

PENNSYLVANIA VICE

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MARIJUANA LAW

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Medical Marijuana Laws Face Unexpected Roadblock

Last month, Delaware joined New Jersey and over a dozen other states legalizing medical marijuana. One Pennsylvania attorney we know — let's call him "Cheech" — regularly updates us on the nuances of these laws, together with questions about whether his significant and serious personal medical history fits more neatly into the New Jersey or Delaware law.

Cheech provided daily updates on Delaware's legislative progress and a number of celebratory e-mails when Gov. Jack Markell signed the law.

Unfortunately for Cheech, both New Jersey and Delaware have imposed strict residency requirements that appear to dovetail with the approach taken by federal authorities elsewhere. And even more unfortu-

nately for Cheech, it is highly unlikely that a draft Pennsylvania bill to legalize marijuana will become law.

MARIJUANA NATION

Medical marijuana bills have been introduced in Congress and almost every state. In most states, these bills have been non-starters; in others, the bills were introduced numerous times before becoming law. But in every state that has seriously considered medical marijuana, the debate has been highly politicized and the process of implementation has set off dramatic land use, regulatory and Supremacy Clause debates.

Although the concept of legalizing marijuana for medicinal purposes appears to enjoy widespread popular support even in very conservative jurisdictions, significant political roadblocks hinder the enactment of such legislation.

Until relatively recently, the federal government's actions towards medical marijuana were largely restricted to general pronouncements about the Supremacy Clause and marijuana distribution being illegal under federal law. Recent action by various United States Attorneys in some of these jurisdictions has changed the dynamic and appears to have had a chilling effect on at least some of the states, including New Jersey. As a result, patients

who can benefit from this treatment will likely not be able to access medical marijuana in many jurisdictions, even where well targeted and tightly regulated frameworks are focused on those that need it most, like those adopted in New Jersey and Delaware.

ROAD-TRIPPING TO NEW JERSEY AND DELAWARE

On his last day in office, former New Jersey Gov. Jon Corzine signed New Jersey's medical marijuana legislation into law. Known as the Compassionate Use Law, the legislation permits qualifying patients to possess and use up to two ounces of pot per month. In order to qualify, patients must register with the state and have their physician certify that they suffer from one of the debilitating medical conditions specified in the law. Sadly for Cheech, it limits its applicability to New Jersey residents.

Those conditions include terminal cancer, multiple sclerosis, muscular dystrophy, Lou Gehrig's disease and Crohn's disease. Terminal illness also qualifies if the physician has determined that the patient has less than one year to live. Additional conditions also qualify if the condition is resistant to conventional treatment. Those conditions include glaucoma, intractable skeletal muscular spasticity, epilepsy and other seizure disorder.

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ders. Cancer and HIV/AIDS patients can also qualify if the condition or its treatment causes chronic pain, severe nausea, or wasting syndrome. Finally, patients with a non-qualifying, yet debilitating, condition may file a petition to participate in the program, but that petition must be refiled annually.

In addition to having a qualifying condition, the physician and patient must also have a bona fide doctor-patient relationship. Specifically, the physician must have seen the patient at least four times for the qualifying condition or seen the patient for at least one year. A bona fide relationship also exists in New Jersey if the physician agrees to accept responsibility for treating or managing the qualifying condition after conducting a comprehensive physical examination, and after personally reviewing the patient's full medical history, including the patient's response to traditional treatments.

Once patients qualify, they must obtain their marijuana from one of six state-licensed Alternate Treatment Centers (ATCs). Unlike other states with medical marijuana laws on the books, the New Jersey Compassionate Use Law does not allow qualifying patients to cultivate their own marijuana. If a qualifying New Jersey patient is too debilitated to personally reach an ATC, a designated caregiver can purchase the marijuana for the patient. The caregiver must register with the state and undergo a criminal background check.

Delaware's medical marijuana law was only recently enacted. The Delaware law is similar to the New Jersey Compassionate Use Law in many respects. It also requires a bona fide doctor-patient relationship; the list of qualifying conditions is almost

identical; and distribution is limited to state licensed dispensaries. The Delaware law contemplates a total of three dispensaries, one in each county. It also restricts services to residents of the state.

The Delaware law, however, permits qualifying patients to possess up to six ounces, triple the limit imposed in New Jersey. Although some commentators have voiced concern over the relatively large volume, even the Delaware law is strict compared to other states.

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Although East Coast jurisdictions have tended to have more rigid rules, West Coast jurisdictions often have taken the opposite tack, making the law easy to navigate and, practically speaking, easy to corrupt. For example, California's medical marijuana law permits patients to possess up to eight ounces, permits users to cultivate up to 12 of their own plants, and leaves its thousands of dispensaries virtually unregulated. In certain hotspots, you will often see a single building, with matching signs, with three officially separated businesses — a doctor who can diagnose the patient with anxiety or other qualifying condition and prescribe marijuana, a dispensary that offers a wide array of different varieties, and a "consultant" who will tell the prospective "patient"

how to describe his "symptoms." In California, patients can grow and possess marijuana, even if they only have oral approval from a physician.

FEDS STILL NEED TO MELLOW OUT

Several U.S. attorneys recently sent letters to most of the states that have legalized medical marijuana. According to published reports, the feds warned that they intend to take vigorous action "against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law."

In March, federal agents went beyond threats and raided medical marijuana businesses in Montana, seizing computers and cell phones and freezing bank accounts. Federal authorities have taken similar, if less confrontational, action against two Washington state dispensaries.

The letters and raids were a clear warning that even state licensees, like those that would operate New Jersey's ATCs and Delaware's dispensaries, could face federal prosecution for growing and distributing pot under their medical marijuana laws.

The letters and the raids are an apparent about-face for the Department of Justice. Shortly after President Obama took office, the DOJ sent a memorandum to all U.S. attorneys instructing them to continue treating marijuana as an illicit drug, but to not focus federal resources on individuals who are in clear and unambiguous compliance with applicable state medical marijuana law. Also pending is a nine-year old petition in front of the Drug Enforcement Agency, proposing to reschedule marijuana under the Controlled Substances Act, that could be a vehicle for a clear statement.

This ambiguity has created significant uncertainty, leading to the introduction of three federal bills, including one, cosponsored by U.S. Reps. Barney Frank, D-Mass., Dana Rohrabacher, R-Calif., and Jared Polis, D-Colo., that would expressly exempt from prosecution anyone acting legally under state medical marijuana laws. Other bills would allow marijuana dispensaries access to banking facilities and another would allow deductibility of expenses for medical marijuana facilities.

In response to this confusion, earlier this month, Attorney General Eric Holder addressed the medical marijuana issue and promised to “bring clarity so that people understand what this policy means and how this policy will be implemented.”

Although Delaware’s implementation of the law is only at the planning stage, New Jersey’s law was already in implementation, having initially licensed six ATCs to begin dispensing. Faced with this uncertainty, coupled with current Gov. Chris Christie’s general skepticism regarding the Compassionate Use Law, New Jersey Attorney General Paula Dow has sent a letter to the DOJ seeking guidance regarding the feds’ take on certain aspects of the Compassionate Use Law. In particular, Dow wants to know whether individuals licensed to grow pot as ATCs under the New Jersey law would be subject to federal prosecution.

Until the DOJ provides that clarity, it appears that implementation of the Compassionate Use Law in New Jersey and Delaware will remain on hold.

PHISHING FOR A SOLUTION

In most jurisdictions overburdened by crime, efforts are being made to reduce enforcement of minor marijuana offenses. For example, in Philadelphia, District Attorney R. Seth Williams has received wide acclaim for a program that practically implements at the front end what judges had been doing at the back end of the process — treating minor marijuana possession arrests as summary offenses.

Although in that context the DOJ’s Montana raids may seem draconian, Montana’s law, approved by ballot initiative in 2004, is so open-ended that the raids may be needed to effectively enforce the laws of adjacent states. Montana lacks many of the key controls put in place under other medical marijuana laws such as in New Jersey and Delaware, including a residency requirement and closely regulated distribution. The open range medical marijuana stance in Montana has resulted in 30,000 registered patients in a state with a population of less than one million. By contrast, the New Jersey and Delaware laws place strict controls on distribution through a very small number of licensed dispensaries statewide and, in New Jersey, by limiting patients to only two ounces per month.

For several sessions, a few Pennsylvania legislators have been advancing a medical marijuana initiative. The current bill, SB 1003, was introduced by Sen. Daylin Leach, D-Montgomery, and has three cosponsors, leaving it likely destined for the same outcome as prior bills introduced in the General Assembly by Rep. Mark Cohen, D-Philadelphia.

SB 1003 is more relaxed than the Delaware and New Jersey bills. Were this bill to become a law, Cheech could not only get his medical marijuana, but he could grow it too, as SB 1003 would allow possession of one ounce of usable medical marijuana and up to six marijuana plants. Yet this framework is dramatically more severe than that in Montana, as it requires a bona fide doctor-patient relationship, state licensed facilities, and patient pre-registration before dispensing marijuana.

Although it is a politically sensitive issue, medical marijuana is gaining popularity even in traditionally conservative locales. For example, a recent Boise State University poll found that 74 percent of traditionally arch conservative Idahoans support allowing terminally or seriously ill patients to purchase and use marijuana for medical purposes. According to a published report, the poll results were so overwhelmingly in favor of medical marijuana that the pollsters thought the results were wrong.

Those kinds of numbers are hard for legislators to ignore forever, even in Pennsylvania, particularly when coupled with the reality that legions of seriously ill and suffering people are finding relief through medical marijuana where traditional medicine has failed. However, this depends on the federal government. Clear DOJ direction and potentially Congressional action would be required before Pennsylvania, or any other “new” state, can move forward with medical marijuana. And until that happens, Cheech and others much more seriously ill, will have to wait. •