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Bridging the Gap: The Role of Science in Policy



In this edition of the Journal our theme is, “Bridging the Gap: The Role of Science in Policy.” The contributions include an original brief that provides a legal perspective on current state marijuana policies and a commentary highlighting the significant problem of diversion of prescription drugs among nurses and other healthcare workers.

In the paper entitled, *State Laws Legalizing Marijuana Do Not Make Marijuana Legal Under Federal Law*, the author, David Evans, Esq., dives into the conflict between state and federal drug laws as they pertain to marijuana legalization in the U.S. In this piece, the author offers federal statutes and case law to build a compelling case on this issue.

The commentary included in this edition, *Drug Diversion in Healthcare*, addresses an alarming trend that is seen far too often in the United States. That trend is the diversion of highly addictive prescription medication from healthcare facilities by drug-dependent healthcare professionals.



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State Laws Legalizing Marijuana Do Not Make Marijuana Legal Under Federal Law

David G. Evans, Esq.

Over the last several years, a few states have passed legislation or have fostered ballot initiatives to legalize the recreational use of marijuana. In addition, several states have by state law legalized the medical use of marijuana. Yet, at the same time, federal law continues to prohibit the recreational and medical use of this controlled substance. This has set up a conflict with federal law. If the federal government decides to enforce the federal law, what will the consequences be for those in the business of growing, marketing and distributing marijuana?

It is important to recognize that, based on an analysis of federal statutes and case law, it is clear that the state ballot initiatives to make recreational or medical use of marijuana legal under state law do not legalize its use under federal law. According to existing federal law, anyone involved in the possession, production, growing or the sale of marijuana is subject to federal prosecution by the U.S. Government under the federal Controlled Substances Act (CSA). Consequently, state marijuana laws are preempted by the CSA. Congress enacted the CSA for the purposes of consolidating various drug laws into a comprehensive statute, providing meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthening law enforcement tools against international and interstate drug trafficking. *21 U.S.C. § 801 et seq.*

This conflict in federal and state law, then, raises critical legal questions which are the focus of this article:

- Are state ballot initiatives preempted by the CSA?
- Are state employees immune from prosecution?
- What are the consequences of a violation of the CSA?
- Are there Racketeer Influenced and Corrupt Organizations Act (RICO) implications?
- What are the tax consequences of trafficking in marijuana?

Are state ballot initiatives preempted by the CSA?

A review of existing case law would answer this question in the affirmative. In *Gonzales v. Raich*, 545 U.S. 1 (2005), for example, the U.S. Supreme Court concluded that local cultivation and consumption of marijuana was prohibited by the CSA under the Commerce Clause of the U.S. Constitution. The Supreme Court acknowledged Congress' Commerce Clause authority to ban marijuana production and consumption. The cultivation, possession and distribution of marijuana remain illegal under federal law.

Currently under the CSA, marijuana is a Schedule I controlled substance. Schedule I controlled substances are those that have a high potential for abuse, lack any accepted medical use and can't be used safely even under the supervision of a physician. As a Schedule I drug, the manufacture, distribution or possession of marijuana is a criminal offense under the CSA. Consequently:

- It is unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance unless it is in accordance with the CSA. *21 U.S.C. 841(a)*
- It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner. This exception does not apply to Schedule I drugs such as marijuana, which has no accepted medical use. *21 U.S.C. 844(a)*
- It is unlawful to use any communication facility to commit felony violations of the CSA. *21 U.S.C. 843*
- It is illegal to conspire to commit any of the crimes set forth in the CSA. *21 U.S.C. 846*
- It is unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances. *21 U.S.C. 856*. This applies to landlords.
- It is unlawful to distribute or manufacture controlled substances within 1,000 feet of schools, colleges, playgrounds, and public housing facilities, and within 100 feet of any youth centers, public swimming pools, and video arcade facilities. *21 U.S.C. 860*

Federal law also states that “[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent

his apprehension, trial or punishment, is an accessory after the fact.” 18 U.S.C. 3. Under 18 U.S.C. § 4, “[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”

All of the above means that those involved in the growing, marketing and distribution of marijuana are likely involved in multiple violations of federal law.

Are state employees immune from prosecution?

In *United States v. Rosenthal*, 454 F.3d 943, 948 (CA 9 2006), it was held that implementation and facilitation of state marijuana laws contrary to the CSA constitute federal crimes. The CSA provides limited immunity from prosecution for certain actions by state officials, but such immunity is not applicable here. *Section 885(d)* of the CSA provides:

Except as provided in sections 2234 and 2235 of Title 18 [relating to illegal procurement and execution of search warrants], no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any state, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

However, for an official to be “lawfully engaged” in the enforcement of a law relating to controlled substances, and therefore entitled to protection under statute creating immunity from federal narcotics laws, the law that the official is “enforcing” must itself be consistent with federal law. *United States v. Rosenthal*, 266 F.Supp.2d 1068, 1078 (ND CA 2003) It is clear that the state laws legalizing marijuana are not consistent with federal law and those involved in implementing those state laws may be subject to federal prosecution.

What are the consequences of a violation of the CSA?

Those involved in growing, marketing and distribution of marijuana are subject to federal prosecution. The consequences are serious. The consequences of violating the CSA include various fines and terms of imprisonment and civil fines and the forfeiture of any property used to facilitate a violation of the CSA. Anyone who possesses, cultivates or distributes marijuana, even if such acts are legal under state law, is subject to federal sanctions. See *Gonzales v. Raich*, 545 U.S. 1 (2005), and *United States v. Oakland Cannabis Buyers' Cooperative*, 532 US 483 (2001).

Anyone who sells or grows or distributes marijuana could be held liable as aiders or abettors under 18 U.S.C. § 2, which provides that “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”

In addition, “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be

fined under this title or imprisoned not more than five years, or both.” *18 U.S.C. § 371*

Penalties for violating the CSA are severe. Simple possession of marijuana constitutes a misdemeanor, punishable by up to one year in prison and a minimum fine of \$1,000. *21 U.S.C. § 844 (a) (repeat offenders face more severe penalties)*. The manufacture, distribution or possession with intent to distribute marijuana constitute felonies, punishable by up to five years in prison and fines up to \$250,000 for individuals and \$1 million for entities. *21 U.S.C. § 844 (a) (Repeat offenders face more severe sanctions)*.

There are specific implications for specific groups of violators. For example, pursuant to *21 U.S.C. § 856* property owners and landlords who rent or provide a location for marijuana stores are subject to prosecution. It is unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances.

Additionally, financiers and banks are targeted under federal statutes. Those who provide financing for marijuana operations may be subject to prosecution. For example, federal anti-money laundering statutes make it illegal to engage in financial transactions designed to promote illegal activities, including drug trafficking, or to conceal or disguise the source of the proceeds of that illegal activity. *18 U.S.C. § 1956 and 1957*

Are there Racketeer Influenced and Corrupt Organizations Act (RICO) implications?

The United States Department of Justice (DOJ) may initiate criminal proceedings under the Racketeer Influenced and Corrupt Organizations Act (RICO). *18 U.S.C. § 1962*. See *United*

States v. Hocking, 860 F.2d 769 (7th Cir. 1988) (“governmental or public entities fit within the definition of 'enterprise' for purposes of RICO”). All property constituting or derived from, directly or indirectly, the proceeds of racketeering activities is subject to forfeiture regardless of any provision of state law. 18 U.S.C. § 1963(a)

The RICO statute also gives rise to a civil cause of action which may be brought by a private citizen injured by the racketeering activity where such activity proximately caused the injury. 18 U.S.C. § 1964.

Under certain circumstances under RICO, both the federal government and private individuals can sue those who grow, market and distribute marijuana because such actions violate federal law. This was done in the case of tobacco and it was successful. The federal government brought an action against nine manufacturers of cigarettes and two tobacco-related trade organizations and alleged that they violated RICO by engaging in a conspiracy to deceive the public about the health dangers of smoking tobacco. The case established that the defendants conspired together to violate RICO and they were then enjoined from further use of deceptive practices. *U.S. v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009). For more information on RICO claims against the manufacturers of tobacco products, see *American Law of Products Liability* 3d § 88:5.

What are the tax consequences of trafficking in marijuana?

Under federal law trafficking in marijuana has negative tax consequences even if the sale of marijuana is legal under a state marijuana law. The Internal Revenue Code states:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of Schedules I and II of the Controlled Substances Act) which is prohibited by federal law or the law of any state in which such trade or business is conducted. 6 U.S.C. § 280E (*expenditures in connection with the illegal sale of drugs*).

Marijuana is a Schedule I controlled substance for tax purposes. Provision of marijuana constitutes “trafficking” within the meaning of the Internal Revenue Code section disallowing business expense deductions for expenditures “in connection with the illegal sale of drugs,” even though the activity was pursuant to a state statute. *Californians Helping to Alleviate Medical Problems, Inc., v. Commissioner of Internal Revenue*, 128 T.C. 173, 93 TCM 3973 (2007).

This means that expenses in the growing, marketing and distribution of marijuana are not tax deductible.

Conclusion

If the federal government decides to enforce the federal marijuana laws, anyone who participates in the growing, possession, manufacturing, distribution, or sales of marijuana under state law or aids or facilitates or finances such actions is at risk of federal prosecution or other liability such as a RICO lawsuit. Under the current administration, federal enforcement of marijuana laws has been lax. This may change and put in jeopardy all those who violate federal marijuana laws.

About the author

David G. Evans, Esq. serves as a Special Advisor to the Drug Free America Foundation. He is admitted to practice before the U.S. Supreme Court and has written amicus briefs in several Supreme Court cases, including those having to do with state marijuana laws that are in conflict with federal law. See: 2004 WL 1843964 (Gonzales v. Raich, 545 U.S. 1 (2005)); 2001 WL 30659 (U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483 (2001)).

Conflict of Interest Statement

I declare that I have no proprietary, financial, professional or other personal interest of any nature or kind in any product, service and/or company that could be construed as influencing the position presented in, or the review of, the manuscript entitled except for the following: NONE

Drug Diversion in Healthcare

By Barry Abramowitz

Drug abuse in America continues to grow. In 2012, approximately 23.9 million Americans used illicit drugs. Of these, 6.8 million used prescription drugs for nonmedical purposes. In other words, they used them without a prescription or for a purpose they were not prescribed. According to the National Institute on Drug Abuse, the trend has continued to rise since 2002 ("Drug Facts: Nationwide Trends, National Institute on Drug Abuse (NIDA)," 2014). While studying the mentioned statistics, it is no wonder that healthcare diversion has become a major problem in the healthcare field.

The American Nurses Association estimates that 10 percent of nurses are dependent on some type of drug. The AMA used the analogy that if one works with 10 nurses, one of the ten is probably struggling with some type of addiction. With almost 3 million nurses working in their field, that could mean that approximately 300,000 may be substance abusers. While nurses typically abuse drugs and alcohol the same as the general public, nurses have a tendency to be more dependent on prescription medications. These prescription medications are: amphetamines, opiates, sedatives, tranquilizers, and inhalants. This goes hand in hand with the availability of these drugs at the workplace ("Drug Addiction among Nurses: Confronting a Quiet Epidemic | Modern Medicine," 2009).

According to retired Pharmaceutical Drug Diversion Investigator, Lorri Abramowitz, nurses and other healthcare individuals use a variety of methods to divert controlled substances from healthcare facilities. Abramowitz is familiar with these types of methods. For approximately 18 years, she investigated hundreds of these types of cases for the Jacksonville Sheriff's Office, to include a hepatitis C case at Mayo Clinic Jacksonville. The Mayo case involved a radiology technician who was addicted to fentanyl. Abramowitz worked closely with the FBI and FDA to prove the hepatitis-infected technician tampered with patients' fentanyl syringes in order to feed his addiction. Because of the tampering, the technician infected some of the patients causing one death. Addiction is the number one reason healthcare professionals divert controlled substances. Nurses typically start diverting using the following methods:

- Taking the waste for personal use.
- Stealing controlled substances from the patients (not dosing the patients properly).
- Remove excessive amounts of controlled substances from the automated dispensing machine, using the "PRN" (as needed for pain) medications.
- Tampering with the patients controlled substance medications. This is done by replacing an injectable pain medication with another substance, usually saline. The replaced substance is then given to the patient.

Healthcare facilities have a responsibility to audit and continue to monitor employees that have access to these controlled substances. Abramowitz gives several examples of what facilities should look for in these audits:

- Removing controlled substances with no “doctor’s orders.”
- Removing controlled substances for patients “not assigned” to the nurse.
- Removing controlled substances for recently discharged patients.
- Removing controlled substances and not documenting the administration of the drug on the Medication Administration Record.
- Patient charting reveals excessive pulls for “PRN” medication compared to other nurses assigned to that patient.
- Discrepancies from the Omnicell machines on a regular basis.
- Pulling out larger dosages of injectable controlled substances to obtain more waste.
- Patient continuing to complain about pain, even though the nurse has documented the administration of pain medications.
- Falsifying records.
- Removing PRN medications too frequently (ex. Medication order for every 4 hours, but it is pulled at every 2 hours).
- Not documenting waste.
- Helpful nurses who only want to help give other nurses’ patients their pain medications.

The Centers for Disease Control (CDC) tracked outbreaks associated with “drug diversion” from 1983-2013. The CDC determined there were gaps in prevention, detection, and/or response in the healthcare facilities affected. The CDC recommended healthcare facilities have strong security measures and monitoring of controlled substances. In addition to these measures, the CDC recommended that when tampering with injectable medication is suspected, it should be

reported promptly to law and other enforcement agencies ("Drug Diversion | Injection Safety | CDC," 2013).

When drug diversion occurs in the healthcare setting it affects the entire institution. Healthcare professionals have an ethical duty to report impaired professionals. This proactive approach helps protect patients, colleagues, and the community. Diversion causes a great deal of liability to the healthcare institution. From a legal standpoint, the institution must conduct a thorough investigation to determine if the healthcare worker violated state regulations and/or committed a felony. In addition, the institution needs to review organizational policies and procedures to determine if a violation occurred. Reporting and disciplinary actions differ from state to state, but most states are mandatory. The unfortunate part of this equation is that “symptoms of impairment” are often hard to detect. Coworkers should be vigilant and look for the signs of impairment including: absenteeism, the deterioration of personal appearance, reduced productivity, and patients complaining of ineffective pain medication. If diversion can be caught early patients can be protected ("Nurse Drug Diversion and Nursing Leader's Responsibilities: Legal, Regulatory, Ethical, Humanistic, and Practical Considerations," 2011).

Drug diversion is a constant problem in the healthcare field. Members of management of healthcare facilities should do everything in their power to deter and detect drug diversion. In order to accomplish this task, the institution must have strict security measures and monitoring in place. Everyone is affected by drug diversion and should do his or her part to prevent it.

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