing medical marijuana laws, ASA is fighting for states' rights to pass and enforce their own laws, regardless of federal law.

California State Agencies Must Enforce Medical Marijuana Law

Under our federalist system of government, the states, rather than the federal government, are entrusted to exercise a general police power for the benefit of their citizens. Due to this constitutional division of authority between the federal government and the states, the State of California may elect to decriminalize conduct, such as medical marijuana activity, which remains illegal under federal law. Even if law enforcement officers take a personal position on any conflict between state and federal law, they are bound by California's Constitution to uphold state law. Under California's medical marijuana laws, patients and caregivers are exempt from prosecution by the State of California, notwithstanding contrary federal law.

In *People v. Tilekkooh* (2003), the court found that California courts "long ago recognized that state courts do not enforce the federal criminal statutes." The same court also stated "the federal criminal law is cognizable as such only in the federal courts." In *People v. Kelly* (1869), it was determined that "State tribunals have no power to punish crimes against the laws of the United States as such. The same act may, in some instances, be an offense against the laws of both, and it is only an offense against the State laws that it can be punished by the State, in any event." In 2006, California Attorney General Bill Lockyer clarified the role and responsibility of the state in upholding medical marijuana

law. In a case where ASA is assisting a patient in seeking the return of his unlawfully seized medicine, a Superior Court ruled against the patient, claiming that, "[medical marijuana cultivation is] still illegal under federal law." On appeal, Lockyer dismissed the entire federal law argument by stating that, "the continuing prohibition of marijuana possession under federal law" does not come into play. Instead, Lockyer "acknowledges that - both generally and in the specific context of interpreting the Compassionate Use Act - it is not the province of state courts to enforce federal laws." This statement is fully consistent with the declaration of the court of appeal in *Garden Grove v. Superior Court* (2007) that "it must be remembered it is not the job of the local police to enforce the federal drug laws as such."

Federal Marijuana Law

The federal government regulates drugs through the Controlled Substances Act (CSA) (21 U.S.C. § 811), which does not recognize the difference between medical and recreational use of marijuana. These laws are generally applied only against persons who possess, cultivate, or distribute large quantities of marijuana.

Under federal law, marijuana is treated like every other controlled substance, such as cocaine and heroin. The federal government places every controlled substance in a schedule, in principle according to its relative potential for abuse and medicinal value. Under the CSA, marijuana is classified as a Schedule I drug, which means that the federal government views marijuana as highly addictive and having no medical value. Doctors may not prescribe "marijuana for medical use under federal law, though they can "recommend" its use under the First Amendment. The Drug Enforcement Administration (DEA), charged with enforcing federal drug laws, has taken a substantial interest in medical marijuana patients and caregivers in general, and large litigation and distribution operations more specifically. Over the past few years, dozens of people have been targets of federal enforcement actions. Many of them have either been arrested or had property seized. More than a hundred providers are currently in prison or are facing charges or ongoing criminal or civil investigations for their cultivation or distribution of medical marijuana.

The DEA, like local enforcement agencies, can choose how to make the best use of its time. Ideally, the DEA will leave medical marijuana patients and their caregivers alone. But federal law does not yet recognize medical marijuana, and the DEA is currently allowed to use the Controlled Substances Act to arrest people for its use. In many pending and past cases, the DEA and U.S.

Attorney's office have used exaggerated plant numbers and inflammatory rhetoric, as well as informants who trade jail time for testimony, to justify enforcing federal laws against medical marijuana patients and caregivers in California and other states.

Federal marijuana laws are very serious, and punishment for people found guilty is frequently very steep. Federal law still considers marijuana a dangerous illegal drug with no acceptable medical value. In several federal cases, judges have ruled that medical marijuana cannot be used as a defense, though defense attorneys should attempt to raise the issue whenever possible during trial. Federal law applies throughout California and the United States, not just on federal property. The key to federal property is that it is more likely than non-federal property to have federal officials monitoring it. Most likely, even if a patient is arrested on federal property and charged with a minor possession offense, he will be referred to the state authorities where he can assert a medical marijuana defense.

There are two types of federal sentencing laws: sentencing guidelines, enacted by the United States Sentencing Commission, and mandatory sentencing laws, enacted by Congress. The Sentencing Commission was created in 1987 to combat sentencing disparities across jurisdictions. The current mandatory minimum sentences were enacted in a 1986 drug bill.

Federal sentencing guidelines take into account not only the amount of marijuana but also past convictions. Not all marijuana convictions require jail time under federal sentencing guidelines, but all are eligible for imprisonment. If convicted and sentenced to jail, a minimum of 85% of that sentence must be served. The higher the marijuana amount, the more likely one is to be sentenced to jail time, as opposed to probation or alternative sentencing. Low-level offenses, even with multiple prior convictions, may end up with probation for the entire sentence of one to twelve months, and no jail time required. Possession of over 1 kg of marijuana with no prior convictions carries a sentence of six to twelve months with a possibility of probation and alternative sentencing. Over 2.5 kg with no criminal record carries a sentence of at least six months in jail, with multiple prior convictions, a sentence might be up to two years to three years in jail with no chance for probation.

In *United States v. Booker* (2005), a Supreme Court decision from January 2005, the court ruled that the federal sentencing guidelines (as outlined above) are advisory and no longer mandatory. However, many federal judges continue to give great deference to the guidelines.

In addition to the sentencing guidelines, there are statutory mandatory minimum sentences, which remain in effect after *United States v. Booker* and primarily target offenses involving large amounts of marijuana. There is a five-year mandatory minimum for cultivation of 100 plants or possession of 100kgs, and there is a ten-year mandatory minimum for these offenses if the defendant has a prior felony drug conviction. Cultivation or possession of 1000kg or 1000 plants triggers a ten-year mandatory minimum, with a twenty-year mandatory sentence if the defendant has one prior felony drug conviction, and a life sentence with two prior felony drug convictions. To avoid a five-year mandatory minimum, it is advisable to stay well below 100 plants, including any rooted cuttings or clones.

Other Applicable Laws

School Zones

Patients should avoid possession of marijuana in school zones, as there are typically additional penalties for the possession, use, and cultivation of marijuana near schools, whether it is for medical or recreational use. California patients and caregivers have been the targets of extreme charges and harsh penalties for medical marijuana in these "Drug Free School Zones." These Drug Free School Zone laws can double the maximum sentences in federal court. SB 420 explicitly states that it does not authorize the smoking of marijuana "in or within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence." SB 420 says nothing about cultivation of marijuana near schools and recreational centers.

Firearms

Firearms can also result in harsher sentencing. "Any person who, during any drug trafficking crime for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall:

- (i) Be sentenced to a term of imprisonment of not less than 5 years;
- (ii) If the firearm is brandished, not less than 7 years; and
- (iii) If the firearm is discharged, not less than 10 years."

Although the U.S. Constitution confers a right to carry firearms, we have seen many patients face extreme legal consequences for having firearms in addition to plants. ASA strongly advises that if you are a medical marijuana patient, do not carry or keep firearms on your property.

Civil Asset Forfeiture

Federal law provides for the forfeiture of property and profits obtained through or used in the commission of felony drug offenses. Prosecutors are encouraged to include forfeiture offenses in all drug indictments. This can apply to landlords who rent to people considered in violation of federal law, and therefore could be used against the landlords of patients who cultivate or use their medicine on the premises.

Employment Law

Some employers retaliate against medical marijuana patients for failing a drug test, due to marijuana usage outside the workplace. The consequences may include a decision not to hire or to terminate the employment of the patient. On January 24, 2008, the California Supreme Court issued a published decision in *Ross v. Ragingwire Telecommunications, Inc. (2005)*, denying a qualified medical marijuana patient any remedy for being terminated from his/her employment simply for testing positive for marijuana. ASA has since sponsored legislation, introduced by Assemblyman Mark Leno, that would overturn the *Ross* decision and restore employment rights to medical marijuana patients. That legislation passed both chambers of the California Legislature, but was vetoed by Governor Schwarzenegger.

Prior to the *Ross* decision, ASA had successfully challenged employers' decisions to deny unemployment benefits to patients who were fired for testing positive for marijuana in an employment drug test. Because the denial of unemployment benefits requires willful disregard of a known employment standard, the *Ross* decision does not rule out the possibility of collecting unemployment benefits. The brief and decision of the California Unemployment Insurance Appeals Board can be found at: www.AmericansForSafeAccess.org/UnemploymentInsurance

Landlord/Tenant Law

Signing a lease means you have read and understand the requirements of the legal contract. Most leases contain specific clauses limiting your landlord's access to the rental property. However, with proper notice, landlords can inspect the property for maintenance needs and to assure you are in compliance with the lease. Closely inspect this clause of your lease and be ready to comply.

Landlords may only enter your premises without permission in the case of an emergency, unless you run a business that is open to the public. Any attempt by your landlord or maintenance personnel to enter your residence without meeting the terms stated in the lease should be firmly but politely refused. Attempts to exclude any person listed on the lease should be immediately

reported to your attorney, as your landlord has no right to exclude you from the premises without going through proper eviction proceedings.

Some leases may include prohibitions on use, cultivation and distribution of controlled substances, which likely includes medical marijuana. To avoid confrontation and hassle, be a good neighbor, and quietly go about meeting your medical marijuana needs.

Child Custody Issues

Sadly, being a parent who is a medical marijuana patient can be a scary thing. Across the state, Child Protective Services (CPS) agents enter the homes of qualified medical marijuana patients, remove their children, and require the parents to take unnecessary drug therapy courses solely based on their status as medical marijuana patients. Also, the issue of one's status as a qualified patient is used by some spouses against the other in child custody disputes. **ASA** takes these issues very seriously, and is working on strategies to better protect medical marijuana patient-parents. In the meantime, here are some precautions that patients can take to demonstrate to CPS that their use of medical marijuana has not affected their ability to be good parents.

- Keep all marijuana out of plain sight, ideally in clearly labeled medicinal jars and with other prescription medications, in a place that small children cannot access. If you choose to cultivate, secure the garden in a locked room or devise another way to deny access to children.
- If you cook with marijuana, clearly label any resultant food products as medicinal, and keep them similarly far away from any children's food.
- Use discretion when medicating, and do not do so when children are present or in the view of persons who might be looking for a reason to report you to CPS.
- If your children can understand, explain to them that the marijuana is your medicine and that is not for them (like any other prescription medication). Furthermore, let them know that it is a private matter, like any other medical information.
- In a dual-parent-patient household, work out a routine with your partner where one parent is always unmedicated in case any unexpected issues arise.
- Never drive with your children in the car after medicating.
- **You** have no reason to inform CPS that you are a medical marijuana patient, unless directly asked. Do not volunteer such information without cause.

Refusal of Service

Another problem facing medical marijuana patients is being refused admission or service because of their status as medical marijuana patients or because of their use of medicine on private property. For instance, medical marijuana patients have been kicked out of amusement parks and convention centers. Always remain calm, explain that you are a legal medical marijuana patient under California law, and that it is illegal to discriminate against you because of your status as a patient. Contact **ASA** if you need assistance responding to a refusal of service.

Driver's Licenses

ASA had received several reports of the **DMV** suspending or revoking driver's licenses from medical marijuana patients based solely on their status as such. In 2009, through litigation, **ASA** forced the **DMV** to issue a new written policy treating medical marijuana use like other prescription drugs.

Driving Under the Influence

Notwithstanding California's medical marijuana laws, it remains illegal to drive under the influence of marijuana, as it is illegal to drive under the influence of some prescription medications. A trend in law enforcement has been for police to stop drivers, find marijuana and, after realizing that possession charges will be futile, the officer will often charge patients with **DUI** as a last resort, even when the patient has not medicated for a long time. These are much more complicated cases, and require more individual attention. If you have been involved in one of these situations, please see: www.AmericansForSafeAccess.org/DUI

Travel

Under California law, a qualified patient with a California recommendation may only possess, cultivate and transport medicine in California. A California recommendation does not provide an affirmative defense in other states (except in Michigan, Montana, and Rhode Island), so do not bring your medicine across state lines with an expectation of legal protection. Also, **DO NOT** bring your medicine to the airport (even if you are flying within California). Federal Transportation Security Administration (**TSA**) employees will screen you and, upon finding your medicine, they may turn you over to local authorities for state charges.

Becoming a Legal Patient

The CUA allows seriously ill people to legally grow and use marijuana as medicine. In order to qualify under California law, a patient must have a doctor's recommendation or approval. A doc-

tor may recommend or approve the medical use of marijuana for any condition for which it provides relief.

Ask Your Regular Doctor for a Recommendation

Be forthright with your doctor. There is nothing wrong with using medical marijuana or discussing it with your doctor. A federal court has ruled that, under the First Amendment, doctors may not be punished for recommending medical marijuana.

- Ask for a written recommendation. Although an oral one is acceptable, it is difficult to verify. A written recommendation is more helpful in defending oneself against criminal charges.
- Tell your doctor specifically what condition or symptoms you treat with marijuana. Honestly describe the amount of marijuana you use, how often, and by what delivery method.
- When recommending quantities of marijuana for medicinal use, doctors may recommend a certain amount based on your need and experience with what works. If this amount is above the state minimum or local guidelines, doctors do not need to specify an amount; they only need to note that a patient requires more to meet their medical need than the guideline amount for that jurisdiction.
- If your doctor does not issue medical marijuana recommendations, you may need to visit a medical marijuana specialist.

Medical Marijuana Specialists

There are a number of California physicians and clinics available for medical marijuana consultations. Before consulting a medical marijuana specialist, patients should already have medical records of diagnosis and treatment or a physician referral. You can find a listing of some specialists at www.canorml.org. Be aware that:

- The doctor will want to see your medical records.
- It can cost more than \$100 to see a medical marijuana specialist.
- Paying the money does not guarantee that you will get a recommendation,

If you have more questions on how to become a legal patient, contact ASA or see: www.AmericansForSafeAccess.org/CAPatient

Becoming a Legal Caregiver

Health and Safety Code 11362.5, the California medical marijuana law, protects patients and their primary caregivers from prosecution for marijuana law violations. By state law, a designated caregiver is allowed to possess, manufacture, and provide marijuana, in all its varieties and forms, for the patient in his/her care. The

caregiver is not allowed to use this marijuana for his/her personal use, nor can s/he provide this medicine to non-qualified patients.

There is no official registration system to become a caregiver for a medical marijuana patient, so it is a good idea to draft an agreement yourselves. This can be an oral or written agreement in which the patient designates you as his/her "primary caregiver." A sample agreement can be found at:

www.AmericansForSafeAccess.org/CaregiverAgreement

At this time, you should discuss the needs of your patient, related to both medical marijuana and other care, decide a plan of action, and then get to work.

The role of caregiver is more clearly defined in the law's text as an "individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." The courts have strictly construed this definition to require caregivers to assist patients in matters of personal health and well-being beyond the mere provision of medical marijuana.

Obtaining Medical Marijuana for Qualified Patients

Even though the CUA encourages "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," no such well-defined plan exists. Until such time as it does, patients may use collectives or cooperatives to obtain their medicine. SB 420 explicitly allows for medical marijuana collectives and cooperatives, and nothing in state law prohibits collectives and cooperatives from dispensing as part of their operation.

The following models have developed since the passage of the CUA and SB 420:

1. The Cooperative Model seeks to combine the efforts of patients and caregivers, as the two groups work together to educate the public and grow marijuana. Each individual involved is expected to give what he or she can to the endeavor. In return, the cooperative offers its members safe access to medical marijuana, often at no cost. While caregivers can be part of a cooperative, none need to participate for a cooperative to be viable. It should be noted that cooperatives are entities defined by state law, and that law must be consulted and followed before a cooperative is formed.

2. **The Collective Model** is considered very similar to the Cooperative Model, with the difference being that state law does not define collectives.

3. **The Collective Dispensing Model** is perhaps the most commonly used model across the state. Due to the conflict between state and federal law, specifically with regard to "distribution," ASA encourages caution when implementing such a model. From a patient's standpoint, this model is the most simple mechanism through which the patient can receive medical marijuana. Each dispensary maintains its own membership of legally qualified patients, and those members are allowed safe access to marijuana. A Collective or Cooperative Dispensary with patient services is a more comprehensive model. Using this model, the dispensary does not simply provide its members the opportunity to secure marijuana, but it also offers other services to meet the needs of the patient's general well being. At these facilities, health-care providers may offer services, such as peer counseling, hospice-style care, classes on various topics like cultivation, as well as other special events benefiting patients.

Attorney General Guidelines

On August 25, 2008, the Attorney General of California issued comprehensive guidelines concerning medical marijuana. Among its other provisions, the Guidelines make clear that storefront dispensaries may operate legally under California law, so long as they do not operate for profit and follow other applicable regulations. The full Attorney General Guidelines can be read at www.AmericansForSafeAccess.org/AGGuidelines.

Disclaimer: Medical marijuana law in California is continually evolving and medical marijuana remains illegal under federal law. If something in this July 2010 manual appears out of date or inaccurate, please consult with an attorney or contact ASA at 510-257-7856 or 1-888-929-4367.

CHAPTER 2—BEING PREPARED

Fortunately, many patients and caregivers never encounter law enforcement problems. Those that do, fairly regularly report successful interactions with local and county police. Many municipalities offer strong protection to medical marijuana patients. However, even in friendly jurisdictions, patients are still being harassed and arrested for medical marijuana, even if they present a valid, current doctor's recommendation and a cooperative dispensary membership card.

Sensible Medical Marijuana Use

Patients and caregivers should educate themselves about medical marijuana and understand the benefits and potential side effects of this medicine. By being a sensible medical marijuana user and making informed decisions, you can be as healthy as possible and help change the way people think about medical marijuana use.

Guidelines for Sensible Medical Marijuana Use:

1. Always listen to the advice of your doctor and use good judgment when using medical marijuana.
2. Carefully determine the amount of marijuana that is right for you. Start with a small amount and slowly increase your dosage to find the proper level for symptomatic relief.
3. Inform yourself about marijuana's effects on yourself and others. These effects include legal and health risks, as well as potential personal consequences.
4. Clearly understand the benefits of marijuana and relief that its use provides you. Be able to explain your use to people who desire information about your use of marijuana as a medicine.
5. Never use medical marijuana as an excuse or cue for antisocial or irresponsible behavior.
6. Avoid medical marijuana use that puts you or others at risk, such as when driving, at work, or in public places. Remember, you can still be arrested for marijuana use and penalties can be stiff. As with any other prescription medication, it remains illegal to drive while under the influence.
7. Medical marijuana should contribute to, rather than detract from, health, well-being, work, and relationships.

8. Always carry a copy of your physician's recommendation or caregiver's agreement and recommendation with your medical marijuana.
9. In addition, although the state-issued ID card is not necessary to obtain the protection of California's medical marijuana laws, law enforcement is more likely to honor ID cards, so it is a good idea to carry your ID card with you.

Being a Good Neighbor

A common cause of trouble for both patients and caregivers is complaints by neighbors. This problem might manifest itself in the form of an unpleasant personal confrontation or neighbors may report concerns about nuisance and safety to the police in some cases. Subsequent investigations have led to the arrest of patients and caregivers and to the closure of medical marijuana dispensing collectives.

Neighbors and nearby businesses may or may not share your opinion about medical marijuana. But, they will be much more likely to respect your right to safe medicine if you are not creating any harm or annoyance for them. By being conscious of neighbors' rights, privacy and property, patients and dispensing collectives can establish and maintain harmonious relationships.

Domestic disputes, loud music, illegal parking, barking dogs, and other nuisances could cause neighbors to call the police. Police are required to investigate these reports, and they will come to your location. This can lead to citations or criminal charges for nuisance violations and also to further investigations that may detect your medical marijuana use. Being a good neighbor can help you avoid these encounters.

Being Prepared in Advance for Successful Law Enforcement Encounters

Any patient or caregiver can become the target of a law enforcement action. Each person who decides to use medical marijuana, or helps a patient to do so, should be prepared to successfully maneuver through these encounters. You might not be able to avoid arrest in each instance, but chances of successfully fighting charges are greatly improved by education and careful planning.

There are many measures you can take before legal problems occur. You should carefully study the Law Enforcement Encounters section of this manual and, if possible, attend a train-

ing class in your local area to most effectively learn this detailed information. You should also stay on top of the basics. Maintain a current doctor's recommendation and have a clearly defined patient/caregiver relationship. Keep a copy of your recommendation in your wallet or purse at all times. You may want to memorize your physician's and lawyer's phone numbers, or write them down to keep with your doctor's recommendation or identification.

It is very important to inform the people in your life, such as family, friends, and roommates, about your medical use of marijuana. They should be prepared to assist if you are arrested or harassed. They should also be educated about their legal rights (see the "know your rights" information), as they may be questioned in an investigation of your marijuana use. Also, be aware of how to get out of jail if you are arrested. You may want to make a plan for bail, bond, or being released from jail on your own recognizance. You may want to protect and organize your personal belongings and financial data and make a plan for emergency child, pet, and plant care. Lastly, always stay alert for signs of surveillance and be aware of potential conflicts with the neighbors to avert problems early.

Safe Gardening¹

Have your Paperwork Together

Post a copy of your medical marijuana recommendation, along with the text of California HS 11362.5, prominently at any place where marijuana is cultivated. Keep a copy of your medical records and keep a duplicate of everything at an off-site location. In addition, if you use more marijuana than local guidelines allow, you should have a note from your doctor specifying that.

Use Common Sense

Fewer plants attract less attention from thieves and others who may wish you harm, so be realistic about the amount of marijuana you will need.

Packaging your medicine in eighth- or quarter-ounce baggies looks suspicious. Note that marijuana stores better in glass jars stored out of plain view, than in baggies.

¹This section is adapted from the "Safe Gardening" brochure prepared by Safe Access Now.

Consider safety when you do medicate; marijuana smoke has a very distinctive smell. You will attract less attention if you do not smoke marijuana in plain view or near windows.

Do not drive your car while smoking. If the police smell marijuana smoke, they can search your vehicle. If you are going somewhere, medicate after you arrive, or bring your medicine in edible form. Please note that Proposition 215 won't protect you from charges of driving under the influence of marijuana.

In the Garden

Don't be sloppy. Compost or eliminate trash off-site. The larger the garden appears, the more likely you are to attract the attention of thieves or others who wish to cause you harm. Cultivating indoors is generally considered safer because it helps avoid nosy neighbors and reduces the risk of theft. Use extra odor-control methods during harvest to avoid offending neighbors. The plants smell especially pungent at this time, as they are particularly resinous. You may find the smell lingering in the air, on your clothes, and in your hair.

If You Are under Investigation

In the event of a law-enforcement encounter, don't talk to the police beyond showing them your identification, physician's statement, and medical marijuana ID card, if applicable. Keep relevant records near your garden and have an attorney to call right away. If you are determined to talk to the police without an attorney, get your affairs in order first and prepare to do some prison time.

Talking to Your Attorney about the Garden

You may talk to your lawyer about your garden, as Prop. 215 protects patients and caregivers who cultivate marijuana. Be careful discussing your financial situation with regard to your garden, and never make reference to selling marijuana. The law is written to allow financial reimbursement from patients only for labor and expenses and nothing more. If your attorney is unfamiliar with medical marijuana law, be prepared to educate them or ask them to contact ASA for more information.

Security Culture²

"Security Culture" refers to the importance of developing unbreakable unity within the medical marijuana community. If everyone involved maintains this unity, the entire community will everyone

²Excerpted from "Security Culture," Slingshot issue #72, <http://slingshot.tao.ca/> with modifications by ASA.
<http://slinc>

be safer. Law enforcement agents frequently aim to turn people against each other and disorganize or disband the community.

Keeping an Eye Out for Surveillance

Take precautions. Assume you are under surveillance if you are in any way involved in providing medical marijuana to patients. Do not discuss sensitive matters on the telephone, through the mail, by email, or in your home, car, dispensing collectives, or office. Be cautious with whom you discuss sensitive information. Keep written materials and lists of individuals in a secure place. If you are arrested, the police may investigate all your contacts. Police officers have the right not only to go through your phone book, but can also answer any calls made to your phone.

Implement a Security Culture

Take care of yourself and your community. Don't gossip, brag or ask for compromising or unnecessary information about medical marijuana operations and activities. Although such behavior may be entertaining, it puts you at greater risk of arrest and the police may use personal splits to divide the community. When you are about to discuss your personal involvement in medical marijuana operations, consider the following:

- Would this person repeat what you are about to tell them to anyone else? When you share information about your involvement in medical marijuana, you are sharing information that may be used against you in court if this person is ever interrogated as a witness. You should also be cautious of theft. Patients and providers have been robbed because of the wrong person knowing sensitive information.
- Would you want this person to have to perjure him or herself? Think carefully: you may be giving people information that may cause harm to you or to them.

If someone you know is doing this, talk to him or her in private about why such talk can be hazardous. Be careful not to preach, injure the individual's pride, or raise defenses and prevent them from understanding your point. Someone who repeatedly engages in gossip, bragging or seeking unnecessary information about inappropriate topics after repeated educational talks is a grave risk at best, and a police agent looking to provoke or entrap others at worst.

Disclaimer: Medical marijuana law in California is continually evolving and medical marijuana remains illegal under federal law. If something in this July 2010 manual appears out of date or inaccurate, please consult with an attorney or contact ASA at 510-251-1856 or 1-888-929-4367.

CHAPTER 3—LAW ENFORCEMENT ENCOUNTERS³

When dealing with the police, keep your hands in view and don't make sudden movements. Avoid passing behind them. Nervous cops are dangerous cops. Also, never touch the police or their equipment - you can get beat up and/or charged with assault.

The police do not decide your charges; they can only make recommendations. The prosecutor is the only person who can actually charge you. Remember this the next time police rattle off all the charges they're supposedly "going to give you."

Police Encounters

Conversation

When the cops are trying to get information, but don't have enough evidence to detain or arrest you, they'll try to coerce information from you. They may call this a "casual encounter" or a "friendly conversation." If you talk to them, you may give them the information they need to arrest you or your friends. In most situations, it is not advisable to volunteer information to the police.

Detention

Police can detain you only if they have reasonable suspicion (see below) that you are involved in a crime. Detention means that, though you aren't arrested, you can't leave. Detention is supposed to last a short time, and they aren't supposed to move you. During detention, the police can pat you down and go into your bag to make sure you don't have any weapons. They aren't supposed to go into your pockets unless they feel a weapon.

If the police are asking you questions, ask if you are being detained. If not, leave and say nothing else to them. If you are being detained, you may want to ask why. Then you should say the Magic Words: "*I am going to remain silent. I want a lawyer*" and nothing else.

A detention can easily turn into arrest. If the police are detaining

³This information provided to ASA by the Midnight Special Law Collective - www.midnightspecial.net

you and they get information that you are involved in a crime, they will arrest you, even if it has nothing to do with your detention. For example, if someone is pulled over for speeding (detained) and the cop sees drugs in the car, the cops may arrest her for possession of the drugs, even though it has nothing to do with her being pulled over. Cops have two reasons to detain you: 1) they are writing you a citation (a traffic ticket, for example), or 2) they want to arrest you but they don't yet have enough information to do so.

Arrest

Police can arrest you only if they have probable cause (see below) that you are involved in a crime. When you are arrested, the cops can search you to the skin and go through your car and any belongings. By law, an officer strip-searching you must be the same gender as you.

Reasonable Suspicion vs. Probable Cause

Reasonable suspicion must be based on more than a hunch - cops must be able to put their suspicion into words. For example, cops can't just stop someone and say, "She looked like she was up to something." They need to be more specific, such as, "She was standing under the overpass staring up at graffiti that hadn't been there 2 hours ago. She had the same graffiti pattern written on her backpack. I suspected that she had put up the graffiti."

Cops need more proof to say they have probable cause than to say they have a reasonable suspicion. For example, "A store owner called to report someone matching her description tagging a wall across the street. As I drove up to the store, I saw her running away spattered with paint and carrying a spray can in her hand."

Searches

Never consent to a search. If police try to search your house, car, backpack, pockets, etc. say the Magic Words: "*I do not consent to this search.*" This may not stop them from forcing their way in and searching anyway, but if they search you illegally, they probably won't be able to use the evidence against you in court. You have nothing to lose from refusing to consent to a search and lots to gain. Do not physically resist cops when they are trying to search, because you could get hurt and/or charged with resisting arrest or assault. Just keep repeating the Magic Words so that the cops and all witnesses know that this is your stance.

Be careful about casual consent. That is, if you are stopped by the cops and you get **out** of the car but don't close the door, they can search the car and claim that they thought you were indicating consent by leaving the door ajar. Also, if you say, "I'd rather you didn't search," they can claim that you were reluctantly giving them permission to search. Always just say the Magic Words: "I do not consent to this search."

Note that in *People v. Hua* (2008), the Court of Appeal for the First Appellate District found that the police violated the defendant's right against unreasonable searches and seizures when they entered his home without a warrant based only on their observation that someone inside was smoking marijuana. And, in *County of Butte v. Superior Court* (2009), the Court of Appeal for the Third Appellate District held that medical marijuana patients may bring civil actions for violations of their constitutional right to be free from unreasonable searches and seizures where there is no probable cause to believe they are not in compliance with California's medical marijuana laws.

Questioning

Interrogation isn't always bright lights and rubber hoses — usually it's just a conversation. Whenever the cops ask you anything besides your name and address, it's legally safest to say these Magic Words:

"I am going to remain silent. I want to see a lawyer."

This invokes legal rights, which protect you from interrogation. When you say this, the cops (and all other law enforcement officials) are legally required to stop asking you questions. They probably won't stop, so just repeat the Magic Words or remain silent until they catch on. If you forget your decision to remain silent and start talking to the police, you can and should re-invoke the Magic Words, then remain silent. **Do not** raise your status as a medical marijuana patient, unless specifically asked about this or the medicine has already been found.

Remember, anything you say to the authorities can and will be used against you and your friends in court. There's no way to predict what information the police might try to use or how they will use it. Plus, the police often misquote or lie altogether about what was said. So say only the Magic Words and let all the cops and witnesses know that this is your policy. Make sure that when you're arrested with other people, the rest of the group knows the Magic Words and promises to use them.

One of the **jobs** of cops is to get information out of people, and they usually don't have any scruples about how they do it. Cops are legally allowed to lie when they're investigating, and they are trained to be manipulative. The only thing you should say to cops, other than identifying yourself, are the Magic Words: "**I am going to remain silent. I want to see a lawyer.**"

Here are some lies they may tell you:

- "You're not a suspect -- just help us understand what happened here and then you can go."
- "If you don't answer my questions, I'll have no choice but to arrest you. Do you want to go to jail?"
- "If you don't answer my questions, I'm going to charge you with resisting arrest."
- "All of your friends have cooperated, and we let them go home. You're the only one left."

Cops are sneaky, and there are lots of ways they can trick you into talking. Here are some scams they may pull:

- **Good Cop/ Bad Cop:** Bad cop is aggressive and menacing, while good cop is nice, friendly, and familiar (usually good cop is the same race and gender as you). The idea is bad cop scares you so badly you are desperately looking for a friend. Good cop is that friend.
- **Prisoners' Dilemma:** The cops will tell you that your friends ratted on you so that you will snitch on them. Meanwhile, they tell your friends the same thing. If anyone breaks and talks, you all go down.
- The cops will tell you that they have all the evidence they need to convict you, but that if you "take responsibility" and confess, the judge will be impressed by your honesty and go easy on you. What they really mean is: "We don't have enough evidence yet, please confess."

Jail is a very isolating and intimidating place. It is really easy to believe what the cops tell you. Insist on speaking with a lawyer before you answer any questions or sign anything.

Miranda Rights

The police do not have to read you your rights (**also** known as the Miranda warnings). Miranda applies when there is (a) an interrogation (b) by a police officer or other agent of law enforcement (c) while the suspect is in police custody (you do not have to be

formally arrested to be "in custody"). Even when all these conditions are met, the police intentionally violate the Miranda requirement. And though your rights have been violated, what you say can be used against you. For this reason, it is better not to wait for the cops to inform you of your rights. You know what your rights are, so you can invoke them by saying the Magic Words, "I am going to remain silent. I want to see a lawyer."

If you've been arrested and realize that you have started answering questions, don't panic. Just re-invoke your rights by saying the Magic Words again. Don't let them trick you into thinking that because you answered some of their questions, you have to answer all of them.

Arrest and Search Warrants

If the police come to your door with an arrest warrant, step outside and lock the door behind you. Cops are allowed to search any room you go into, so don't go back into the house for any reason. If they have an arrest warrant, hiding won't help, because they are allowed to force their way in if they know you are there. It's usually better to just go with them without giving them an opportunity to search.

If the police have a search warrant, nothing changes - it's legally safest to say the Magic Words. Again, you have nothing to lose from refusing to consent to a search and lots to gain if the search warrant is incorrect or invalid. If they do have a search warrant, ask to read it. A valid warrant must have a recent date, the correct address, and a judge's or magistrate's signature; some warrants indicate the time of day the cops can search. You should say the Magic Words whether or not the search warrant appears correct. The same goes for encounters with any other government official who tries to search you, your belongings, or your house.

Infiltrators and Informants

Undercover cops sometimes infiltrate political organizations. They can lie about being cops even if asked directly. Undercover cops can even break the law (undercover cops get hazard pay for doing drugs as part of their cover) and encourage others to do so as well. This is not legally entrapment.

FBI, DEA, and Other Government Agents

The essence of the Magic Words "I'm keeping my mouth shut until I talk to a lawyer" not only applies to police but also to the FBI, DEA, INS, CIA, even the IRS. If you want to be nice and polite, say that you don't wish to speak with them until you've spoken with your lawyer, or that you won't answer questions without a lawyer present. If you are being investigated as a result of your political activity, you can call the National Lawyers Guild at (415) 285-5067; they will help you find a lawyer you can talk to.

Phone Calls in Jail

You're entitled to make a phone call from jail, but that doesn't mean you're going to get one right away. Jail telephones are often rigged to only make collect calls, although some take coins as well. All telephone calls from people in custody can be monitored. You may not want to discuss anything that is secret or sensitive - circumstances of your arrest, people you are close to, any contact information for those people, etc.

Taking Notes

Whenever you interact with or observe the police, always write down what is said and who said it. Write down the cops' names and badge numbers and the names and contact information of any witnesses. Record everything that happens. If you are expecting a lot of police contact, get in the habit of carrying a small tape recorder and a camera with you. Be careful -- cops don't like people taking notes, especially if the cops are planning on doing something illegal. Observing them and documenting their actions may have very different results; for example, it may cause them to respond aggressively, or it may prevent them from abusing you or your friends.

Conclusion

People deal with police in all kinds of circumstances. You must make an individual decision about how you will interact with law enforcement. It is important to know your legal rights, but it is also important for you to decide when and how to use them in order to best protect yourself.

Disclaimer: Medical marijuana law in California is continually evolving and medical marijuana remains illegal under federal law. If something in this July 2010 manual appears out of date or inaccurate, please consult with an attorney or contact ASA at 570-251-1856 or 1-888-929-4367.

CHAPTER 4—DEMYSTIFYING THE LEGAL SYSTEM

Getting Out of Jail

There are several procedures for getting out of jail while a case is in process. If you are in possession of more than one ounce of marijuana, the police decide whether to give you a citation and release you, or to arrest you and let the judge decide the validity of your medical marijuana claim. Once arrested, the judge will decide whether to offer you bail, bond, or release you on your own recognizance (OR).

Citation: Citing out is a type of release from custody in which you sign a citation, which is a promise to appear in court. It is usually a form that looks like a traffic ticket. Never sign a piece of paper that is an admission of guilt. Read the form closely and make sure you know what you are signing.

Bail: Bail is money you pay to the court, to be forfeited if you don't appear at scheduled hearings. A bail bondsman can put up the money for you, but you have to give the bondsman a percentage of the total bail, which the bondsman keeps as payment. Often, there is a pre-set bail for misdemeanors and lesser felonies that you can pay at the jail without waiting to go before a judge.

Bond A bond is like bail except that you put up collateral instead of paying money. Collateral is something of value, like a car, a house, or property.

OR: Release on your own recognizance (OR, ROR or PR) is simply your promise to come to court for scheduled hearings without having to put up bond or pay bail. Usually you will only be released on your own recognizance if you can prove that: (1) you are not a danger to the community; and (2) you are not a flight risk or unlikely to return for court appearances.

You are likely to be kept in jail if you:

- Have an outstanding warrant for another charge
- Are already out on OR, bond or bail for another charge
- Are currently on probation or parole

- Have failed to appear for court dates in the past
- Have immigration problems

You can prove you're not a flight risk by organizing documents for your first court appearance that show the judge you have long-term ties to the community and are therefore unlikely to skip town. Assemble as many of the following documents as possible. You need the originals, plus a copy to give the court:

- Lease, rent receipts, utility bills, phone bills (both current bills and old ones to show the time you've been at this residence)
- Employment contract, pay stubs, records of volunteer work
- School ID, school records
- Proof of membership in community organizations or churches
- General character reference letters from landlords, roommates, employers, teachers, clergy
- List of character references with phone numbers
- Letters on doctor's stationery about any medical conditions or appointments that necessitate your release

it would be very difficult for your friends to assemble such materials while you are sitting in jail. It makes more sense for you to put together this packet in advance and keep it in a safe and accessible place. If you are arrested, your friends can bring these papers to your lawyer so that you will have this material in court.

Going To Court

When do I go to court for the first time?

If you are in custody, the authorities are legally supposed to bring you to court within two business days or "as soon as reasonably possible." If you are not being held in jail, your first court date may be anywhere from one week to a month after arrest. Court dates should be written on the citation or release forms.

What happens at the first court appearance?

The first hearing generally involves the appointment of counsel. You indicate who's going to represent you: yourself, a private attorney, or a court-appointed lawyer. Also at the first hearing, you find out the charges against you, and respond by making a demurrer, or entering a plea. This part is called the arraignment. If you've been in jail up until court, the first hearing usually focuses on release issues: bail, bond or release on your own recognizance (OR). This part is called a bail hearing. Even if you're not released the first time, the subject can be brought up at later

hearings. The appointment of counsel, arraignment, and bail hearing can sometimes be separate appearances. Many people choose to waive the right to a speedy trial at this time, called "waiving time." This is mainly done to have the most amount of time to plan your defense and build public support.

What are the choices when it's time to enter a plea?

Pleas generally fall into two categories: guilty and not guilty. Normally, people only plead guilty if they've negotiated a plea bargain. If you do not reach or want a plea bargain plead "not guilty" and go to trial.

What happens if I don't show up for a court hearing?

If you miss a scheduled hearing, the judge will usually issue a bench warrant. If an individual with an outstanding bench warrant gets into any kind of trouble, like a traffic violation, s/he is subject to arrest. Judges usually accept extreme excuses for missing a hearing, like funerals or medical emergencies. Conflicts with school or work schedules are not acceptable excuses.

When does the trial happen?

When you do not waive time, trial usually occurs a month or two after arraignment. When time is waived, trial might not begin for many months. In both cases, trials are often preceded by hearings at which written and/or oral "motions" are made and heard.

What goes on at trial?

At trial, you can testify if you want to. You can also put on eye (and ear) witnesses, and possibly witnesses to testify about your good character. In addition, you have the right to cross-examine the witnesses against you, who will probably be law enforcement officers. You also get to make opening and closing arguments.

The judge may try to forbid you from talking about anything political, and even disallow mention of medical marijuana, on the grounds that it would be irrelevant. Lawyers may be able to get around the judge's prohibitions, but there's considerable precedent (published results of earlier trials) supporting the notion that judges can forbid discussion of political matters at trial.

Your lawyer will handle witnesses, make opening and closing arguments, and file motions. All you do is testify. Sometimes, people represent themselves (called pro per or pro se). In these situations, it's useful to have an attorney as advisory counsel or co-counsel, to help with technical legal matters.

You don't necessarily get a jury trial. The alternative is a bench trial, or trial by judge in which the judge hears the evidence and

reaches a verdict. The judge will also decide what will be allowed as testimony and evidence. In state court, you must be charged with at least a misdemeanor to get a jury trial. In federal court, you must be charged with an offense that carries a maximum sentence of greater than six months to get a jury trial. This requirement rules out all infractions and most misdemeanors.

The trial ends with the verdict: guilty, not guilty, or a hung jury. If found not guilty, celebrate. If there is a hung jury (the jury couldn't agree on the verdict), then the prosecutor gets to decide whether to retry you or dismiss the case. Prosecutors often give up or offer a really good deal at this point. If you're found guilty, then the judge sentences you. The judge can either sentence you immediately after the verdict or set a separate hearing for sentencing. You may be qualified to appeal this sentence or the original case ruling, so consult with an attorney.

What happens at sentencing?

You can pack the courthouse. You get to make a speech, because you have the right to allocution. This sentencing statement is normally a chance to ask for mercy and explain mitigating factors, but activists often use it as a chance to discuss political matters, especially if they didn't get to speak their minds at trial.

Return of Property

In nearly every case where a patient or caregiver is cited or arrested for medical marijuana, law enforcement will seize the medicine and often other property they feel is connected with the alleged offense. If this happens and you are found **not** guilty or have your charges dismissed or dropped, you can petition the court for the return of your property. The police typically do not return property without a court order. This requires a patient to file a motion for return of property. ASA has an ongoing return of property campaign and has information on its website to help you file a motion. See www.AmericansForSafeAccess.org/RoP

If you are certain that the property has been destroyed or is damaged beyond use, you may want to sue the city or county responsible for the property's damage or destruction. In this instance, you would be filing a civil suit. This process can often take years to complete. In order to qualify for filing a civil suit, you must first file a claim form with the appropriate government entity no later than 6 months after the seizure. Once the claim is denied, you then have six months from that date to file the actual civil suit. It may be helpful to have the claim form and, later, the civil suit complaint drafted by an attorney, but that is not necessary.

Court Support and Organizing During Trials

Medical cannabis patients are being arrested, facing trial, and going to jail nationwide. As advocates, it is our job to highlight these injustices in the courts.

What is court support?

Court support is a group of tactics used to support a patient or provider while s/he is going through the legal system. Listed below are some examples of tools that can be used for court support. You may want to use some or all of them depending on the situation. Remember the health and safety of the defendant must ALWAYS be your first priority.

Media:

- Get all the facts straight: Before you contact the press, make sure you have a clear account of what has happened. Get contact numbers for the defendant and anyone s/he would like to speak on his/her behalf: his/her attorney, family members, local officials, doctors etc.
- Contact local media about case: Either immediately following the raid or a week before a hearing, send a press advisory to local press outlets.
- Press Release: Before a court date, send a press release at least 24 hours in advance. Press releases have very specific formats, so if it is your first release, check out ASA's media manual for tips: www.AmericansForSafeAccess.org/MediaManual
- Backgrounder: Medical cannabis trials can be very confusing. It is a good idea to have a one-page handout to give to the press that explains the specifics of the case and information about state law and about the state-federal conflict.
- Press Conferences: Press conferences should only be between 10-30 minutes long. Having a MC can help keep things moving. Make sure everyone knows the speakers' order, only have a press conference when there is something NEW to say, make sure someone helps the press set up and get all the interviews they need, and don't forget signs and visuals!

In the courtroom:

Fill the courtroom with supporters...

- Be respectful, It is often hard to sit and watch injustices unfold in front of you, but interruptions in the courtroom can cause a judge to take his anger out on the defendant.
- Dress for court. Dress like it is YOU that is on the stand, since your appearance reflects on the defendant.

TIP: No need to draw attention to yourself, just all stand up and leave with the defendant.

Outside the courtroom:

- Protests and rallies: Get creative! Street theater, easy-to-read signs, marches, pickets, and large puppets can deliver a complex message to the public and to the press.

CAUTION: Be aware of laws concerning Jury tampering. Do not hand out information about the defendant once jury selection begins or during the trial.

Emotional Support

Going through the legal system can be financially and emotionally draining. To build a strong, vibrant movement, we must make sure we do not let anyone slip through the cracks. Sometimes people need an ear, sometimes a ride to court, or childcare for their children. Don't be afraid to reach out and ask what they need. It is important to only commit to what is viable for you.

When should you use court support?

Court support should be used anytime a medical cannabis patient or caregiver is arrested. A defendant or even your community may decide that a specific case may be too cloudy for the local political landscape, and media may do more harm than good. If this is the case, you can still do everything else but contact the media (protests, presence in the court, emotional support etc.).

Why do court support?

- Organizing opportunity: Court cases create a crisis in a community and court support can give quiet supporters an opportunity to become active supporters.
- Community Awareness: Court cases create an opportunity to educate your community, local media, and legislators about the injustices surrounding medical cannabis.
- Bring the issue home: Court cases provide the opportunity to localize and put human faces on the medical cannabis issue.
- The fate of the defendant: Simply, judges and prosecutors are less likely to screw people in public.

How do you find cases to support?

- Keep an eye in the paper for local medical cannabis busts
- Stay in touch with people in the medical cannabis community
- Check ASA's listing of upcoming federal court dates: www.AmericansForSafeAccess.org/UpcomingCourtDates

CHAPTER 5—TAKE ACTION

Get involved in the movement for safe and legal access to medical cannabis today. Our power comes from our collective action. Whether it's calling Congress, attending rallies, organizing a local ASA chapter, signing an online petition, or supporting federal defendants, take action today!

What You Can Do

- Sign up for ASA's Updates, Alerts and Publications! Visit www.AmericansforSafeAccess.org/EmailLists
- Sign-up for ASA's Condition-based Unions. To find out more about a specific patients' union or to join one, please email PatientsUnion@AmericansforSafeaccess.org.
- Join an ASA chapter or affiliate! ASA chapters and affiliates represent the core of ASA's grassroots activism. If there is no chapter or affiliate in your region, please consider starting one today. Call 510-251-1856 x 321 or visit www.AmericansForSafeAccess.org/LocalResources.

ASA Online Resources

Online Action Center
www.AmericansForSafeAccess.org/OnlineAction

ASA Organizer's Handbook
www.AmericansForSafeAccess.org/OrganizingHandbook

Resources for Organizers
www.AmericansForSafeAccess.org/Resources

Media Resources for Grassroots Organizers
www.AmericansForSafeAccess.org/GrassrootsMedia

Upcoming Court Dates
www.AmericansForSafeAccess.org/UpcomingCourtDates

Write to Medical Cannabis Prisoners
www.AmericansForSafeAccess.org/WriteToPrisoners

APPENDIX—LANDMARK RULINGS

State of California Medical Marijuana Rulings

People v. Trippet (1997): Under the Compassionate Use Act, a patient may not possess an unlimited quantity of marijuana, even if he has a physician's recommendation. In *Trippet*, the court held that the Act provides a defense for transportation of marijuana if the quantity transported, time and distance of transportation are reasonably related to the patient's medical needs.

Lungren v. Peron (1997): This case holds that a medical cannabis dispensary cannot qualify as the primary caregiver of patients simply by providing medical marijuana to patients.

People v. Rigo (1999): A person arrested for possession or cultivation of marijuana before obtaining a recommendation from a physician for the medical use of marijuana may not use this defense retroactively if a physician's recommendation is obtained after the arrest, unless there is a spectacular explanation.

People v. Young (2001): In a ruling directly conflicting with *People v. Trippet* ruling, the court ruled that the Compassionate Use Act does not protect transportation of medical marijuana.

People v. Fisher (2002): Law enforcement officers are not required to abandon a search for marijuana authorized by a search warrant when a resident of the premises produces documents indicating his status as a qualified medical marijuana patient or primary caregiver.

People v. Mower (2002): This unanimous CA Supreme Court ruling declared that patients and their care providers are entitled to a pre-trial hearing to determine the legitimacy of their medical marijuana defense. If the defense is established by a preponderance of the evidence, the case should be dismissed before going to trial. In addition, the Court ruled that the state must show proof of guilt "beyond a reasonable doubt" in any criminal case.

People v. Jones (2003): This California Appellate Court ruling holds that a defendant's testimony, confirming an "approval" or "recommendation" by a doctor to use medical marijuana, is sufficient, without verification from the doctor, to establish for a jury the defen-

dant's status as a medical marijuana patient.

People v. Tilehkooh (2003): This ruling criticizes the decision in *People v. Bianco* (2001), which held that it is within the trial court's discretion to impose a probation condition prohibiting all marijuana use for the offense of marijuana cultivation where the defendant's marijuana use was found to have contributed to his offense. Instead, the court ruled in *Tilehkooh* that no rehabilitative purpose is served by such probation condition in cases where there is no claim of diversion or violent behavior by defendant. [SB 420 now expressly provides for modification of parole conditions to accommodate one's medical marijuana use.] Even if the court imposes a probation condition forbidding all marijuana use, defense counsel may assert the CUA as a defense in any probation revocation proceeding brought against a qualified patient.

Bearman v. Superior Court of Los Angeles (2004): The California Superior Court refused to review an appellate decision blocking the California Medical Board from searching the medical records of Dr. David Bearman and the patient for whom he had recommended medical marijuana. The doctor was being investigated for negligence in prescribing marijuana for the patient. The decision protects doctors and patients in possession of medical marijuana from violations of their privacy rights.

People v. Konow (2004): A defendant may "informally suggest" that the magistrate or superior court dismiss the information or complaint "in the interests of justice." Counsel may do this at any time, even as early as the arraignment, or in connection with a demurrer to the complaint, when the evidentiary foundation is laid through the submission of the doctor's recommendation.

People v. Urziceanu (2005): The Third District Court of Appeal affirmed the legality of collectives and cooperatives, and held that SB 420 provides for a defense to marijuana distribution for collectives and cooperatives. Drawing from the Compassionate Use Act's encouragement of the government to implement a plan for the safe and affordable distribution of medical marijuana, the court found that SB 420 and its legalization of collectives and cooperatives represented the state government's initial response to this directive. By expressly providing for reimbursement for marijuana and services in connection with collectives and cooperatives, the Legislature has abrogated cases such as *Trippett*, *Peron* and *Young*, and established a new defense to those who form and operate collectives and cooperatives to dispense marijuana.

People v. Wright (2006): The California Supreme Court reaffirmed that SB 420 specifically provides an affirmative defense to the crime

of transporting marijuana to a qualified patient or a person with a state identification card who transports or processes marijuana for his or her own personal medical use. In addition, the Court found that the amounts of marijuana described in SB 420 (8 ounces of dried marijuana and 6 mature or 12 immature plants) constitute a floor, not a ceiling, on the amount of marijuana a qualified patient may possess.

People v. Strasburg (2007): The First District Court of Appeal issued a published decision in *People v. Strasburg*, holding that the CUA does not provide immunity from an otherwise justifiable search, such as when an officer smells marijuana. In its words, "[a]n officer with probable cause to search is not prevented from doing so by someone presenting a medical marijuana card or a marijuana prescription."

County of San Diego v. San Diego NORML (2007): ASA intervened in a lawsuit that the County of San Diego filed against the California Department of Health Services in San Diego Superior Court. Together with the ACLU Drug Reform Law Project, Drug Policy Alliance, and representing five patients, a physician, and the Wo/Men's Alliance for Medical Marijuana, ASA fought on behalf of the rights of patients across the state. ASA argued that federal law does not preempt state law, and that the County must abide by the Compassionate Use Act and SB 420. ASA's side prevailed in the Superior Court and the Court of Appeal, as these courts unanimously confirmed the validity of California medical marijuana laws. San Diego petitioned the California United States Supreme Courts for review of these decisions, and both courts denied review.

Garden Grove v. Superior Court (Kha) (2007): For years, there was a question whether courts should order the return of medical marijuana that was improperly seized by the police. In *Garden Grove v. Superior Court*, the court made clear that a refusal to do so violated both the Penal Code, as well as constitutional requirements of due process. Because the California Supreme Court has denied review of the case, it is binding on all trial courts, requiring them to return medical marijuana to qualified patients where there is no probable cause to believe that they have committed any state law crime.

People v. Chakos (2007): The Court of Appeal for the Fourth Appellate District reversed appellant's convictions for possessing six ounces of marijuana for distribution based on the "expert" testimony of a police officer that a scale, baggies, and small sum of cash evidenced marijuana distribution. The court found that such testimony evinced a lack of understanding of the patterns of use of marijuana by qualified patients, which rendered the police officer unqualified to testify as an expert and required that his testimony be stricken.

People v. Hua (2008): The Court of Appeal for the First Appellate

District found that the police violated the defendant's right against unreasonable searches and seizures when they entered his home without a warrant based only on their observation that someone inside was smoking marijuana.

People v. Mentch (2008): After several courts of appeal very narrowly construed what is meant by a "primary caregiver," the California Supreme Court affirmed the Court of Appeal and held that one does not qualify as a "primary caregiver" simply by furnishing marijuana to a qualified patient. The Court did not, however, discuss "collectives," which are entirely different than caregivers.

People v. Phomphakdy (2008): The Court of Appeal for the Third Appellate District (Sacramento) held that the quantities of marijuana specified in the Medical Marijuana Program Act (SB 420) constitute an unconstitutional legislative amendment of a voter-approved initiative.

Ross v. RagingWire Telecommunications (2008): The California Supreme Court issued a decision denying qualified medical marijuana patients any remedy for being terminated from their employment for testing positive for marijuana for using their medicine off-duty. ASA is currently sponsoring legislation in the California Legislature that will overturn the *Ross* decision and provide employment protections for medical marijuana patients.

People v. Windus (2008): The Court of Appeal for the Second Appellate District held that the trial court improperly denied a medical marijuana defense to the defendant. The court held that the defendant's medical marijuana recommendation did not expire, even though the doctor who issued it required yearly evaluations. The court further held that patients are not bound by the quantities specified in SB 420, but may possess an amount of marijuana that is consistent with their personal medical use.

City of Claremont v. Kruse (2009): In this published decision, the Court of Appeal for the Second Appellate District affirmed a preliminary and permanent injunction against a medical marijuana dispensary as a nuisance because it had not obtained a business license. The court further held that localities were not preempted by California's medical marijuana laws from issuing moratoriums on dispensaries.

County of Butte v. Superior Court (2009): In 2006, ASA filed a civil action on behalf of David Williams and the other six members of his collective because the Butte County Sheriffs Office compelled him to tear down most of the marijuana plants growing on his property, since not all members of the collective physically tilled the soil and, instead, contributed to the collective in other ways. The Superior

Court agreed that ASA had properly stated claims for damage, as well as declaratory and injunctive relief. On July 1, 2009, the Court of Appeal for the Third Appellate District issued a published decision affirming the Superior Court's holding that medical marijuana patients may state civil causes of action for violations of their right to be free from unreasonable searches and seizures under the California Constitution where they are acting in compliance with state law. This decision is now final.

People v. Moret (2009): The Court of Appeal affirmed a superior court order denying a man convicted of a firearm offense from using medical marijuana as a condition of probation because he obtained his doctor's recommendation after his conviction.

People v. Kelly (2010): The California Supreme Court issued a unanimous published decision striking down as unconstitutional SB 420's legislative limits on how much medical marijuana patients may possess and cultivate.

Federal Medical Marijuana Rulings

Conant v. Walters (2002): The Ninth Circuit Court of Appeals held that the federal government could not punish, or threaten to punish, a doctor merely for telling a patient that his or her use of marijuana for medical use is proper. However, because it remains illegal for a doctor to "aid and abet" a patient to obtain marijuana or conspire with him or her to do so, the court drew the line between protected First Amendment speech and prohibited conduct as follows – A physician may discuss the pros and cons of medical marijuana with his or her patient, and issue a written or oral recommendation to use marijuana within a bona fide doctor-patient relationship without fear of legal reprisal. And this is so, regardless of whether s/he anticipates that the patient will, in turn, use this recommendation to obtain marijuana in violation of federal law. On the other hand, the physician may not actually prescribe or dispense marijuana to a patient, or recommend it with the specific intent that the patient will use the recommendation like a prescription to obtain marijuana. There have been no such criminal or administrative proceedings against doctors to date.

US v. Oakland Marijuana Buyers Cooperative (2002): A federal district court issued a permanent injunction against the OCBC, prohibiting it from distributing medical marijuana. The District Court was executing the opinion of the U.S. Supreme Court that heard this case one year earlier. In that opinion, the Court declared that a person in federal court may not argue that distribution of marijuana to patients was a medical necessity. It specifically left open several ques-

tions, such as constitutional limitations on federal authority, which was then litigated in the Raich case, described below. This ruling applied to five other medical marijuana cases, all of which were sued civilly along with the OCBC.

US v. Ed Rosenthal (2003 & 2007): A jury in San Francisco federal court found Oakland resident Ed Rosenthal guilty of cultivating marijuana, conspiracy to cultivate, and maintaining a place where drugs are manufactured. Jurors were never allowed to hear evidence regarding medical marijuana. Jurors publicly recanted their "not guilty" verdict after finding out the facts that were left out of the trial. On appeal, the Ninth Circuit reversed Rosenthal's convictions because of juror misconduct. The government later re-indicted Rosenthal, this time adding counts for filing false tax returns and money laundering. ASA filed a motion to dismiss the financial charges because they were vindictive. The court granted the vindictive prosecution motion and, after Rosenthal was convicted again on marijuana charges, the court again imposed a sentence of one-day with credit for time served.

McClary-Raich v. Gonzales (2007): The Ninth Circuit Court of Appeals put what appears to be the final touches on the Raich case on March 14, 2007. In McClary-Raich v. Gonzales, the court addressed the outstanding issues remaining after the Supreme Court's pronouncement that the federal government has the authority under the Commerce Clause to regulate medical marijuana. In particular, the Ninth Circuit held that McClary-Raich: (1) could not obtain a preliminary injunction to bar enforcement of the Controlled Substances Act (CSA) based on common law medical necessity, although she appeared to satisfy the factual predicate for such claim; (2) application of the CSA to medical marijuana cultivators and users did not violate substantive due process guarantees; and (3) the Tenth Amendment does not bar enforcement of the CSA. Although the outcome was not positive, there was plenty of language in the decision that bodes well for the future of medical marijuana. In particular, with respect to the claim that there is a fundamental liberty interest to use marijuana medicinally, deserving of constitutional protection, the court stated: "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.'" The court continued: "For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected." Also,

although the court found that McClary-Raich could not affirmatively use a common law medical necessity defense to obtain an injunction in a civil suit, it did not foreclose the possibility that a criminal defendant might do so.

In re Grand Jury Subpoena for THCF Medical Clinic Records (2007): The United States District Court for the Eastern District of Washington quashed a subpoena directed to the State of Oregon to reveal information about 17 patients receiving medical marijuana. The court found that the subpoena issued by the federal government to prove criminal violations against a medical marijuana clinic was unreasonable, since the government did not have strong need for the information and the state would be violating its own laws regarding confidentiality to reveal the information sought, which, in addition, would deter medical marijuana patients from participating in the state's medical marijuana program. Balancing these interests, the court concluded that the subpoena should be quashed.

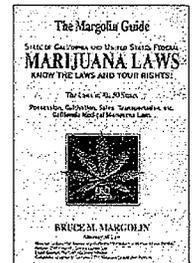
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 PERS EASE, STILL
 ON APPROVAL OF
 CITY MULLS
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 COMPLIANCE LAWS?
 YOU SHOULD BE
 SLY FACING MEDICAL
 LANARKER JAMES ANN AT
 THE COUNTY
 PREPARES TO
 OVER
 NEW
 MED POT SHOPS
 SHERIFF'S PUSH FOR
 VOTER PROTESTS
 MARIJUANA
 FUNDING
 ENFORCEMENT
 JUDGE SAYS HE MAY RULE AGAINST LA MEDICAL MARIJUANA DISPENSARY

The way the medical marijuana regulatory landscape changes on what seems like a daily basis, it feels nearly impossible to stay compliant. At MMLG, we recognize that you need help getting through the compliance maze. And we've been helping our clients navigate this evolving situation successfully. If you're trying to balance your work in the field with staying on the right side of the law, MMLG may just be the legal partner you've been looking for. Call us today. You'll sleep better tonight.

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LAW OFFICES OF
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MEDICAL MARIJUANA POSSESSION SALES TRANSPORTATION CULTIVATION NONPROFIT FORMATION	DUI PROBATION VIOLATIONS PROBATION MODIFICATIONS COLLECTIVES/COOPERATIVES RETURN OF PROPERTY ZONING & PERMITS
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RESULTS*

HS 11358 CULTIVATION DISMISSED
 HS 11359 POSSESSION WITH INTENT TO SELL DISMISSED
 HS 11360 SALE OF MARIJUANA DISMISSED
 HS 11360 TRANSPORTATION OF MORE THAN 28.6 GRAMS ... DISMISSED
 HS 11357(A) POSSESSION OF CONCENTRATED CANNABIS DISMISSED
 HS 11357(B) POSSESSION OF LESS THAN 28.6 GRAMS DISMISSED
 HS 11357(C) POSSESSION OF MORE THAN 28.6 GRAMS DISMISSED
 RETURN OF PROPERTY FOR 12 PLANTS & GROW EQUIPMENT .. GRANTED

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Advancing Legal Medical Marijuana Therapies and Research

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Disclaimer: Medical marijuana law in California is continually evolving and medical marijuana remains illegal under federal law. If something in this July 2010 manual appears out of date or inaccurate, please consult with an attorney or contact ASA at 510-251-1856 or 888-929-4367.