On Prohibiting the Use of Medical Marijuana by Persons Granted Probation

By Judge Frederic B. Rodgers

Judges in states that have legitimized medical marijuana are increasingly faced with the need to decide whether to prohibit medical marijuana use as a condition of probation. In 1972, marijuana was placed in Schedule I of the Controlled Substances Act, which reflected the U.S. government's view of it as having "no currently accepted medical use in treatment in the United States."[1] In 1996, however, California voters first approved an initiative legalizing possession and sale of marijuana for medical purposes in Proposition 215.[2] Thirteen other states followed suit.[3] In addition, two more states have passed laws that, in one case, permit physicians to prescribe it (Arizona) and, in another, allow its medical use as a legal defense in a prosecution for unlawful possession (Maryland). Moreover, bills to legalize marijuana have been introduced in the state legislatures in 13 more states.[4]

In 2009, the U.S. Department of Justice (DOJ) announced that prosecutorial priorities should *not* target "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." Specifically, it indicated that individuals with cancer or other serious illnesses who use medical marijuana and the caregivers who provide the medical marijuana in accordance with state law should not be the focus of federal prosecution. On the other hand, the memo states that "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority." It is also explicitly stated that it "does not 'legalize' marijuana or provide a legal defense to a violation of federal law." However, one may infer from the memo that the Supreme Court's decision in *Gonzales v. Raich*,[5] recognizing that federal prosecutors may prosecute medical marijuana patients even in states with compassionate-use laws, will be followed whenever the alleged offender's compliance with the state law is not "clear and unambiguous."[6]

In many of the states that have legalized medical marijuana, as in my home state of Colorado, medical marijuana is a growth industry. It is not unusual to see advertisements for marijuana dispensaries in traditional media, and to learn of enterprising individuals leasing retail space for future use as commercial dispensaries. Others are leasing, optioning, and buying tracts of agricultural land for marijuana growing operations—and all this before state and local governments have put the finishing touches on regulating the marijuana business through zoning and other measures. A poll, conducted on behalf of the American Association of Retired Persons (AARP) by International Communications Research (ICR), has revealed that a large, 72-percent majority of seniors support legalizing marijuana for medical purposes. This support, together with the many ballot successes, may signal a watershed change in attitude about *cannabis sativa l.*

Yet, through all this evolution, operating a motor vehicle while under the influence of drugs or alcohol remains a strict liability crime in all 50 states. Whether the defendant is impaired or drunk from having ingested either beer, wine, scotch whisky, Vicks NyQuil (an alcohol-based over-the-counter cold remedy), Adderall (an amphetamine derivative and Schedule II drug, addictive and mind-altering, prescribed for persons with attention deficit disorder), or Acapulco Gold (marijuana) is of no legal significance in connection with the proof of the underlying offense. Although accurate measurement of marijuana in a suspect's system is less certain than measuring the presence of ethyl alcohol, from an evidential standpoint it is the impairment and its degree that matter.

Terms and Conditions of Probation for Impaired Drivers

Against this background, judges recognize that probation is a privilege, not a right.[7] Many convicted impaired drivers avail themselves of this privilege, especially first offenders. In most states, and particularly with respect to drug and alcohol driving offenses, when a defendant receives probation, the court suspends conditionally what might be a harsher punishment, as long as it is consistent with the offender's potential for rehabilitation and protecting the safety of the community.[8] Probation is, in effect, a contract sanctioned by law made by the court with the convicted person that he or she may remain out of jail based on good conduct and following all of the express terms and conditions of probation designed to promote rehabilitation. But a probationer is charged with the knowledge that a breach of probationary terms will most assuredly result in a revocation of probation and a subsequent sentence.[9] The same reasoning applies to juvenile impaired-driving offenders.[10]

States' laws require that a person on probation not violate any federal, state, or local laws or orders of court.[11] While the use of marijuana remains unlawful under federal law,[12] the October 19, 2009, DOJ memo brings little clarity to the situation. Marijuana remains on the controlled substances list and thus is *ipso facto* illegal, but the U.S. government will not prosecute compliant patients in states with compassionate use laws. What is the court to do in sentencing to probation when faced with this state of the law and a DUI offender who participates in a legal marijuana compassionate use program? Remember that in law school nobody promised you that fathoming the consequences of federalism's overlay of federal law on state law would be easy.[13]

American Bar Association Trial Court Standards

The American Bar Association Standards relating to *Sentencing Alternatives and Procedures* (1968), the ABA Standards relating to *Probation* (1968), and the ABA Standards for *Traffic Justice* (1974) encourage the use of probation in preference to incarceration as long as such a sentence does not unduly depreciate the seriousness of the offense.[14] Probation has been described "as a matter of grace."[15] Trial judges are alert to the potential for rehabilitation, and most face the reality of overcrowded jails when making decisions whether to grant probation. Drug and alcohol treatment providers are a large part of the therapeutic landscape, and many successes are realized by addicted persons who genuinely desire to recover.

In considering probation, the court necessarily considers community protection, the seriousness of the offense, and the offender, in that order. If, after considering these three factors, the trial court concludes the applicant is a worthy risk for probation, it may grant it. It is every judge's nightmare to read in the news that a probationer has killed or injured someone in a traffic crash. For this reason, in most impaired and intoxicated driver cases, sentences to probation include as a standard term and condition no consumption of alcohol or illegal controlled substances. Monitoring by toxicology testing or Antabuse may also be a requirement. Persons on probation waive certain privacy rights enjoyed by other members of society, such as the right to be free from unreasonable searches and seizures, and they must accept the inevitable random visit by the probation officer as well as drug and alcohol screening.[16]

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Options on Sentencing a Medical Marijuana Patient

Recognizing that the court has the power to grant probation in its discretion when it can be reasonably assured that it may assist the offender to lead a law-abiding life, judges in states that have legitimized medical marijuana are faced increasingly with the question of what express terms and conditions of probation should be imposed.

Appellate courts, faced with the question of whether courts have authority to impose a sentencing condition that denies a qualifying patient the right to use medical marijuana in accordance with permitted state use, have reached divergent results. In *People v. Tilehkooh*,[17] the court reversed a probation revocation for marijuana possession for "failure to obey all laws" (state courts do not enforce federal law); *accord*, *State v. Nelson*[18] on the same reasoning (trial court exceeded its jurisdiction requiring defendant to comply with all federal laws).[19] And in *City of Garden Grove v. Superior Court*,[20] the court held that federal law did not preempt state law on the topic, entitling a defendant to have marijuana evidence returned to him after criminal charges had been dismissed. Laws in California and Montana provide a legal defense and broad immunity from prosecution to qualifying medical marijuana patients. The California Supreme Court has even analogized the use of marijuana under the Compassionate Use Act (approved by the voters in 1996 as "Prop. 215") to the use of a prescription drug in *People v. Mower*.[21] But with a new composition, the court receded from this conclusion in *Ross v. RagingWire Telecommunications Inc.*,[22] an employment law case that rejected *Mower*'s analogy to a prescription drug, thereby making many California employers breathe easier, figuratively speaking.

In contrast, the Hawai'i Court of Appeals in dictum affirmed probation conditions restricting drug possession in *State v. Vincent*.[23] Similarly, in *People v. Bianco*,[24] a court held that conditions of probation for one convicted of unlawful cultivation of marijuana may include requirements of no marijuana use, even for a person licensed for medical marijuana use, the court reasoning that notwithstanding the Compassionate Use Act, possession of marijuana is still a crime under federal law. The *Bianco* court concluded that trial courts must be free to impose conditions of probation that may impinge on a defendant's constitutional rights if they are "narrowly drawn" and "reasonably related to a compelling state interest in reformation and rehabilitation."[25] Retreating from *Vincent* and *Bianco*'s concerns about courts supervising probationers who continue to use medical marijuana, see *People v. Beaty*,[26] which discusses the intersection of Prop. 36 (drug courts and mandatory probation) and Prop. 215 (medical marijuana). *Beaty*'s holding favors use of probation even for daily users of medical marijuana and rejects the notion that they are disqualified from drug court participation as "unamenable" to treatment. It also has an interesting take on popular "legislative intent" as applied to initiative measures.

The corresponding provision in the Colorado Constitution (Article XVIII § 14) establishes an affirmative defense for a patient or caregiver charged with a violation "of the state's criminal laws related to the patient's medical use of marijuana . . ." but falls short of providing the broad immunity from prosecution seen in California's and Montana's statutes.

Standard Terms of Probation

Clearly courts may order a probationer to abstain from alcohol and controlled substances as a condition of probation. Equally certain is that courts may prohibit the use of illegal drugs. Judges know that a probationer who professes to work toward

rehabilitation may be a safer driver if he or she is on a program of monitored abstaining from either legal or illegal intoxicants. Judges recognize that community safety and protection are furthered when an alcoholic in recovery is on a monitored sobriety program. With alcohol being prohibited, this probationer is more likely to work the recovery program successfully; from this a judge may infer that a successful recovery program will reduce the likelihood of the offender returning to the drinking and driving scenario. However, prohibiting the use of *prescribed* medications is rarely a provision of probation.

Should this same rationale apply to medical use of marijuana? If the offender demonstrates a propensity to drive while impaired by prescribed medications of any character, a judge may deem the defendant a danger to society and decline to grant probation. Whether the drug of choice is alcohol, Vicodin, NyQuil, or marijuana, a judge may regulate its use as a requirement of probation. However, the difference between these substances turns on whether the use is recreational or medically therapeutic. Few have the temerity to argue with a straight face that alcohol use is therapeutic. True, it may relax, relieve tension, and provide a pleasurable high to the drinker, but its medical use is limited to local sterilization. On the other hand NyQuil is available over the counter, and marijuana and Vicodin may be prescribed for medical use. Should the judge differentiate marijuana from the other drugs because of its recent history as a recreational drug similar to beverage alcohol?

In jurisdictions with a compassionate use law and without superseding appellate opinions or other requirements covering the probation option, the sentencing judge considering probation must carefully review the offender's pharmaceutical regimen. If the offender is demonstrably incapable of controlling his or her behavior when under the influence of any drugs—legal or illegal—probation would be an ill-considered sentence. However, an offender who is prescribed any drug (including medical marijuana) that has the potential to impair ability to drive, but who at the same time is willing to abide by the law and not drive a car while taking that drug, may be a good candidate for probation, if it is otherwise indicated.[27]

Checklist 1: Probation

Question: Is a probation condition requiring abstaining from medical marijuana

1. reasonably related to the crime for which defendant was convicted?
2. reasonably related to preventing future criminal conduct given a demonstrated likelihood that defendant will possess marijuana for nonmedical purposes, or in greater quantities than permitted for medical purposes under law?
3. reasonably related to preventing a demonstrated tendency on defendant's part to become addicted to drugs?
4. reasonably related to promoting defendant's success in a court-ordered substance abuse treatment program?

Any "yes" answer weighs in favor of ordering the defendant to abstain from medical marijuana as a condition of probation. *People v. Lent*, 541 P.2d 545 (Cal. 1975).

Judges' Choices

Judges need to examine their own state's law on medical marijuana, in particular whether, as in some jurisdictions, it provides immunity or an affirmative defense to a marijuana patient or provider. It is reasonable to question the wisdom of converting a recreational drug to a medical drug by popular vote.[28] Many judges fear that state initiatives approving medical marijuana are simply a back door approach to legalizing all illegal drugs. Some are chiefly concerned that marijuana remains a "controlled substance," despite the DOJ memo, and to them this means it remains illegal and its use, even under medical supervision, is incongruous with rules of probation requiring the probationer to be law-abiding. To them, the Model Code of Judicial Conduct's requirement that judges be faithful to the law[29] arguably precludes as an ethical matter any sentencing judge's overlooking the illegality of marijuana use under federal law, despite its state-sanctioned medical use.

Each case before a judge must be carefully examined on its own merits and the applicable law. A judge's comfort level may be elevated by evidence at sentencing about the defendant's medical condition and the effects of prescribed marijuana (or other medication for that matter) upon it. If any applicant for probation appears to be using any prescribed medication in bad faith,[30] this may serve as a factor in the judge's weighting of the community safety and protection sentencing goals in deciding the probation issue. The sidebars below propose a suggested analysis template to supplement the statutory probation criteria (e.g., Colorado Revised Statutes §§ 18-1.3-203(1), (2)) for the sentencing court to use before imposing conditions of either pretrial release on bond or probation that may include a requirement of abstaining from marijuana.

Whether marijuana prohibition eventually goes the way of the Eighteenth Amendment to the U.S. Constitution and the Volstead Act is unknowable.[31] It is important, as all judges understand, not to sentence by rote and formula. A judge who inflexibly operates on "automatic pilot" in making sentencing decisions may be perceived by the public and the bar as lazy or prejudiced. In states where the law provides complete immunity to a qualifying medical marijuana user, appellate courts have resolved the issue without regard to troubling questions of judicial ethics. The current anomalous state of the law on medical marijuana is one of the challenges judges must face, but it is not insurmountable. Resolving inconsistencies and harmonizing conflicting views have always been a part of the judicial job description.[32] ■

Endnotes

1. 21 U.S.C. § 812(b)(1)(B).

2. Proponents for the legal use of medical marijuana argue that marijuana has accepted medical use in treatment in the United States, and that it would easily meet the FDA criteria over whether a new product's benefits to users will outweigh its risks. Marijuana, they claim, is a safe and effective treatment for dozens of conditions, such as cancer, AIDS, ALS, multiple sclerosis, chronic pain, migraines, glaucoma, and epilepsy. Proponents say that thousands of yearly deaths from legal prescription drugs could be prevented if medical marijuana were legal.

Opponents of medical marijuana argue that marijuana has not been FDA-approved because it is too dangerous to use, and that various FDA-approved drugs make the use of marijuana unnecessary. Marijuana, they claim, is addictive, leads to harder drug use, injures the lungs, harms the immune system, damages the brain, interferes with fertility, impairs driving ability, impairs brain development in teens, fosters schizophrenia, and sends the wrong message to kids. They say that medical marijuana is a front for drug legalization, and that people who claim medical use are actually using it for recreational pleasure.

3. Alaska, Oregon, and Washington (1998); Maine (1999); Colorado, Hawai'i, and Nevada (2000); Montana and Vermont (2004); Rhode Island (2006); New Mexico (2007); Michigan (2008); and New Jersey (2010). Readers are cautioned that these laws vary widely in breadth, some providing immunity from criminal prosecution, others affording lesser protections.

4. Alabama, Connecticut, Delaware, Illinois, Iowa, Massachusetts, Minnesota, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, and Tennessee.

5. 545 U.S. 1 (2005).

6. *Gonzalez v. Raich* was decided on Commerce Clause grounds, not preemption under the Supremacy Clause (Art. VI). *See People v. Mentch*, 195 P.3d 1061 (Cal. 2008), and *State v. Mullins*, 116 P.3d 441 (Wash. Ct. App. 2005), holding that an individual must do more than simply supply a patient with medical marijuana to qualify as a "primary care-giver."

7. *See* People v. Colabello, 948 P.2d 77 (Colo. App. 1997).

8. Holdren v. People, 452 P.2d 28 (Colo. 1969).

9. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

10. *In re* Gault, 387 U.S. 1 (1967); *In re* BLM, 500 P.2d 95 (Colo. App. 1972).

11. *See, e.g.*, Colo. Rev. Stat. § 18-1.3-204 People v. Colabello, 948 P.2d 77 (Colo. App. 1997).

12. Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* and § 844(a).

13. Under principles of federalism as expressed in the U.S. Constitution, "states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Addington v. Texas, 441 U.S. 418, 431, (1979). This freedom extends to the "great latitude" given the states "under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Gonzales v. Oregon, 546 U.S. 243, 270 (2006).

14. Probation Standards § 1.3; Sentencing Alternatives Standards §§ 2.3, 5.3; Traffic Standards § 4.3.

15. Gehl v. People, 423 P.2d 322 (Colo. 1967).

16. U.S. v. Knights, 534 U.S. 112 (2001).

17. 113 Cal. App. 4th 1433 (2003).

18. 195 P.3d 826, 833–34 (Mont. 2008).

19. Montana's voter-initiated Medical Marijuana Act § 50-46-201 provides broad immunity from prosecution. Under its terms a qualifying patient or caregiver who possesses a registry identification card may not be arrested, prosecuted, or penalized in any manner or be denied any right or privilege, including but not limited to civil penalty or disciplinary action by a professional licensing board or the department of labor and industry, for the medical use of marijuana or for assisting in the medical use of marijuana if the qualifying patient or caregiver possesses marijuana not in excess of the amounts allowed in subsection (2). (A qualifying patient and that qualifying patient's caregiver may not possess more than six marijuana plants and 1 ounce of usable marijuana each.)

20. 157 Cal. App. 4th 355 (2007).

21. People v. Mower, 49 P.3d 1067 (Cal. 2002).

22. 42 Cal 4th 920 (Cal. 2008).

23. 198 P.3d 730 (unpub. 2009) (although providing an affirmative defense to a qualifying patient, the state's medical marijuana law did not expressly forbid a court from prohibiting marijuana use as a condition of probation for an offense of possessing more marijuana than allowed by law).

24. 93 Cal. App. 4th 748 (2001).

25. *Id.* at 754–55.

26. 105 Cal. Rep. 3d 76 (Cal. App. 2010).

27. KUSA-TV9News (Denver, Co.) reported on February 4, 2010, that 6 of Colorado's 22 judicial districts (1st, 4th, 8th, 13th, 16th, and 17th) are governed by blanket Chief Judge Orders forbidding use of medical marijuana for anyone on supervised probation, thus restricting judges' options. It reports that two districts (3d and 19th) allow probationers to continue their prescribed use of medical marijuana. In the remaining districts, judges address the issue on a case-by-case basis.

28. As Judge Alex Kozinski stated in his concurrence in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), while the allowance of medical marijuana "may seem faddish or foolish . . . the public record reflect[s] a legitimate and growing division of informed opinion on this issue. A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs." *Id.* at 640–41 (Kozinski, J., concurring).

29. Colorado Code of Judicial Conduct Canon 3A(1); ABA Model Code of Judicial Conduct Canon 3B(2).

30. *E.g.*, a demonstrated primary recreational as opposed to therapeutic use.

31. Alcohol prohibition under the 18th Amendment in 1919 was repealed 14 years later by the Twenty-First Amendment in 1933.

32. In Colorado rules of statutory construction offer little guidance. *See* Colo. Rev. Stat. §§ 2-4-201 *et seq.* In particular, the preference favoring local over general applicability of conflicting statutes in § 2-4-205 applies to conflicts in state law, rather than conflicts between federal and state law.

Checklist 2: Release on Bail Conditions

Question: Is a condition of release on a bail bond requiring abstaining from medical marijuana

1. reasonably related to the crime for which defendant was arrested?
2. reasonably related to the likelihood of defendant's making all court appearances and remaining law-abiding while out on bond?
3. reasonably related to the likelihood that defendant may possess marijuana for nonmedical purposes, or in greater quantities than permitted for medical purposes under law?
4. reasonably related to preventing a demonstrated tendency on defendant's part to become addicted to drugs?
5. reasonably related to promoting defendant's success should s/he be sentenced to a court-ordered substance abuse treatment program?

Any "yes" answer weighs in favor of ordering defendant to abstain from medical marijuana as a condition of pretrial release on bail. *People v. Lent*, 541 P.2d 545 (Cal. 1975).