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SORTING THROUGH THE WEEDS

by Andrew R. Quinio

As a California initiative legalizing non-medical marijuana is poised to appear on the upcoming ballot, the state's long term care facilities will still have to grapple with the ongoing conflicts and conundrums presented by medical marijuana no matter what the voters decide in November.

This November, Californians may decide on "The Adult Use of Marijuana Act," which will permit adults 21 years and older to use, possess, purchase, and grow nonmedical marijuana, except within 1,000 feet of K-12 schools and other areas where children are present. The Act also prohibits the sale of non-medical marijuana by businesses that also sell alcohol or tobacco, and using marijuana while driving a motor vehicle. Despite this and other restrictions, the Act will mark a significant expansion of marijuana access if passed, as it repeals *Health & Safety Code* §1157, which makes simple possession of any amount of marijuana a crime.

While the impact on California's long term care facilities by the potential passage of the marijuana initiative remains to be seen, it is difficult to imagine how caregivers can avoid the issue of recreational marijuana among their patients and residents, especially as the Baby Boomer generation gets closer to needing long term care. A March 2015 report in *The Wall Street Journal* cites to a survey by the Substance Abuse and Mental Health Services Administration that revealed marijuana as the most popular way for aging baby boomers to get high. *The Wall Street Journal* also reported that government researchers estimated more than 5.7 million people over the age of 50 will need substance-abuse treatment by the year 2020.¹ Meanwhile, a March 2015 poll conducted by the Public Policy Institute of California showed 52% of Californians aged 55 and older think that marijuana should be made legal.²

But even if voters disapprove non-medical marijuana legalization in November, medical marijuana use remains an issue for long term care providers because of the passage of Proposition 215 ten year ago, which enacted the Compassionate Use Act of 1996 and added Section 11632.5 to the *Health & Safety Code*.

Section 11632.5 ensures 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. Section 11632.5 applies to patients with cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or "any other illness for which marijuana provides relief." The definition of a "primary caregiver" includes skilled nursing facilities, intermediate care facilities, residential care facilities for the elderly, hospice, and home health agencies.³

Meanwhile, individuals that have legal access under California law could interpret the Patients Bill of Rights under 22 CCR §72527(a)(11) to continue using medical marijuana in a skilled nursing facility, as it affords them the right "[t]o be treated with consideration, respect and full recognition of dignity and individuality,

¹ Elinson, Zusha, "Aging Baby Boomers Bring Drug Habits Into Middle Age," *The Wall Street Journal*, 16 March 2015, available at: <http://www.wsj.com/articles/aging-baby-boomers-bring-drug-habits-into-middle-age-1426469057>

² Baldassare, Mark, Dean Bonner, and Lunna Lopes, "Just the Facts: California's Attitudes Toward Marijuana Legalization," *Public Policy Institute of California*, April 2015, available at: http://www.ppic.org/main/publication_show.asp?i=1150

³ *Health & Safety Code* §11362.7

including privacy in treatment and in care of personal needs.” For individuals in a residential care facility, the right under *Health & Safety Code* §1569.269(a)(4) “[t]o be encouraged and assisted in exercising their rights as citizens and as residents of the facility,” can be similarly interpreted to allow the continued use of medical marijuana. Efforts to limit an RCFE resident’s use of medical marijuana could be met with a reminder that such residents “shall be free from interference, coercion, discrimination, and retaliation in exercising their rights.” Essentially, a medical marijuana user may argue that they cannot be marginalized in the facility for their choice of alternative treatment.

However, despite the Compassionate Use Act, the collection of rights under California law, and the potential passage of the November initiative that could bolster marijuana rights, patients and residents remain limited by federal law. Caught in the middle of the tug-of-war between state and federal law are administrators and directors that are dragged in either direction.

Under federal law, marijuana is a Schedule I drug, making the possession, dispensation, or distribution of it a criminal offense.⁴ Consequently, a consumer of medical marijuana under California law and their caregivers assisting in the administration of the substance are technically committing a crime. Indeed, in *Gonzales v. Raich* (2005) 545 U.S. 1, 33, the U.S. Supreme Court specifically addressed California’s Compassionate Use Act and upheld the federal government’s power to regulate and sanction marijuana as part of Congress’ constitutional authority to control interstate commerce, despite conflicting state laws allowing for medicinal use.

For skilled nursing facilities, permitting patients to use marijuana may lead to a loss of Medicare funds, since facilities must operate and provide services in compliance with all applicable federal laws in order to receive federal funding.⁵ Though it may be a risk that facilities are able to take. In 2009, the U.S. Department of Justice issued a memo stating that a core priority for federal prosecution would be “significant traffickers of illegal drugs” and not “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁶ In a follow-up memo in 2013, the Department of Justice reiterated this priority, but clarified that state and local laws do not provide a legal defense to a violation of federal law, and that the Department still had the authority to enforce federal law regardless of state law.⁷

Under this patchwork of laws, long term care providers in California can approach patient marijuana use in a variety of ways. Colorado provides some examples, which were reported in a 2012 article in the *Denver Post*.⁸ Given the supremacy of federal law, facilities can take a zero-tolerance approach and completely ban the use of marijuana on the premises by patients. On the other hand, facilities can permit its use and facilitate its administration like any other medication, carefully controlling its storage and administration. One major senior living community in Colorado reported a policy of following state laws governing medical marijuana and requiring residents to self-administer the drug in the privacy of their rooms. But again, these options would still be pursued under the shadow of existing federal prohibitions on marijuana. Further considerations should still be made for the rights of other patients and residents that are bothered by marijuana use.

Ultimately, long term care providers must continue the precarious balancing act with medical marijuana until state and federal laws are reconciled. That reconciliation could depend once more on the long term care providers themselves, along with their patients and residents, through the power of their civic engagement.

⁴ 21 USC §§841(a)(1); 844(a)

⁵ 42 U.S. Code § 1395i–3(d)(4)(a)

⁶ Ogden, David, U.S. Department of Justice Memorandum re: Investigations and Prosecutions in States, 19 October 2009, available at: <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>

⁷ Cole, James, U.S. Department of Justice Memorandum re: Guidance Regarding Marijuana Enforcement, 29 August 2013, available at: <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

⁸ Parker, Ryan, “Medical-marijuana policies in Colorado nursing homes are cloudy,” *The Denver Post*, 5 February 2012, available at: http://www.denverpost.com/ci_20526488/medical-marijuana-policies-colorado-nursing-homes-are-cloudy

As the Supreme Court reminded, “But perhaps even more important than these legal avenues is the democratic process, in which the voices of voters...may one day be heard in the halls of Congress.”⁹

*** This article is not intended to be an endorsement of or opposition to any initiatives, ballot measures, or candidates, or any particular form of medical treatment. The views and opinions expressed in this article do not reflect those of the firm’s clients or affiliates.

About the Author:

Andrew Quinio joined Wroten & Associates in 2013. He was admitted to the California State Bar and the U.S. District Court for the Central District of California in 2012.

Mr. Quinio obtained his Juris Doctorate from the University of Southern California, Gould School of Law. While at USC, he was a finalist in the Hale Moot Court Honors Competition, and later competed in the National Moot Court Competition. He also served as President of the USC Federalist Society. During his third year, he was as an Editor on the Moot Court Executive Board. Mr. Quinio received the USC Edward and Eleanor Shattuck Award, which is awarded to law students that exhibit the greatest potential for becoming outstanding members of the bar. During law school, he clerked for the Tax Division of the U.S. Attorney’s Office and several complex civil litigation firms. Prior to joining Wroten & Associates, he clerked for the Los Angeles District Attorney’s Office.

Mr. Quinio is an honors graduate of UC Berkeley, where he obtained a degree in Political Science and a minor degree in Public Policy. Mr. Quinio had the honor of serving as a Commissioner for the City of Mission Viejo Planning and Transportation Commission. He is currently a member of the Orange County Bar Association, Philippine American Bar Association, and the Legislative Resolutions Committee of the Orange County Bar Association. Mr. Quinio is also a Legislative Liaison Subcommittee member for the DRI Young Lawyers Committee. To reach Andrew directly email him at Aquinio@wrotenlaw.com

⁹ Raich, *supra*, at 33.