# Up in Smoke? How to Avoid Getting Burned When Counseling Clients on California's Medical Marijuana Laws and Landlord-Tenant Rights

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## Introduction

More than 15 years ago, California decriminalized the use of medical marijuana. This change greatly assisted people who use marijuana to offset the effects of chemotherapy, treat chronic pain, and alleviate symptoms of other illnesses, like glaucoma and AIDS. Landlords, however, potentially face serious consequences from both state and federal authorities (as well as civil liability to neighbors) if a tenant is suspected of possessing, cultivating, manufacturing, or dealing drugs (illegal or controlled substances) on the rented premises; this is true whether it is a commercial or residential tenancy. Landlords have sometimes found it difficult to evict tenants who are believed to be engaged in illegal drug-related activities on the premises. Even worse, counsel for landlords or tenants negotiating leases may be in jeopardy if they know that the premises will be occupied by a user or supplier of medical marijuana, which is now legal in California under limited circumstances, but not legal under any federal law regardless of the circumstances. This article summarizes some ways that counsel for both landlords and tenants can minimize the risk of handling medical marijuana-related cases.

## Summary of Medical Marijuana Law

California's Proposition 215, also known as the Compassionate Use Act of 1996 (CUA) (Health & S C §11362.5), allows persons who have received a written or oral recommendation or approval from a physician to possess and cultivate marijuana for their personal medical use. The CUA protects these persons and their "primary caregivers" (*i.e.,* persons designated by the medical marijuana user who have consistently assumed responsibility for the housing, health, or safety of the user). Health & S C §11362.5(b), (d)–(e). The CUA does not preclude criminal actions against nonprotected persons for selling or furnishing marijuana to others, regardless of the immunity of the user or purchaser. See *People ex rel Lungren v Peron* (1997) 59 CA4th 1383 (defendants operating commercial enterprise selling marijuana for medical use do not qualify as primary caregivers under CUA by simply obtaining as condition of sale documentation that purchaser is qualified to obtain or medically use marijuana).

Persons protected under the CUA have an affirmative defense against criminal prosecution in state court for violating California laws that prohibit simple possession and cultivation of marijuana (Health & S C §11362.5(b)(1), (d)); notably, however, the CUA does not supersede laws that prohibit persons from engaging in conduct that endangers others (Health & S C §11362.5(b)(2)).

The Medical Marijuana Program Act (MMPA) (Health & S C §§11362.7–11362.83) clarifies the scope of the CUA and regulates the cultivation and distribution of medical marijuana. For further discussion, see The California Municipal Law Handbook, chaps 9–10 (Cal CEB).

## Effect on Tenant and Landlord Rights

Federal prosecutors assert that a landlord who enters into a lease with a medical marijuana dispensary may be guilty of a crime for aiding and abetting the illegal possession, sale, or distribution of a controlled substance under 21 USC §846. The landlord might also be subject to a civil forfeiture of its real property under 21 USC §881(a)(7). Although many prosecutors are primarily targeting only those dispensaries they believe are connected with organized crime, the discrepancy between state and federal law makes the practice of landlord-tenant law in this area continuously risky for attorneys. Consequently, an attorney who has knowledge of the anticipated use of the premises and renders legal advice or services in forming the business entity for a dispensary, or negotiating the lease for either the landlord or tenant, is in an equally precarious position with his or her client, even if the use of the premises appears to conform to California law.

Neither the CUA nor the MMPA creates civil rights for residential tenants to smoke marijuana in their rental units, even if the tenants are protected under the CUA or MMPA from criminal prosecution. Effective January 1, 2012, for example, CC §1947.5 allows residential landlords to prohibit in the lease the smoking of tobacco products on the premises by the tenant or guests of the tenant. Arguably, §1947.5 does not apply to marijuana because it is not chemically a tobacco product. But there is no authority in state or federal antidiscrimination law requiring landlords to accept tenants or reasonably accommodate tenants who smoke marijuana for medical purposes. See, *e.g., Ross v RagingWire Telecommunications, Inc*. (2008) 42 C4th 920. See also Muni Law, chap 4.

While California law protects the marijuana user from state prosecution for possession or use, it does not create a license to commit a nuisance or endanger the health or safety of others. Marijuana smoke is a carcinogenic substance and noxious to many people. There are other

ways for a marijuana user to get the benefits of the drug. There are devices to contain the smoke and there are foods containing marijuana, such as cookies or brownies. For these reasons, marijuana users whose smoke constitutes a nuisance or substantial interference with the safety or enjoyment of the premises by others can still be subject to eviction under traditional rules, such as public or private nuisance law.

Even if a tenant is protected under the CUA or MMPA from state criminal prosecution, the use, distribution, or possession of marijuana is a federal criminal offense, and it may not be legally prescribed by a physician for any reason. See Controlled Substances Act (21 USC §§812(b)(1), 841(a)(1), 844(a)). Although the CUA is not a defense to federal marijuana charges, the common law necessity defense may protect the defendant from criminal liability in a federal, but not a state, prosecution. Compare *Raich v Gonzales* (9th Cir 2007) 500 F3d 850, 860, with *People v Galambos* (2002) 104 CA4th 1147, 1162.

A landlord who knowingly rents property to a user, possessor, or cultivator of medical marijuana runs the risk of (1) criminal prosecution under federal law for aiding and abetting (21 USC §846) or (2) a civil forfeiture of its real property under federal law (21 USC §881(a)(7)) whether or not the tenant-defendant succeeds on the necessity defense. See, *e.g., U.S. v Real Property Located at 5300 Lights Creek Lane* (9th Cir 2004) 116 Fed Appx 117. Consequently, a landlord may properly refuse to rent property to anyone who poses this risk.

Most leases contain a "compliance with law" clause that imposes a contractual obligation on the tenant to comply with all federal, state, and local laws. Such a clause supports the landlord's initiating an eviction action when there is a threat by a federal enforcement agency to seize the landlord's property as a result of the tenant's illegal (under federal law) drug-related activities. That situation would be further complicated if the lease from its inception expressly gave permission for the use of marijuana or stated that the premises would be used, *e.g.,* as a medical marijuana dispensary. When faced with similar facts, some superior courts in unreported cases have refused to evict the tenant and have ruled that under state criminal law and the terms of the lease, the tenant complied with state law or operated a legal business and did not violate its lease.

Currently, there is no officially reported California precedent on the issue of whether state law entitles a landlord to have a state court declare a lease terminated and order an eviction of the tenant solely on the basis of the tenant's use of the property for a purpose that is unlawful under federal controlled substance law but immunized from criminal and quasi-criminal penalties under state law.

### Reasonable Accommodation Requests

Under both federal and state fair housing law, a landlord must make "reasonable accommodations in rules, policies, practices or services" when such accommodations may be necessary to provide a person with a disability "equal opportunity to use and enjoy a dwelling." 42 USC §3604(f)(3)(B); Govt C §12927; CC §54.1(b)(3)(B). See California Landlord-Tenant Practice §§2.26–2.27F (2d ed Cal CEB). However, a landlord's denial of an individual tenant's request to permit marijuana use prescribed for a disability under the CUA would likely be upheld. See *James v City of Costa Mesa* (9th Cir 2012) 684 F3d 825 (federal antidiscrimination law, which defines illegal drug use by reference to federal (rather than state) law, did not protect plaintiffs' medical marijuana use). See also *Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920 (disabled employee was not protected from discrimination on basis of medical marijuana use; unreasonable to require employer to accommodate employee's drug use).

If a residential tenant should make an accommodation request to cultivate or use medical marijuana, the landlord should not simply ignore or categorically refuse it. The landlord may instead engage in an interactive process that communicates in writing the conflict between (1) state law decriminalizing the use of medical marijuana and reasonable accommodation law, on the one hand, and (2) federal criminal law, on the other. The landlord may assert that the accommodation request is not reasonable because it would unduly burden the landlord by subjecting it to the personal and financial risks of (1) criminal prosecution under federal law for aiding and abetting a crime, (2) forfeiture under federal law of the real property where the tenant resides, and (3) civil liability if the tenant's activity interferes with quiet enjoyment of neighboring tenants or constitutes a public or private nuisance under California statutory or common law. See Landlord-Tenant §§4.44–4.44E.

### Right to Inspect Premises

In commercial tenancies, landlords have at least a limited implied right to be assured that the tenant is not violating any laws. Unless the tenant can otherwise provide reasonable assurances, the landlord may enter and inspect the premises for this purpose. See *Sachs v Exxon Co., U.S.A.* (1992) 9 CA4th 1491, 1498, reported at 16 CEB RPLR 26 (Jan. 1993) (commercial landlord's right to enter premises and conduct environmental testing in reasonable and unobstructive manner). A commercial lease might also give the landlord a right to inspect as a contractual covenant.

However, landlord inspections in a residential tenancy are governed and limited by CC §1954. Unless there is an emergency, or the tenant has abandoned or surrendered

the premises, the entry may be made only after reasonable written notice to the tenant and during normal business hours. CC §1954. Oral notice is allowed in limited situations. See CC §1954(d)(2)–(3). The tenant may not waive in the rental agreement the rights conferred by CC §1954 (CC §1953(a)(1)), but may consent to the entry, without written notice and outside of normal business hours, at the time of entry.

Notwithstanding their limited right of entry to inspect for criminal activity, landlords must be cautious in this area.

### Nuisance Law

Some local ordinances declare that all medical marijuana dispensaries (MMDs) are public nuisances per se; the justification for this is the association of criminal elements with the dispensaries. See, *e.g., City of Riverside v Inland Empire Patient's Health & Wellness Ctr.* (review granted Jan. 18, 2012, S198638; superseded opinion at 200 CA4th 885) (court of appeal upheld trial court's finding that defendant's MMD constituted nuisance and ruled that local ordinance declaring all MMDs to be public nuisances per se was not preempted by state law decriminalizing use of medical marijuana; court of appeal opinion reported at 35 CEB RPLR 23 (Jan. 2012)). The supreme court heard oral arguments on the *Riverside* case in early February; a decision is expected by mid-2013. The justices were divided in their questions and comments on whether allowing an individual community to ban dispensaries altogether would render the state medical marijuana law partially or totally ineffective.

A landlord may face liability, and potentially even a forced sale of the property, under the Narcotics Nuisance Abatement Act (Health & S C §§11570–11587). Under Health & S C §11570, a nuisance is defined as every building or place "used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance" specified in the Act. A district attorney, county counsel, city attorney, or private citizen may bring an action to abate and perpetually enjoin such a nuisance against both the landlord and the tenant under Health & S C §11571 or an action for damages resulting from the nuisance under CCP §731. Thus, neighbors or other tenants who are bothered by drug use or dealing on the premises may bring an action to abate the activity and obtain a judgment for damages. Preliminary injunctive relief is available, and an abatement order after trial may result in severe penalties for the property owner, including:

- Closure of the building for 1 year;
- Requiring the owner to reside in the property until the nuisance is abated;
- Relocation assistance to innocent tenants;
- Making the injunctive order applicable to subsequent owners and requiring disclosure of the order to prospective purchasers and commercial lessees;
- Monetary penalties not exceeding $25,000; and
- Attorney fees.

See Health & S C §§11573, 11573.5, 11581. Under Health & S C §11571.1, the legislature declared that state law is not preemptive of local ordinances relating to drug abatement and that state law remedies are not intended to prevent a tenant from asserting relief against forfeiture under CCP §1179.

In *Lew v Superior Court* (1993) 20 CA4th 866, reported at 17 CEB RPLR 75 (Feb. 1994), neighbors individually filed separate nuisance complaints against the landlord in small claims court, claiming that they were disturbed by drug dealers working from and around the landlord's property. The small claims court consolidated the actions and awarded the plaintiffs $218,325. The court of appeal upheld the award, relying on Health & S C §11570 and its definition of drug-related activity as a nuisance. The court also allowed the plaintiffs to recover for mental suffering, because a finding that an activity constitutes a nuisance permits recovery of damages for discomfort and annoyance.

If a locality were to enact ordinances giving the police or other agency powers to compel landlords to deal with alleged drug abuse in rented property, landlords should still be very cautious and review the provisions of such an ordinance very carefully, particularly in jurisdictions with eviction controls. In *Cook v City of Buena Park* (2005) 126 CA4th 1, reported at 28 CEB RPLR 81 (May 2005), the court of appeal held unconstitutional on due process grounds a local ordinance in a nonrent-control jurisdiction giving the local police chief discretion to force a landlord to evict tenants suspected of illegal drug activity. The court found that the landlord was given insufficient information or time to prevail in an eviction action and was required to prevail in the action to avoid criminal penalties.

When a local ordinance requires a "just cause" for eviction, there will often be a provision allowing for eviction of tenants who cause "substantial interference" with the enjoyment of the premises by other tenants or the owner. Such interference is similar to or the equivalent of a nuisance.

Landlords who have not consented to the nuisance (*e.g.,* in the lease) may find remedies under CC §3479 (which defines "nuisance" to include the illegal sale of controlled substances), CC §§3485–3486 (which allow the landlord or the city attorney to evict a tenant to abate the nuisance caused by the tenant's "illegal conduct" involving controlled substances), and CCP §1161(4) (which allows an eviction action by the landlord based on

the tenant's (1) "maintaining, committing, or permitting the maintenance or commission of a nuisance" or (2) illegal activities defined in CC §§3485–3486).

In 2007, CC §3485 was added to California's general nuisance law. In 2009, it was amended and expanded. It authorizes any city attorney in Los Angeles, Long Beach, San Diego, Oakland, or Sacramento to bring an unlawful detainer action against a tenant who unlawfully uses, manufactures, imports, possesses, sells, furnishes, or gives away weapons or ammunition on the premises. See CC §3485(a), (c), (f); CCP §1161(4). In 2009, CC §3486 was added to the nuisance law. It authorizes any city attorney in Los Angeles, Long Beach, Palmdale, San Diego, Oakland, or Sacramento to bring an unlawful detainer action against a tenant who creates a nuisance or uses the premises for an unlawful purpose by manufacturing, cultivating, importing, transporting, possessing, selling, furnishing, administering, giving away, or providing a place to use controlled substances on the premises. See CC §3486(a), (c), (f); CCP §1161(4).

Either action to evict must be based on an arrest report or other law enforcement agency report. CC §§3485(a), 3486(a). Before bringing the action, the city attorney must first give 30 calendar days' written notice to the landlord and tenant about the nuisance activity; the landlord must either bring an unlawful detainer action and provide the city attorney with the details of the action or assign the right to bring the unlawful detainer action to the city attorney. The notice to the tenant must meet statutory requirements regarding content and translation into specific languages. It must also include prescribed information about the nature of the unlawful detainer action, potential defenses, and where to find legal assistance to defend the action. CC §§3485(a)(1), 3486(a)(1). The statute requires each participating jurisdiction to report specific information about evictions on an annual basis to the California Research Bureau. CC §§3485(g), 3486(g). The eviction remedy under both sections will sunset in January 2014, except in Los Angeles County, where the law as it pertains to controlled substances will remain in effect indefinitely, except as specified. CC §§3485(h), 3486(h). See Stats 2009, ch 244, §3, re-enacting CC §3486, effective January 1, 2014, only for Los Angeles County if certain conditions are met.

Neighbors may fear retaliation and may not be willing to be called as witnesses for the landlord. As long as CC §§3485–3486 exist (they are both scheduled to sunset in 2014), a landlord who needs evidence to support the unlawful detainer action may either inquire from the local police department about whether the tenant has been arrested for the illegal activities or invite the city attorney to formally request that the landlord bring an eviction action.

### Effect on Land Use

Local governments are in the difficult position of regulating a land use that is legal under state law but whose purpose is illegal under federal law. In 2008, the California Attorney General's office published Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use. In addition to providing guidance for local agencies, the Guidelines state the Attorney General's position that no conflict exists between federal and state laws because the California law exercises the state's reserved powers not to punish certain marijuana offenses under state law in limited circumstances. Both property owners and local governments have litigated to obtain clarity in the conflict between state and federal laws. Case law, however, is split. Compare *County of Santa Cruz v Ashcroft* (ND Cal 2004) 314 F Supp 2d 1000 with *City of Riverside v Inland Empire Patient's Health & Wellness Ctr*. (review granted Jan. 18, 2012, S198638; superseded opinion at 200 CA4th 885); *U.S. v McWilliams* (9th Cir 2005) 138 Fed Appx 1, withdrawn (9th Cir 2005) 2005 US App Lexis 16527. On the conflict between the decriminalizing provisions in state law and local zoning or business regulations, see Muni Law, chap 10; California Land Use Practice, chap 12 (Cal CEB).

### Mitigating Ethical and Other Risks for Attorneys

Many attorneys believe that the potential exposure for civil attorneys involved in leasing and business entity transactions is much greater than for those who defend the criminally accused. Some attorneys have reported that their legal malpractice insurance was cancelled because of involvement in such business or leasing transactions. Consequently, if a decision is made to go forward and represent the client, the attorney should first contact its malpractice carrier to determine the extent of coverage, then consult with both criminal defense and ethics counsel, and finally make a number of comprehensive disclosures both orally and in writing to the client, including the following:

- The likelihood of a conflict of interest between the attorney and the client if one or both are later prosecuted for a crime (see California Client Communications Manual: Sample Letters and Forms (Cal CEB); California Professional Responsibility Handbook (Cal CEB));
- The various ways in which the landlord or tenant may be subject to criminal prosecution under federal law, including enhanced sentencing, property forfeiture, and other penalties;
- The various ways in which the landlord or tenant may be subject to criminal prosecution under state law if the activity does not fully comply with medical marijuana legislation; and

- Potential civil liability of the landlord or tenant if the activity interferes with quiet enjoyment of neighboring tenants or constitutes a public or private nuisance under California statutory or common law.

## Conclusion

As long as the conflict between California and federal law continues to rage, the risks for attorneys representing both landlords and tenants as outlined in this article will exist. On the horizon is the belief that this problem is generational and that decriminalization of medical marijuana on a national scale will ultimately put out the fire. The experts differ on how long this process will take. The law might be settled more quickly if the justices hearing these cases on the appellate level were to accept the argument that having available optimum medical treatment and medicine for an individual, like a woman's right to choose, is a constitutionally based right. Whatever course is ultimately taken, it is probably going to be easier to regulate the cultivation, distribution, and use of medical marijuana if the pharmaceutical industry and medical professions are more involved than they are currently, or if other mechanisms are created that weaken the magnet between medical marijuana and organized crime. In the meantime, those counsel who for ideological or other reasons place themselves on the front line must continue to be cautious.

For detailed, expert discussion of this topic, see CEB's on-demand MCLE program "Current Issues in Medical Marijuana Regulation," available on ceb.com in April 2013.