Don’t Bogart that Lease, My Friend: Legal and Ethical Issues in the Representation of Medical Marijuana Facilities

2015 Annual Meeting
Baltimore, MD

THE "KNOWNS," "KNOWN UNKNOWNS," AND THE “UNKNOWN UNKNOWNS” OF MEDICAL MARIJUANA

DWIGHT MERRIAM
ROBINSON+COLE
Known Unknowns and Unknown Unknowns...

The message is that there are no "knowns." There are things we know that we know. There are known unknowns. That is to say there are thing [sic] that we now know we don't know. But there are also unknown unknowns. There are things we don't know we don't know. So when we do the best we can and we pull all this information together, and we then say well that's basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns.
23 States and the District of Columbia

current as of June 19, 2015

- Alaska*
- Arizona
- California
- Colorado*
- Connecticut
- Delaware
- Georgia
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- Oregon*
- Rhode Island
- Vermont
- Washington*
- District of Columbia *

* recreational use
Map of cannabis laws in US jurisdictions

- Jurisdiction with legalized cannabis
- Medical and decriminalization laws*
- Legal psychoactive medical cannabis
- Legal non-psychoactive medical cannabis
- Decriminalized cannabis possession laws
- Total cannabis prohibition

* In Mississippi medical cannabis is non-psychoactive only.

Some Native American reservations and cities have laws that are different from the states.
Many States Considering It

Prominent among them:

• California
• Maine
Harrison Narcotic Act of 1951
Narcotic Control Act 1956
Controlled Substances Act (1970)

- **SCHEDULE I**
  - (a) Opiates
  - (b) Opium Derivatives
  - (c) Hallucinogenic Substances
    - (10) Marihuana.

- The drug or other substance has a high potential for abuse.
- The drug or other substance has no currently accepted medical use in treatment in the United States.
- There is a lack of accepted safety for use of the drug or other substance under medical supervision.
- E.g. heroin, LSD, ecstasy
- Schedule II: cocaine, morphine, oxycodone
“Whether the power vested in Congress by Article I, § 8, of the Constitution ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution’ its authority to ‘regulate Commerce with foreign Nations, and among the several States’ includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.” 545 U.S. 1 (2005).
## Claimed Uses

<table>
<thead>
<tr>
<th>Condition</th>
<th>Count</th>
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</thead>
<tbody>
<tr>
<td>Agitation related to Alzheimer’s disease</td>
<td>61</td>
</tr>
<tr>
<td>Cachexia</td>
<td>1,097</td>
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<tr>
<td>Cancer</td>
<td>2,056</td>
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<tr>
<td>Glaucoma</td>
<td>832</td>
</tr>
<tr>
<td>HIV+/AIDS</td>
<td>731</td>
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<tr>
<td>Nausea</td>
<td>7,856</td>
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<tr>
<td>Severe Pain</td>
<td>52,597</td>
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<tr>
<td>Seizures (including, but not limited to, epilepsy)</td>
<td>1,354</td>
</tr>
<tr>
<td>Persistent muscle spasms, including, but not limited to, those caused by multiple sclerosis</td>
<td>14,671</td>
</tr>
</tbody>
</table>
Judge Gustin Reichbach

http://www.nytimes.com/2012/05/17/opinion/a-judges-plea-for-medical-marijuana.html?_r=0
“Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.”
DOJ Guidance
It will still enforce...

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.
Jonathan Janetski Sentenced In U.S. District Cour

FOR IMMEDIATE RELEASE

The United States Attorney’s Office announced that during a federal court session in Missoula, on May 21, 2012, before U.S. District Judge Donald W. Molloy, JONATHAN JANETSKI, a 36-year-old resident of Whitefish, appeared for sentencing. JANETSKI was sentenced to a term of:

- Prison: 12 months and 1 day
- Special Assessment: $100
- Supervised Release: 3 years
Real Estate Issues
Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote.
Dear Ms. [redacted]:

This office has been advised that there is a marijuana dispensary, [redacted] Collective, operating at the real property located at [redacted] Drive, San Jose, California, which property you own or have under your management or control. The dispensary is operating in violation of federal law, and persons and entities who operate or facilitate the operation of such dispensaries are subject to criminal prosecution and civil enforcement actions. Since the dispensary is operating within a prohibited distance of a school, [redacted] Art Academy, the unlawful operation of the dispensary is subject to enhanced penalties. Additionally, property involved in such operations, including real property, is subject to seizure by and forfeiture to the United States. These penalties and remedies apply regardless of the purported purpose of the dispensary or the uses for which marijuana is purportedly sold. Specifically, Title 21, United States Code, Section 856(a) provides:
Medicinal marijuana raids in Montana stun advocates

By John S. Adams, USA TODAY

GREAT FALLS, Mont. — Federal agencies conducted 26 raids on medical marijuana facilities in 13 Montana cities this week, as agents seized thousands of marijuana plants and froze about $4 million in bank funds.

The raids stunned medical marijuana advocates, many of whom believed the Obama administration's policy was to leave states with medical marijuana laws alone.

That belief stemmed from Attorney General Eric Holder's announcement in October 2009 that the pursuit of "individuals whose actions are in clear and unambiguous compliance" with existing state medical marijuana laws would be the lowest priority of U.S. law enforcement.

"I think most everybody believed the directive from the Justice Department was that no priority would be given to utilizing..."
SACRAMENTO, Calif. — John Lester Gross III, 48, of Rough and Ready, pleaded guilty today to maintaining a drug-involved premises, United States Attorney Benjamin B. Wagner announced.

This case is the product of an investigation by the IRS-Criminal Investigation, the United States Drug Enforcement Administration, the California Department of Justice, and the Nevada County Sheriff’s Office. Assistant United States Attorney Michael M. Beckwith is prosecuting the case.

According to court documents, Gross helped organize and maintain a marijuana dispensary on P Street in Sacramento. The dispensary was supplied with marijuana grown on Gross's property in Rough and Ready, which is near Grass Valley. On July 19, 2010, law enforcement officers executed a search warrant at 1137 Glenn Loop Road in Rough and Ready. On the property, officers found more than 2,800 marijuana plants and approximately 100 pounds of processed marijuana. They also found scales, packaging material, a few marijuana sales receipts, various forms of ammunition, and identification documents. Investigators encountered a number of people working and living there.

Gross is scheduled to be sentenced by United States District Judge Morrison C. England Jr. on June 27, 2013. Gross faces a maximum statutory penalty of 20 years in prison and a $500,000 fine. The actual sentence, however, will be determined at the discretion of the court after consideration of any applicable statutory sentencing factors and the Federal Sentencing Guidelines, which take into account a number of variables.
Colleges - Robyn Smith

http://www.npr.org/sections/health-shots/2012/05/24/153525631/medical-marijuana-101-you-cant-smoke-that-on-campus
Don’t be a dope! Federal marijuana laws apply to you

Commentary by Capt. Mary Ann Mazzarini
60th Air Mobility Wing Judge Advocate
Landlords
Residential Landlords
Duty to Disclose or Accommodate?

• “Material fact” that MM tenant resides in or occupies a portion of building

• No duty to allow tenant/patient
  – Not protected under ADA, FHAA
  – No requirement to provide a “reasonable accommodation”
• What to do if the tenant asks for a “reasonable accommodation” to possess and use medical marijuana on the premises?
  – Release from the lease without penalty
  – Accommodate the tenant, but require the tenant to pay the cost of mitigation (e.g. exhaust fans)
An Ounce of Prevention...

• Have new and current tenants sign an addendum concerning prohibition of drug activity in violation of federal law

LEASE ADDENDUM FOR CRIME-FREE/DRUG-FREE HOUSING
In consideration of the execution or renewal of a lease of the dwelling unit identified in the lease, Owner and Resident agree as follows:
1. Resident, any members of the resident's household or a guest or other person under the resident's control shall not engage in illegal activity, including drug-related illegal activity, on or near the said premises. "Drug-related illegal activity" means the illegal manufacture, sale, distribution, purchase, use or possession with intent to manufacture, sell, distribute, or use of a controlled substance (as defined in Section 102 or the Controlled Substance Act [21 U.S.C. 802]) or possession of drug paraphernalia.
MEDICAL MARIJUANA: The parties agree, that it shall be a breach of this Lease for Tenant to grow, cultivate or raise marijuana on or in the property or for Tenant to sell, dispense or become a dispenser of marijuana, regardless of whether Tenant has or is licensed to do so and regardless of whether Tenant has been granted the right to supply or provide marijuana is a violation of this lease and will subject Tenant to eviction and or any other remedy available to Landlord pursuant to this lease. It shall also be a breach of this Lease for Tenant to use or smoke marijuana on the property even if Tenant has a prescription for its medical use or if Tenant is legally registered for such use. Tenant shall be required to use or smoke medical marijuana off the premises and a violation of this shall subject Tenant to eviction and or any other remedy available to Landlord pursuant to this Lease.
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, DC  20410-5000  

February 10, 2011

MEMORANDUM FOR:  All Field Offices and Public Housing Agencies (PHAs)

FROM:  Sandra B. Henriquez, Assistant Secretary
        for Public and Indian Housing

SUBJECT: Medical Marijuana Use In Public Housing 
         and Housing Choice Voucher Programs
MEMORANDUM FOR: John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity

David Stevens, Assistant Secretary for Housing/ Federal Housing Commissioner

Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing

FROM: Helen R. Kanovsky

SUBJECT: Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing.
The Electric Bill

• Same light levels as an operating room
• Air exchange rates 6X that of a biotech lab and 60X that of your home
• Power needs equal to a data center
• California: 3% of all electric use and 9% of household use
Smoke and Odors

• In multi-tenant building
• Outside

Nasal Ranger Odor Mapping
with ODOR TRACK'R™
St. Croix Sensory

INTRODUCING

Map odors around a facility or in a community using odortrackr.com

Image source: Nasal Ranger/St. Croix Sensory
Mold

Feature

Marijuana Grow Operations – The Challenge for Home Inspectors
Pests

- Spider mites
- White flies

The whitefly has caused more than $1 billion crop damage nationwide. In California, silverleaf whitefly has caused estimated $350 million in crop damage since 1990 and has largely damaged the sweet potato crop.
Water Consumption

• RAND Report (2010)

Water consumption calculations give a sense of perspective. Cannabis is not a water intensive crop, but indoor cultivation requires attention to hydration levels, and Cervantes estimates that 16 plants will require between 10 to 25 gallons of water per week (Cervantes, 2006). Assuming plants are grown for 90-days before harvest, that is equivalent to 8 - 20 gallons of water per plant.
Insurance

• Maybe no coverage for:
• Mold
• Property damage
• Theft
• Indoor air quality
• Government seizure
• Marijuana plants or products
Parking, Traffic

• Higher traffic and parking demands?
• Patients medicating in the parking areas
Market Impacts

• Decreased traffic to other tenants?
• Adverse effects on image
• Tenant-initiated rent reduction requests
• Medical marijuana tenant tenure
Tenant
Quiet Enjoyment

• Suits by other tenants

• Versus good faith and dealing
  – If one tenant’s quiet enjoyment is disturbed by the MM tenant’s use, which lease will landlord enforce?

• Gross negligence
  – Sometimes negotiated as a exclusion from tenant’s obligation to indemnify and hold landlord harmless
Owner/Developer
Business Planning

• Limiting liability

Image from [www.bpmcpa.com](http://www.bpmcpa.com)
Tax Planning

- Section 280E tax on the gross, not net, income largely to punish drug dealers
Due Diligence for Buyer/Tenant

• Review declaration of covenants and restrictions
  – No violation of federal law
  – Requirement of “first class” business operations
  – No consumption on premises
Zoning

1,000 feet from:

residential use district

park, playground, school, church, recreation center, youth center

another Collective Facility

(San Diego County)
Lender
• February 2014 Treasury and Justice Department Guidelines
  – Banks must review state license applications
  – Look for red flags suggesting illicit activity
  – File “suspicious activity reports” on MM clients
    • “If I misreport, I’m liable as a bank,” said Bill Uffelman, president of the Nevada Bankers Association. “So I’m putting my license to do business on the line so that you can do business. That’s a hard mouthful for bankers to swallow.”
Ethics

- As a lawyer representing
- As a lawyer using

Beware! Young and Old—People in All Walks of Life!

This may be handed you by the friendly stranger. It contains the Killer Drug “Marihuana”—a powerful narcotic in which lurks Murder! Insanity! Death!

WARNING:
Dope peddlers are shrewd! They may put some of this drug in the ☕ or in the 🍀 or in the tobacco cigarette.

Write for detailed information, enclosing 12 cents in postage—mailing cost!

Address: THE INTER-STATE NARCOTIC ASSOCIATION (incorporated not for profit)
53 W. Jackson Blvd. Chicago, Illinois, U. S. A.
In the End...

Think of the things we know, and the known unknowns, but fear most the unknown unknowns...