

MENDOCINO COUNTY SHERIFF'S OFFICE
THOMAS D. ALLMAN, Sheriff-Coroner

DIRECTIVE

NUMBER: 2009-04-03-NO.1

SUBJECT: MEDICAL MARIJUANA

SUPERSEDES: 2008-08-04-NO.1
2008-02-11-NO.1 Amended
2005-10-26-NO.1

PURPOSE AND SCOPE

The purpose of this directive is threefold: (1) ensure that marijuana grown or possessed for medical purposes remains secure and does not find its way to non-patients or illicit markets; (2) help law enforcement personnel perform their duties effectively and in accordance with California law; and (3) help patients and primary caregivers understand how they may cultivate, transport, possess and use medical marijuana in compliance with California law and County ordinances.

BACKGROUND AND AUTHORITIES

The possession, sale, cultivation or transportation of marijuana is ordinarily a crime under California law. (See, e.g., §§ [11357](#), [11358](#), [11359](#), [11360](#) & [11361](#) H&S; § [23222](#) CVC).

On November 5, 1996, California voters passed [Proposition 215](#), which states, in part that “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 a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or verbal recommendation or approval of a physician.”

The federal [Controlled Substances Act](#) (CSA) (21 U.S.C. §801, et seq.) states the federal governments position that marijuana is a drug with “no currently accepted medical use.” Thus the manufacture, distribution, or possession of marijuana is a federal criminal offense. The difference between federal and state law has led to confusion, but the courts have found no legal conflict. In adopting the current medical marijuana laws, California exercised its power to not punish certain marijuana offenses under state law. California’s medical marijuana laws do not limit the federal government’s ability to enforce the CSA.

On January 1, 2004, [Senate Bill 420](#), the Medical Marijuana Program Act (MMP), became law. (§§ [11362.7-11362.83](#).) The MMP established a voluntary statewide identification card program for qualified medical marijuana patients and their primary caregivers. State and local law enforcement officers are required to accept the cards unless there is reasonable cause to believe that the card is false or fraudulent, or the card is being used fraudulently. (§ [11362.78](#).) In

addition to establishing the card program, the MMP also defines certain terms, sets possession guidelines for qualified patients and their primary caregivers, and recognizes a qualified right to collective or cooperative cultivation of medical marijuana.

On May 13, 2004, the [California Medical Board](#) clarified that physicians who recommend marijuana to their patients must follow the same accepted standards that a reasonable and prudent physician would follow when recommending any medication. They include the following:

1. Taking a history and conducting a good faith examination of the patient;
2. Developing a treatment plan with objectives;
3. Providing informed consent, including discussion of side effects;
4. Periodically reviewing the treatment's efficacy;
5. Consultations, as necessary; and
6. Keeping proper records supporting the decision to recommend the use of medical marijuana.

In February 2007, the California State [Board of Equalization](#) issued a special notice confirming that medical marijuana transactions are taxable, and businesses engaging in such transactions must hold a Seller's Permit. In June 2007 the BOE published a special notice that addressed frequent questions about the taxability of medical marijuana transactions.

On August 7, 2007, the Board of Supervisors received a request from its Criminal Justice Committee for direction on the establishment of marijuana possession and cultivation guidelines in accordance with SB 420 and H&S 11362.77. The Board [voted](#) to reassert and enforce the 25 plant limit specified in Measure G, and possession of no more than 2 pounds of processed marijuana.

On January 8, 2008, the Board of Supervisors adopted Chapter [9.31](#) of the Mendocino County Code, which addresses the cultivation of marijuana on parcels of land in the unincorporated portions of Mendocino County. Violations of Chapter [9.31](#) are not subject to criminal prosecution. The County may abate a violation by pursuing civil prosecution or through the uniform nuisance abatement procedures specified in Chapter [8.75](#) of the County Code.

On May 22, 2008, the California Court of Appeal, Second Appellate District, in [People v. Kelly](#), held that H&S § [11362.77](#) is unconstitutional because it amended Proposition 215 without a vote of the people. On August 13, 2008, the California Supreme Court granted an application for review of the case. It is currently depublished and not citable.

On June 3, 2008, Mendocino County voters approved Measure B. The measure has two operative sections: (1) it repeals Chapter 9.36 of the Mendocino County Code; and (2) it limits the possession of medical marijuana by qualified patients and primary caregivers in Mendocino county to only those amounts specified in H&S § [11362.77](#).

On July 31, 2008, the California Court of Appeal, Second Appellate District, in [People v. Phomphakdy](#), also held that H&S § [11362.77](#) unconstitutionally amended Proposition 215. On

October 28, 2008, the California Supreme Court granted a petition for review of this case. Like Kelly, it is currently depublished and not citable.

In August 2008, the California Attorney General published [Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use](#).

DEFINITIONS

Attending Physician means an individual who possesses a license in good standing to practice medicine or osteopathy issued by the Medical Board of California or the Osteopathic Medical Board of California and who has taken responsibility for an aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient and who has conducted a medical examination of that patient before recording in the patient's medical record the physician's assessment of whether the patient has a serious medical condition and whether the medical use of marijuana is appropriate. (H&S § [11362.7\(a\)](#).)

Legal Parcel means a parcel of land for which one legal title exists ([MCC § 9.31.030](#)).

Physician's Recommendation means a written or verbal recommendation for medical marijuana from an attending physician. Possession of a valid MMP identification card is evidence of a physician's recommendation. Physicians may not prescribe marijuana because it is a Schedule I drug under the [Controlled Substances Act](#).

Primary Caregiver is a person who is designated by a qualified patient and "has consistently assumed responsibility for the housing, health, or safety" of the patient. (§ [11362.5\(e\)](#).) A person may serve as a primary caregiver to more than one qualified patient provided that the patients and caregiver all reside in the same city or county (§ [11362.7\(d\)\(2\)](#).) A person may serve as a primary caregiver to not more than one qualified patient who lives in another county, but only if that person has not been designated as a primary caregiver by any other qualified patient (§ [11362.7\(d\)\(3\)](#).) Additionally, a primary caregiver must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana. ([People v. Mentch](#) 45 Cal. 4th 274)

Qualified Patient is a person whose physician has recommended the use of marijuana to treat cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (H&S § [11362.5\(b\)\(1\)\(A\)](#).) This includes patients who possess a Medical Marijuana Program Identification Card (H&S § [11362.7\(c\)](#).) and a person who is entitled to the protections of § [11362.5](#) but who does not have a MMP identification card (§ [11362.7\(f\)](#).)

DIRECTIVE

I. CRIMINAL ENFORCEMENT

- A. California does not provide any exception for individuals driving under the influence of marijuana, and all such cases should be handled with appropriate enforcement action (e.g., Vehicle Code § [23152](#), et seq.).

B. Medical Marijuana Program Cardholders:

1. A qualified patient who presents a valid MMP identification card should not be subject to arrest for possession, transportation, delivery or cultivation so long as the amount of marijuana does not exceed 6 mature or 12 immature marijuana plants and not more than 8 ounces of dried marijuana.
2. A primary caregiver who presents one or more valid MMP identification cards should generally not be subject to arrest for possession, transportation, delivery or cultivation so long as the amount of marijuana does not exceed the amounts allowable per-patient multiplied by the number of valid MMP cards.
3. **Subsections 1. & 2. above do not apply when there is evidence that an MMP card is being used fraudulently, or there is indicia of other illegal activity (i.e. weapons, illicit drugs, or excessive amounts of cash).**
4. A qualified patient or primary caregiver may possess a greater quantity of medical marijuana if the qualified patient has a doctor's recommendation that the amounts listed above do not meet the patient's medical needs. In no event however shall the amount of medical marijuana possessed, transported, delivered or cultivated exceed that which is consistent with the qualified patient's personal medical needs.
5. In no event may the total amount of marijuana possessed by a qualified patient and that patient's primary caregiver exceed the amounts allowed for the qualified patient alone.

C. Non-Cardholders:

1. Qualified patients and primary caregivers may present other evidence that they are entitled to the protections of § [11362.5](#), such as a written recommendation from a licensed California physician.
2. Deputies need not abandon their search or investigation. The standard rules of search and seizure apply.
3. Documentation should be reviewed for validity.
4. If, based on the totality of the circumstances, the deputy believes that the medical-use claim is valid and the person is within the possession limits set for MMP cardholders, then the person should not be arrested and the marijuana should not be seized.

5. If the deputy has probable cause to doubt the validity of a person's medical marijuana claim based upon the facts and circumstances known to the deputy at the time, then the person may be arrested and all the marijuana may be seized. It will then be up to the person to establish his or her medical marijuana defense in court.
6. Deputies are not obligated to accept a person's claim of having a verbal recommendation from a physician that cannot be readily verified with the physician at the time of detention.

D. Exceeding Possession Limits:

1. If a person has what appears to be a valid MMP card or medical marijuana documentation, but exceeds the possession limits stated above, then the person may be arrested and all marijuana may be seized. This also applies to primary caregivers who may have multiple MMP cards or medical marijuana documentation for multiple qualified patients.
2. Deputies who seize marijuana pursuant to this subsection from an otherwise qualified patient or primary caregiver need not leave any allowable amount of marijuana behind but may do so based on their sound professional judgment and the totality of the circumstances.

E. Destruction of Seized Marijuana

Health & Safety Code §§ [11473-11479](#) define the conditions under which seized marijuana may be destroyed. A ten pound sample (which may include stalks, branches or leaves) and five representative samples consisting of leaves or buds shall be retained for evidentiary purposes. Photographs must be taken which reasonably demonstrate the total amount of marijuana to be destroyed.

F. Case Preparation & Submission

1. Marijuana investigation / eradication reports should specifically address the following::
 - a. The number and size of the plants seized.
 - b. The type of watering system and the water source.
 - c. The presence of large generators, or contamination from fuel, oil or other hazardous materials (note that these should also be reported immediately to the Environmental Health branch of Public Health and to the Air Quality Management District).

- d. Indication of sales or personal use.
- e. Any claims of medical necessity.

G. Return of Marijuana

Regardless of the prosecution status or disposition of any related criminal case, this department will not be responsible for the return of any marijuana seized as evidence unless presented with a valid court order requiring same.

II. MENDOCINO COUNTY CODE VIOLATIONS

A. Chapter [9.31](#) of the Mendocino County Code addresses the cultivation of marijuana in the unincorporated areas of the county.

1. Section [9.31.050](#) makes it a public nuisance to cultivate more than 25 marijuana plants on one legal parcel, regardless of whether the plants are grown indoors or outdoors, or whether the person growing the plants is a qualified patient or primary caregiver.
2. Section [9.31.070](#) states that the 25 plant per-parcel limitation applies regardless of the number of qualified patients residing on the parcel. The limitation also applies to marijuana cultivated or possessed by a primary caregiver for multiple qualified patients.
3. Section [9.31.090](#) prohibits the cultivation of marijuana in any amount within 1,000 feet of a youth oriented facility, school or park; any school bus stop; or any church. The distance is measured from the boundary of the parcel containing the marijuana to the boundary of the parcel containing the designated facility.
4. Section [9.31.100](#) requires marijuana grown outside to be fully enclosed by a fence at least six feet in height, with a lockable gate that is locked at all times when the patient or caregiver is not in the immediate area.

B. Persons who violate Chapter [9.31](#) are not subject to arrest or criminal prosecution. The County may abate a violation by pursuing civil prosecution or through the uniform nuisance abatement procedures specified in Chapter [8.75](#) of the Mendocino County Code. The enforcement process is as follows:

1. Complete a NOTICE AND ORDER TO ABATE.
2. Serve the Notice in the manner specified by MCC § [8.75.070](#):

- a. By certified mail, addressed to the owner, or his or her agent, at the address shown on the last equalized assessment roll or as otherwise known;
 - b. By certified mail addressed to anyone known to the deputy to be in possession of the property at the street address of the property being possessed; and
 - c. By posting such Notice and Order to Abate conspicuously in front of the property on which, or in front of which, the nuisance exists, or upon the portion of the property nearest to a street, highway, or road, or most likely to give actual notice to the owner and any person known by the deputy to be in possession of the property.
3. Complete a Sheriff's Office incident report with a copy directed to the Mendocino County Department of Planning & Building.

III. If you encounter a situation not covered in this directive, contact your supervisor.

THOMAS ALLMAN
SHERIFF-CORONER

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