Proposition 215 and You

A Guide for Medical Marijuana Patients — Updated May 15, 1997

Proposition 215 created a new exemption from state criminal penalties for medical use of marijuana (codified as California Health and Safety Code Section 11362.5). A recent federal court ruling protects doctors who recommend marijuana for most medical purposes. This brochure gives a general description of how the exemption applies to Californians. It represents the best of our knowledge as of the date printed above. Be sure to speak with a lawyer for an up-to-date interpretation and answers to any specific questions about your own situation.

Prop. 215 did not legalize marijuana. It changed how certain people — doctors, medical patients and their "primary caregivers" — will be treated by the State of California's court system. Patients with a doctor's recommendation to use marijuana in medical treatment have a new legal defense available to them. Physicians are exempt from state-level penalties for recommending marijuana, and in most cases they are protected from federal sanctions as well, for the time being.

If arrested by state or local authorities on marijuana charges, patients can claim immunity under state law. The burden of proof is largely on the patient to prove his or her medical need, and to prove that marijuana was used with the recommendation of a doctor. Because compliance is so important, take time to understand the new law. And remember, federal laws banning medical marijuana remain in effect — while federal charges are rarely brought for small-scale, personal possession or cultivation of marijuana, the protections of Prop. 215 do not fully immunize you from any punishment.

Who is affected by Prop. 215?

Proposition 215 was designed to protect seriously and terminally ill patients from state-level criminal penalties for using marijuana medically. Only people with their doctor's recommendation to use marijuana in medical treatment can take advantage of Prop. 215 as a legal defense against marijuana charges.

A doctor must judge whether marijuana is appropriate for treatment of a specific illness. Simply having a specific disease does not automatically qualify anyone for the marijuana exemption under Prop. 215. Only a doctor's recommendation can do that.

What is medical marijuana used for?

Marijuana has been used for centuries by doctors and patients all over the world. Some conditions for which patients report medical benefits from marijuana:

• **Nausea reduction.** The most common medical application of marijuana is for the reduction of nausea — the extreme nausea caused by cancer chemotherapy and AIDS treatment, and even common nausea induced by standard medications for various ailments. Patients facing such treatments often find that just a small amount of inhaled marijuana can immediately quell nausea.

• **Increasing appetite.** Marijuana also reportedly increases appetite for patients with nausea or other conditions, permitting more normal food intake and preventing dangerous weight loss. This is particularly important to patients with AIDS "wasting syndrome."

• **Reducing eye pressure in glaucoma patients.** Glaucoma is a progressive disease of the eye which can lead to blindness. It results from a buildup of pressure within the eye. Marijuana reduces the pressure within the eye, holding off some of the damage.

• **Controlling muscle spasms, seizures and chronic pain.** Marijuana is also used medically by patients with **epilepsy**, **paralysis**, **arthritis**, **multiple sclerosis**, **spinal cord injuries** and **migraines**.

Can I get a prescription for marijuana?

No. Even though Prop. 215 is now law, it is still not possible to get a standard prescription for marijuana from a doctor. Pharmacies cannot carry marijuana, because it is still illegal under federal law for use as a medicine.

Instead, Prop. 215 permits doctors to make "recommendations" for medical marijuana use, or to "approve" such use, either in writing or verbally. Never should a marijuana recommendation be made lightly. If you are arrested and charged with a marijuana offense, the doctor may be required to testify on your behalf. For this reason, the doctor needs to be clear about the rationale for the recommendation, and should monitor the patient's progress carefully. It is best to be conservative and cautious in obtaining the recommendation and in trying to keep it valid.

Can a doctor's recommendation expire?

Yes. For as long as the marijuana-recommending physician is in charge of the patient's care, and for as long as the physician continues to believe marijuana is helpful, the patient is protected under California law from criminal penalties for marijuana. However, if a patient changes doctors, or if the recommending doctor changes his or her opinion of marijuana's importance to treatment, the patient may not be protected any longer. Common sense suggests that the recommendation must be current to be valid when used as a legal defense, and therefore should be periodically renewed.

Federal laws against marijuana — what you need to know about your doctor's legal risks.

After Prop. 215 passed, federal officials threatened California physicians who recommend marijuana under Prop. 215 with revocation of their federally issued license to prescribe drugs, cutoff from eligibility for the Medicare and Medicaid programs, and even criminal prosecution. Doctors quickly became aware of these threats, and, out of fear, many of them have become very reluctant to discuss medical marijuana at all. However, a lawsuit filed against the federal government by several California physicians and some patients and organizations has succeeded in eliminating most of the risk for physicians who recommend medical marijuana.

On April 30, 1997, federal Judge Fern Smith issued a **preliminary injunction** in the case, titled *Conant vs. McCaffrey*, preventing the threatened punishments while the case proceeds to trial. This general protection for physicians could therefore remain in effect for one or two years, unless the judge's action is overturned by a higher court. Even in the unlikely event that it is overturned, doctors who recommend marijuana in the interval are protected from future action against them.

Judge Smith's injunction has a couple of important qualifiers: **1) The protection from federal penalties applies only to physicians treating patients with cancer, glaucoma, HIV and AIDS, and/or "seizures or muscle spasms associated with a chronic, debilitating condition"**; and 2) The protection has a limit — doctors may not get involved directly in helping a patient to acquire marijuana. Judge Smith defined this limit as "criminal conduct" under federal law, meaning "aiding and abetting or conspiracy" to violate federal drug laws.

This second qualification will not be clear to some physicians. Constantly updated guidelines for physicians are produced by the California Medical Association, and are available by calling (800) 592-4CMA. In addition, the provisions above could change, perhaps expanding the reach of the protections, since litigation in the case is ongoing.

How to document a medical marijuana recommendation or approval from your doctor.

Federal officials have stated clearly that physicians and patients have the right to freely discuss the risks and benefits of medical marijuana. Judge Smith's April 30 ruling went a step further, permitting doctors treating the conditions listed above to affirmatively recommend marijuana to their patients, as called for under Prop. 215. However, Judge Smith said physicians cannot directly assist patients with obtaining marijuana.

It is best if you obey some limits in your discussion with your doctor. In simplest terms: talk about your condition, talk about medical marijuana, but don't talk about how or where you might obtain it.

If, for instance, you were to say to your physician, "Please write me a recommendation so that I can begin to grow marijuana," you would be giving unnecessary detail that would make your physician aware that the recommendation would lead to activity considered to be criminal under federal law (even though it is legal under state law). Your doctor could then possibly be punished for knowingly helping you to obtain marijuana.

What you need most from your doctor is a professional medical opinion as to the possible usefulness of medical marijuana in your treatment. Ask your physician to discuss the risks and benefits of medical marijuana for your particular case. Whether or not your doctor believes it might help, good medical practice requires your physician to record the fact that you have had the conversation in your medical records. If the doctor recommends marijuana, that ought to go into the record.

State law permits you access to copies of your medical records. Patients request copies of their medical records all the time, for a variety of reasons. Whether you request copies of your records to be protected under Prop. 215, or merely to keep in a private file at home, should be of no real concern to your doctor or anyone else. Just remember, when you request copies of your medical records from your doctor's office, not to unnecessarily mention anything about your possible intention to obtain or grow marijuana. You should ask for the entire chart or record, not just sections pertaining to marijuana.

This copy of your medical records, indicating that you have a medical marijuana recommendation, will be the basis for your protection under Prop. 215. Make copies and keep at least one in a secure place; try to have one with you or with any marijuana you might come to possess later on.

Because of the risks your doctor faces if he or she helps you obtain marijuana, you should not ask your doctor to suggest a place or person from whom to obtain marijuana — obtaining it is your responsibility alone.

How can patients buy marijuana?

Most patients still have to rely on the black market for marijuana. Selling marijuana remains illegal, but a patient who possesses marijuana upon a doctor's recommendation is protected from state-level criminal penalties for possession under state law. "Cannabis buyers' clubs" may be an option for some (see below). If the operators are satisfied that a person has a true medical need, they will register the patient and permit that person to buy marijuana.

How to join a cannabis buyers' club without putting your doctor at risk.

Cannabis buyers' clubs have existed in various parts of California for the last several years, and more are opening in the wake of Prop. 215's passage. These facilities sell medical

marijuana to patients after a careful screening process verifies a person's medical condition, and after attempts are made to verify that the patient has a doctor's recommendation.

All cannabis buyers' clubs are illegal under federal law, though many facilities, as a result of their developing trusting relationships with local authorities, are tolerated and even regulated by communities. If local officials, including police, believe that the facilities only distribute marijuana to truly sick people, they may permit them to operate on a modest scale.

Unfortunately, because of the federal threats against physicians and the exceptions made in Judge Smith's order, doctors are still likely to be wary of dealing directly with a buyers' club. The California Medical Association still advises its doctors to be very cautious and not to fill out forms with a buyers' club logo or with the intent of transferring the information to such a club. By approaching this process carefully, however, you can very likely join a buyers' club without putting your doctor at risk.

First, follow the steps detailed above for documenting your marijuana recommendation. Next, call the club closest to you and tell them what documentation you already have, and ask if it is enough to begin your membership process. If so, bring the documents to the club and follow the staff's advice on how to proceed.

You should know that, for their own protection, the clubs need two things: proof of your illness, and the best documentation they can get that your doctor approves of your medical use of marijuana. The intake staff at the clubs will try to work with you in a way that brings you into the club and does not expose anyone to unnecessary legal danger or repercussions.

Can I grow marijuana?

• **Yes.** Under Prop. 215, the cultivation of marijuana plants for the personal, medical use of a patient is permitted. However, you must go to the black market for seeds or seedlings.

Cultivation of marijuana remains a felony under federal law. A person arrested and charged with cultivation under state law has the right to use a Prop. 215 defense, if the cultivation was for personal use only, and if the patient has a doctor's recommendation. Federal agents are believed to be unlikely to arrest and prosecute small-time growers of marijuana for medical use, because small-scale cases are not a high priority to federal law enforcement. Still, prosecutions by federal agencies are possible.

• **Cultivation guidelines.** It is important to keep any cultivation within the boundaries suggested by Prop. 215.

Grow no more marijuana than you need for personal consumption. There is no concrete standard for numbers of plants under Prop. 215. Generally speaking, one to a few healthy plants should satisfy a patient's needs. Attorney General Dan Lungren has taken the position that "one marijuana plant produces approximately one pound of bulk marijuana ... Therefore, one can argue that more than two plants would be cultivation of more than necessary for personal medical use.... [But] the number of plants will depend on the circumstances."

Do not give away, distribute or sell marijuana under any circumstances to anyone. Any evidence of such distribution puts a person at very high risk. A Prop. 215 defense will not work for someone who distributes or sells any amount of marijuana, because the new law applies only to a patient's personal, medical supply. If prosecutors discover evidence of sale or distribution, they can charge a person with felony counts that could result in years of prison time, regardless of that person's medical condition or medical authorization to use marijuana.

• **Cultivation co-operative farms.** According to Attorney General Dan Lungren, it may be possible for a group of patients and/or their caregivers to join together to create a small plot of marijuana plants strictly for the patients' use. In a February 24, 1997, letter to California law enforcement officers (No. 97-BNE-01), Lungren wrote: "a true cooperative cultivation of a very small number of plants by properly qualified patients and/or caregivers might qualify for the [Prop. 215] affirmative defense." Exercise caution and speak with attorneys before assuming that a co-op is legal.

If I'm caught, how does 215 protect me?

If you are caught with marijuana you are using with a doctor's authorization, you will have a few opportunities to prove that you are a legal, medical user of the drug. Though Prop. 215 does not specifically prevent arrests, police officers are now being trained in ways to determine legitimate medical use versus illegal, social use, when they discover a person with marijuana. You can make a police officer's job easier, and protect yourself, by carrying written documentation of your medical need for marijuana, including a copy of your doctor's recommendation or medical records.

If a police officer has any reason to doubt that a patient is using marijuana — or cultivating it — for only personal, medical use, the officer is free to make an arrest. On November 6, 1996, the Attorney General issued broad guidelines for officers to help determine who has a legitimate medical-use claim under Prop. 215. These guidelines can also be helpful to patients. In part, officers are told to ask about or investigate:

- the person's status as patient or caregiver, and the documented medical condition of the patient in question;
- the name of the physician who recommended marijuana;
- quantity and packaging of the marijuana; and
- the presence of pay/owe documents, weapons, police radio scanners, or other evidence of conduct associated with drug dealing.

Most legitimate cases of patients and specified caregivers facing charges for strictly medical use of marijuana are likely

to be dismissed before proceeding to trial. Local police investigators or prosecutors ought to be able to determine, from evidence presented by arrested persons, who is and who is not entitled to an exemption from the marijuana laws under Prop. 215. Some cases may go to trial, in which case the patient and physician involved should expect to testify under oath about the reasons for the patient's medical marijuana use. If your physician is unwilling to testify, you should point to Judge Smith's April 30 injunction and the CMA's guidelines, both of which say it is clearly permissible for doctors to testify about their recommendations. If your doctor remains hesitant, your lawyer can issue a subpoena to the doctor, adding to the protection your physician should feel in coming to court.

Patients should be allowed to assert a Prop. 215 defense, and the evidence for it, at a pre-trial hearing, rather than awaiting a full trial. (The state attorney general has pointed out that Penal Code section 866(a) permits presentation of such a defense at a preliminary hearing, while section 1020 preserves the right to present the defense at trial.) If you are caught, your defense attorney should try to work out the earliest possible opportunity to present elements of your medical defense, to avoid unnecessary expense and time for everyone involved.

Who qualifies as a "primary caregiver?"

Prop. 215 was designed to protect patients from prosecution for medical use of marijuana. However, the new law recognizes that some patients may be in such ill health that a family member or close friend may need to obtain and possess marijuana for that patient. Or, a patient may live with someone who could be subject to criminal or civil charges for the patient's marijuana kept on the same property. In this spirit, so-called "primary caregivers" to medical marijuana patients are also exempted from marijuana charges.

So who is a "primary caregiver?" The Prop. 215 text defines such a person as **"the individual designated by the ... [patient] who has consistently assumed responsibility for the housing, health or safety of that person."** The fact that a person must have "consistently assumed responsibility" for the patient's welfare could narrow the definition of "primary caregiver" considerably. Family members, very close friends and roommates of patients will fit this definition most readily.

The best advice at this time is to be conservative in designating a caregiver or in considering yourself to fit under the new law's definition. A judge may have to decide each case on its merits.

Is there a pill form of marijuana?

There is a pill form of one of the many chemicals found in marijuana, tetrahydracannabinol (THC). It is available by prescription under the trade name Marinol. Marinol's use is currently restricted to cancer and AIDS patients; so-called "off-label" prescription of Marinol for other conditions may lead to punitive action by federal authorities.

For some people, Marinol works fine, at least for a while. But for many patients, it is too expensive — costing up to $30,000 a year — or too powerful. And taking a pill to combat nausea is often impractical. Some patients say that Marinol takes too long to work and then "knocks them out," as opposed to marijuana in its whole form, which permits dosage to be better controlled and has milder effects. Researchers are now investigating ways to vaporize THC or marijuana to bring maximum benefits without smoking.

Banned activities for medical marijuana patients and caregivers.

Prop. 215 does not give a broad freedom to medical marijuana patients to use marijuana anywhere, any time.

Prop. 215 contains a provision ensuring that "conduct that endangers others" remains illegal. Such conduct is likely to include driving under the influence of marijuana, operating heavy machinery, or other similar activities, in which there is a realistic risk that a person's marijuana use could impair judgment and lead to harm to other people.

Courts would probably also consider smoking marijuana in public or in the workplace to be a danger to others, permitting sanctions against anyone for doing so.

Drug testing programs — including urinalysis and hair testing — required by federal agencies and some businesses for workers in certain safety-sensitive positions are unaffected by Prop. 215. Even where drug testing is not a factor, employers may prevent employees from using marijuana on the job, if any degree of impairment would interfere with their work — for example, factory workers who must operate complex or heavy machinery.

A warning to all marijuana users.

Prop. 215 was designed to protect a specific class of people — the seriously and terminally ill. It does not apply to recreational users of marijuana who simply feel they get some "medical" benefit. It does not even apply to terminally ill patients who fail to get their physicians' approval. Prop. 215 enables the courts to sort out who is entitled to these new protections, and who is not.

Every detail, from proof of illness to the form and reasons for a marijuana recommendation, is a potential weak link in a person's case. Don't put yourself at risk on a flimsy claim of a medical need for marijuana!

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626 SANTA MONICA BLVD., SUITE 41 • SANTA MONICA, CA 90401 • **1-888-YES-4-215**

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