Regulatory and Criminal Options in Medical Marijuana Control

Executive Summary

The passage into law of the Colorado Medical Marijuana Code ("CMMC")[1] reflects the national trend of states [2] and local jurisdictions entering the field of medical cannabis regulation. Undoubtedly, federal primacy is a settled matter [3]; however, federalism is not a zero-sum game. In practice, functional limitations and finite resources create extensive areas of federal and state concurrent authority; and a broad range of regulatory and criminal alternatives in the oversight of state-administered medical marijuana programs.

The overlap of federal and state authority can be managed so as to further the common goal of identifying and prosecuting individuals and organizations who are not in "unambiguous compliance with state law" [4]; and minimizing access, availability, and social acceptance of medical marijuana among and between unauthorized end-users, particularly adolescents.

Recommended changes in Colorado law include: increased implementation and enforcement of the CMMC, enhanced criminal penalties for illicit diversion and sale to minors, strict limitations on medical marijuana advertising, and a prevention and education initiative [5] involving a sustained media campaign targeting youth marijuana use.

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[1] *C.R.S. 12.43.3-101 et seq.*

[2] As of February 2012: Alaska, Arizona, California, Colorado, Delaware, District of Columbia, New Jersey, Montana, New Mexico, Oregon, Hawaii, Maine, Maryland, Michigan, Nevada, Rhode Island, Vermont, and Washington.

[3] *See* Gonzales v. Raich (03-1454) 545 U.S. 1 (2005) 352 F.3d 1222, vacated and remanded (*holding the commerce clause gave Congress authority to prohibit the local cultivation and use of marijuana).*

[4] See Formal Guidelines for Federal Prosecutors, Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, October 19, 2009 (http://blogs.usdoj.gov/blog/archives/192).

[5] Proposed Initiative would be funded by increasing CMMC licensee fees.

Colorado Medical Marijuana

In light of the constitutional grant of authority in Colorado law for the medicinal use of cannabis [6] and the statutory mandate of the CMMC, an undoing of Colorado's medical marijuana program is unlikely. As of October 2011, the Colorado Department of Public Health and Environment ("CDPHE") reports[7] that 88,872[8] patients posses a medical marijuana registry card, patients on the registry represent all the debilitating conditions covered under Amendment XX [9], more than 1,000 different physicians have signed recommendations, and the average age of all patients in Colorado is 42.

The comprehensive security, surveillance, and reporting requirements of the CMMC provide regulators and law enforcement with a bright-line to measure unambiguous compliance. A primary achievement of the CMMC is the capacity given to regulators and law enforcement to quickly and definitively discern legitimate and unambiguously compliant providers from black-market criminal organizations.

Colorado's medical marijuana laws are not an open license to posses, cultivate, manufacture, distribute, or sell cannabis; rather, they create a narrow range of individuals and businesses exempt from prosecution who must comport with the terms, conditions, limitations, and restrictions of the law.[10]

Federal Response

A review of the criminal law relating to marijuana leaves no room for doubt that state medical marijuana laws are of minimal consequence to federal courts and federal prosecutors. Notwithstanding, U.S. Attorneys are not without

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[6] See Amendment XX, Article XVIII Sec. 14 Colorado Constitution.

[7] http://www.cdphe.state.co.us/hs/medicalmarijuana/statArchive/10_2011_%20MMR_report%20_2_.pdf

[8] This represents 1.7% of Colorado's population currently estimated at 5,116,796

[9] See Supra at 6. " Glaucoma; positive status for human immunodeficiency virus; or acquired immune deficiency syndrome; cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis or treatment for such conditions.

[10] See Supra note 1, C.R.S. 12.43.3-102

guidance and certain critical prosecutorial interests have been identified.[11] In practice, choice of forum remains a strategic and policy exercise predicated by enforcement priorities and political shifts.

Most recently in reaction to legitimate concerns expressed by many as to the direct or indirect effect of medical cannabis laws on youth, the Colorado U.S. Attorney has begun enforcement of 21USC § 860 [12] as it relates to the medical marijuana businesses exempted from the 1000 foot setback requirement of the CMMC.[13]

Despite federal supremacy, Colorado's police powers to regulate the health, economic and social welfare of its people [14] are an important consequences of federal system. Though its powers are broad, the federal government cannot eliminate the independent lawmaking authority of states. No kind of conduct is categorically beyond the boundaries of state or federal jurisdiction. The overlapping power of state and federal government promotes plurality, dialogue and offers a myriad of criminal and regulatory options for medical marijuana control.

Medical Marijuana Laws and Teen Use

Critical to the success of the regulatory model is the need to reconcile the legal availability and demand of medical cannabis with adequate safeguards controlling the likelihood of its illicit abuse. Among no other demographic is this more salient than among teens and young adults. Rates of illegal consumption

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[11] See Supra note 4, The "Ogden Memo' identifies certain non-exclusive criteria that precipitate federal intervention:*unlawful possession or unlawful use of firearms; violence; sales to minors; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law; amounts of marijuana inconsistent with purported compliance with state or local law; illegal possession or sale of other controlled substances; or ties to other criminal enterprises.*; See Also Memorandum for United States Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, June 9, 2011 ("Cole Memo")

[12] US Attorney Walsh has sent cease and desist letters to medical marijuana businesses 1000 ft from schools or universities pursuant to his authority under 21USC § 860(a)(b).

[13] C.R.S. 12-43.3-308(d)(I) provides that local licensing authorities may by rule or regulations vary the distance restrictions imposed by state law.

[14] C.R.S. 12-43.3-102

of controlled substances by young people are cyclical, and are only incidentally related to the legal status of the substance.[15] Valid concerns with illegal adolescent cannabis abuse should be balanced by an assessment of broader public health issues affecting young people.[16]

Vigorous enforcement of existing regulations and laws limiting access and diversion of medical cannabis, new laws enhancing penalties for illicit diversion to minors, a ban on above the line advertising of medical cannabis products, and a sustained public education campaign providing information to young people concerning the short and long term risks and physiological effects of illegal marijuana consumption offer the best opportunity to positively affect outcomes over the long-term.

Vigorous enforcement of existing regulations and laws

As discussed supra both federal statute and the DOJ's formal guidelines provide increased penalties and criminal scrutiny for sale of medical cannabis to minors. [17] This prohibition should be actively enforced and

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[15] Alcohol use is associated with the four leading causes of death among adolescents including homicide. The relationship between alcohol and violence can be explained by theories of problem behavior clustering as well as alcohol's pharmacological effects. Prior research has found almost half of adolescent drinkers are also involved in violent behaviors (e.g., physical fighting)and adolescents who use alcohol and report violent behaviors are at increased risk for other drug use, and injury during adolescence and into adulthood. (Initiating Moderate to Heavy Alcohol Use Predicts Changes in Neuropsychological Functioning for Adolescent Girls and Boys, *Psychological Addictive Behavior*. 2009 December ; 23(4): 715–722.

[16] Among the factors leading to a drastic spike in teen morbidity and drug addiction are prescription drug abuse and illicit diversion of prescription drugs. In 2009, more than twice as many people in Colorado died from prescription drug abuse than from drunk-driving related crashes. In 2009, 70% of the drug-related deaths in Denver involved the abuse of prescription drugs. A 2009 Youth at Risk Survey conducted in a Denver-Metro community revealed that more than 33% of high school students had abused prescription medication. This is significantly higher than the national data of 1 in 5 teens (20.9%), reporting the abuse of prescription drugs in 2009. Many teens feel that prescription drugs are "safer to use" than street drugs since they are prescribed by a physician. Teens also state that they are "easier to get than beer," because prescription medications are easily obtained from friends and family medicine cabinets. (See Colorado Department of Public Health and Environment, Health Statistics Section (Oct 2010) based on ICD-10 codes related to the cause of death; National Highway Traffic Safety Administration, Traffic Safety Facts Colorado, 2005-2009; Denver Office of Drug Strategy, The Denver Drug Strategy Commission, (April 2011); Denver Substance Abuse Trends Proceedings of the Denver Epidemiology Work Group; Denver Medical Examiner's Office Autopsy Reports for drug related decedents.)

[17] See Supra at note 11, 12.

monitored by federal and state authorities; criminal cases should be instigated when appropriate.

For its part the CMMC makes clear that it is unlawful to sell to individuals not authorized to possess medical cannabis and to, "use advertising material that is misleading, deceptive, or false, or *that is designed to appeal to minors."*[18] Colorado's regulatory body should increase its administrative oversight in terms of permissible advertising and undertake administrative actions against those licensees using questionable advertising practices.

New laws enhancing penalties for illicit diversion

Along with increased oversight of advertising practices, enhanced administrative and criminal penalties should be adopted in Colorado law that would deter illicit diversion of all controlled substances, particularly prescription drugs and medical cannabis to minors. Considering the serious public health consequences of adolescent drug abuse; an integrative approach is necessary that clearly demarcates sanctioned use from illegal abuse of medical substances.

Expanded ban on medical marijuana advertising

Although Colorado law prohibits deceptive advertising practices and materials designed to appeal to minors[19]; a more extensive ban proscribing medical marijuana advertising should be considered, including a ban on outdoor advertising, radio and television. [20] Sharply restricting advertising of medical cannabis products will help ensure that the perceived risks associated with its use is not mitigated by marketing and promotion.

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[18] See C.R.S. 12.43.3-901(4)(b), emphasis added.

[19] Id.

[20] The scope and substance of the advertising ban should be modeled on, 21 CFR Part 1140, Food and Drug Administration, Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents .

Public Education Campaign Aimed at Youth

Mass media strategies have been used for broad based public education regarding for a variety of public health issues, including tobacco use prevention and control.[21] Mass media are viewed as particularly appropriate for reaching youth, who are often heavily exposed to and greatly interested in media messages. What is proposed is a MMED[22] licensee funded mass media campaign that highlights the risks of medical marijuana use and is (1) based on sound social marketing principles; (2) large, intense and of sufficient duration; (3) and targets specific vulnerable youth groups. This along with school based programs and community interventions involving parents will over time produce a stronger and more lasting positive impact on public health.

Conclusion

At their conceptual core, stringent regulation and absolute prohibition have the same objective: increased public safety and decreased societal costs. This calculation is complicated by the multiple and at times conflicting notions of sovereignty inherent in our federalist system of government. In practice, however, such jurisdictional overlap can foster better results by providing law enforcement, prosecutors, and regulators more flexibility in allocating limited resources.

Increased enforcement of existing Colorado law and regulation, enhanced limitations on medical marijuana advertising, and a sustained public education campaign aimed at youth will do a better job over the long-term of minimizing the deleterious public health consequences associated with medical cannabis regulation.

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[21] See Lantz P, Jacobson P. et. al *Investing in youth tobacco control: a review of smoking prevention and control strategies*, Tobacco Control 2000;9;47-63 (http://tobaccocontrol.bmj.com/content/9/1/47.full.pdf)

[22] Colorado Department of Revenue, Medical Marijuana Enforcement Division