



How High?

Insurance and Medical Marijuana in 2017

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What is Marijuana?

- How does Marijuana work?
- Statistics on use – shifting perceptions
- What is Medical Marijuana?
 - Marinol is currently the only FDA-approved synthetic alternative to marijuana

What is Marijuana?

- Medicinal Use – 6% research
 1. History of medical necessity as an affirmative defense in Florida: Jenks v. State, 582 So.2d 676 (Fla. 1st DCA 1991), rev. denied, 589 So.2d 292 (Fla.1991) described the elements necessary to establish a Medical Necessity defense
 - a. That the defendant did not initially bring about the circumstance which precipitated the unlawful act;
 - b. That the defendant could not accomplish the same objective using a less offensive alternative available to the defendant; and
 - c. That the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it. Sowell v. State, 738 So. 2d 333 (Fla. 1st DCA 1998), rev. denied 734 So.2d 421 (Fla.1999) Concluded that the medical necessity defense remains viable under the limited circumstances described in Jenks.

What is Marijuana?

2. Side Effects / Addiction
3. Why does it matter?
 - a. Who will control dosage amount and frequency of use?
 - b. Who will pay for the prescriptions?
 - c. How will safety programs be affected?

Viability of Medical Necessity Defense

- The three elements of a medical necessity affirmative defense, as outlined in *Jenks v. State*, 582 So.2d 676 (Fla. 1st DCA 1991):
 1. That the defendant did not initially bring about the circumstance which precipitated the unlawful act;
 2. That the defendant could not accomplish the same objective using a less offensive alternative available to the defendant; and
 3. That the evil sought to be avoided was more heinous than the unlawful act perpetrated to avoid it.

Viability of Medical Necessity Defense

- How might the passage of Amendment 2 effect a medical necessity affirmative defense? Narrow the scope: After the passage of Amendment 2 in November 2016, the law in Florida now nine “debilitating medical conditions” which may be legally treated by the use of medical marijuana.
 1. Cancer, epilepsy, glaucoma, HIV/AIDS, PTSD, ALS, Crohn’s, Parkinson’s,
 2. + “other debilitating medical conditions of the same kind or class as or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient.”
 3. Hep C specifically excluded in change to Amendment

Viability of Medical Necessity Defense

- C. Eliminate the defense entirely?
 1. ANTONIN SCALIA – TEXTUALISM
 - a. Expressio unius est exclusion alterius : expression of one thing suggests the exclusion of others.
 - b. Noscitur a sociis: interpret a general term to be similar to more specific terms in a series.
 2. Successful use already rare; anecdotal evidence from several criminal judges “In 25 years on the bench I’ve seen it asserted twice and successfully asserted zero times.”
 3. Now that a defendant “can accomplish the same objective using less offensive alternatives,” i.e. medical cannabis, this defense no longer appears viable

Viability of Medical Necessity Defense

4. Low THC cannabis specifically permitted – probably means that “regular” cannabis would not be permitted.
5. “Medical cannabis” is “dispensed only from a dispensing organization for medical use by an eligible patient”
6. “Medical use” means administration of the ordered amount of low-THC cannabis or medical cannabis.
7. Florida's Compassionate Medical Cannabis Act of 2014 explicitly excludes "possession, use or administration of low THC cannabis or medical cannabis by smoking" from the definition of "medical use." One cannot "burn or ignite a substance [marijuana] and inhale the smoke" as a means of ingesting medical marijuana (vaporizing permitted)

Legislation

- Federal Legislation -21 USCS 801 and 812. Schedule 1 drug.
- State Legislation status
- Growers Approval
- Banks clearance
- County attempts at moratoriums

Health / Professional Services

- Cost
- Employer-funded insurance programs
- Business Owners Policy (BP 00 03 07 13)
- Nova Scotia decision - Canadian Elevator Industry Welfare Trust Plan contravened the province's Human Rights Act.

(1st/3rd) BI/UM/PIP – Auto

- ISO Personal Auto Policy (PP 00 01 01 5)
- Personal Umbrella Liability Policy (DL 98 01 10 06)
- Commonality of Drugged Driving
- Testing for Impairment
 1. Urine/Breath

(1st/3rd) BI/UM/PIP – Auto

- Effects on PIP / DME – Cost/Rate – Election of Product
- Effects on BI/UM
 1. Medical Necessity – Other Approved Treatments
 2. Alternative Care Clinics – protocol Considered/Completed
 3. Malingering
 4. No Medicare Set Asides

(1st) Property Damage / Burglary-Theft- Premises - Grow Houses / Grow-Ops – HO3 / Tree & Shrubs

- Property Interest

1. *People v. Crouse*, 2017 CO 5. Supreme Court of Colorado. January 23, 2017.
2. *Allen v. County of Lake*, 2017 U.S. Dist. LEXIS 10511. United States District Court for the Northern District of California. January 25, 2017.

- Vandalism

1. *Bowers v. Farmers Insurance Exchange*, 991 P.2d 734 (2000), 99 Wash. App. 41.
2. *Century-National Ins. Co. v. Jesus Garcia*, 2011 Cal.Lexis 1392 (Cal. Feb. 17, 2011).

(1st) Property Damage / Burglary-Theft- Premises - Grow Houses / Grow-Ops – HO3 / Tree & Shrubs

- Fire
 1. *Inspections – Installation*
 2. *Nationwide Mutual Fire Ins. Co. v. McDermott*, No. 14-1623 (6th Cir. 2015).
 3. *Kochendorfer v. Metropolitan Property & Casualty Insurance Company – USDC Washington, C11-1162-MAT (2012)*
 4. *Updated Reporting requirements*
- Contents – Theft
 1. Building and Personal Property Form (BPP) (CP 00 10 06 07)
 2. Business Owners Form (BP 00 03 01 10)
 3. Farm Property Coverage Form (FP 00 10 09 94)
 4. *Barbara Tracy v. USAA Casualty Insurance Company, Civil No. 11-00487 LEK-KSC*, U.S. Dist. Ct. Dist. Hawaii, 2012.
 5. *Barnett v. State Farm General Insurance Company*, California 4th Appellate Dist 3, 30-2009-0118385 (2011)

(1st) Property Damage / Burglary-Theft- Premises - Grow Houses / Grow-Ops – HO3 / Tree & Shrubs

- For Personal Lines Rentals
 1. Homeowners 3-Special Form and Homeowners 4-Contents Broad Form
 2. Fair Housing Requirements
 3. Right to access

(1st) Inland Marine - Cargo – Transport

- Product Costs
- Federal position on Transport
- Robbery etc.
- Mitigation of damaged cargo

(3rd) General Liability / Casualty – Med Pay / Neg Security - Pharmacies / Providers / Hospitals / Gas Stations

- Increased Safety requirements
- Homeowners Exclusion 8 of Section II, Subsection E,
- Farm Liability Coverage Form (FL 10 20 10 06)
- Businessowners Policy (BP 00 03 07 13)
- Commercial General Liability Form (CG 00 01 12 07)

Workers Compensation

- Workers Compensation and Employers Liability Policy (WC 00 0001 A)
- Redwood Fire & Casualty - Ben's Automotive Services - Albuquerque NM

Closing

- Coverages

1. The McCarran Ferguson Act of 1945 (McCarran, 2005) leaves regulation of insurance up to the individual states
2. Cannabis cultivation, equipment, workers compensation, auto for transport vehicles, and product/product loss from theft and spoilage. Medical marijuana dispensary (MMD)
3. Carriers: 420insurance.com, CannaRisk, Cannasure, ASIG, The Weed Scene, Greenpoint Insurance Advisers, GP Insurance Brokers.

- Continued Federal Position

1. United States v. Daleman, 2017 U.S. Dist. LEXIS 23213. United States District Court for the Eastern District of California. February 17, 2017

Closing

- Bankruptcies
 1. *In Re: Arm Ventures, LLC*, 2017 Bankr. LEXIS 416. United States Bankruptcy Court for the Southern District of Florida, Miami Division. CASE NO. 16-23633-BKC-LMI, Chapter 11
 2. *In re Medpoint Mgmt., LLC.*, 528 B.R. 178 (Bankr. D. Ariz. 2015), *vacated in part*, 2016 Bankr. LEXIS 2197, 2016 WL 3251581 (9th Cir. B.A.P. 2016).
- US Patent No 06630507
- Recommendations: Marijuana remains a Schedule 1 drug per the Controlled Substances Act (CSA). As a Schedule I substance prohibits the assigning of a National Drug Code (NDC) or a procedure code to medical marijuana for billing purposes. Marijuana is not FDA-approved to treat any medical conditions or diseases.

Ethical Considerations for Attorneys

- There are three specific ethical issues which each state has begun to address differently
 1. A lawyer's personal use of marijuana: varies state-to-state
 2. Advising clients about the parameters of new marijuana laws: universally permitted, so long as lawyer advises client on unlawfulness at federal level
 3. Assisting with a marijuana business (legal activities such as drafting contracts to participation/ownership of cannabis business): varies state-to-state. Is often addressed by NOT addressing it.
 - a. For example, Florida Board of Governors Ethics Opinion reads: "The Florida Bar will not prosecute a Florida Bar member solely for advising a client regarding the validity, scope, and meaning of Florida statutes regarding medical marijuana or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy."

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3. Assisting with a marijuana business (legal activities such as drafting contracts to participation/ownership of cannabis business): varies state-to-state. Is often addressed by NOT addressing it.
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 - b. The use of the word “solely” arguably limits the ability of an attorney to engage in marijuana business activity which is not expressly permitted by Florida Statutes. Whether this extends to involvement with inter-state activities (such as buying a stake in a recreational marijuana business in another state) is unclear.

Questions?



Thank You For Your Time

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