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DEPARTMENT: PRACTICE TIPS: PROPOSITION 215: LEGAL STRATEGIES FOR THE MEDICINAL USE OF MARIJUANA: HOW TO SEEK AND SECURE PROTECTION FOR PATIENTS UNDER THE NEW LAW

by Ronald Richards

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TEXT:

[*21] One of the measures on the November 4, 1996, statewide election ballot in California was Proposition 215, n1 also known as the Compassionate Use Act of 1996 n2 or, more familiarly, the Medical Marijuana Initiative. Its passage signaled that a majority of California voters support its main purpose: to ensure that seriously ill persons have the right to obtain and use marijuana for medical purposes when that medical use is deemed appropriate and has been recommended by a physician. The new law was designed to shield citizens from criminal prosecution or any other sanction n3 for the approved medical use of marijuana and affords protections for physicians from criminal or administrative prosecutions for recommending marijuana.

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n1 Proposition 215 has been codified as HEALTH & SAFETY CODE @ 11362.5.

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n2 See CAL. CONST. art. II, @ 10(a) (provides authorization for ballot initiatives).

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n3 HEALTH & SAFETY CODE @ 11362.5(b)(1)(B).

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Proposition 215 was written specifically to encourage federal and state government officials to implement a plan for the safe and affordable distribution of marijuana to all patients in need of it. To fulfill the voters' intent, a bill is pending in the legislature that would designate the University

of California to create the California Marijuana Research Program for the development and implementation of studies ascertaining the general medical efficacy and safety of marijuana. The bill provides for a $ 1 million appropriation to the university for establishing and operating the program, as well as the authorization for the program to raise funds and to include other research projects in the studies. n4

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n4 Proposed HEALTH & SAFETY CODE @ 11362.59 codifies the funding mechanism of the state program and expresses the urgent need for it.

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Proposition 215 provided specific exemptions under existing California Health and Safety Code sections for growing and possessing marijuana that is not for sale. n5 Thus the patient, as well as the designated "primary caregiver"--defined as the person who has consistently assumed responsibility for the housing, health, or safety of the person n6--generally are protected, but land mines remain.

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n5 HEALTH & SAFETY CODE @ 11362.5(d).

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n6 HEALTH & SAFETY CODE @ 11362.5(e).

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Two published opinions on certain applications of the new law were issued during the period between Proposition 215's enactment and codification as Health and Safety Code Section 11362.5, and March 1, 1998. n7 These cases, People v. Trippet and Lungren v. Peron, reflect the greatest fears facing medical marijuana patients and their caregivers: the possibility of being charged with possession for sale and for transportation, both of which are violations of the Health and Safety Code, specifically Sections 11359 and 11360. n8 The police may arrest a patient or caregiver under either charge. The presumptive bail is $ 15,000, and a defendant also can face a suspension of his or her driver's license n9 and a felony conviction--so the medication can become quite expensive. The decision to arrest for a sales offense or to bring a sales charge is within the discretion of the officer and/or the prosecutor, but there is no discretion to reduce the charge to a misdemeanor because it is a straight felony. n10 Thus these code sections present dangers for the patient and/or the caregiver, who theoretically can be charged with two felonies and must prove their exemption from prosecution under Proposition 215. n11

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n7 People v. Trippet, 56 Cal. App. 4th 1532 (1997); Lungren v. Peron, 59 Cal. App. 4th 1383 (1997).

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n8 See HEALTH & SAFETY CODE @@ 11359 and 11360.

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n9 See HEALTH & SAFETY CODE @ 11362.5(d).

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n10 See HEALTH & SAFETY CODE @ 11359.

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n11 See HEALTH & SAFETY CODE @ 11362.5(d).

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Trippet and Peron

In People v. Trippet, n12 the defendant offered a battery of common law as well as religious defenses to a transportation charge, which were all rejected, but the court of appeal accepted a defense arising from Proposition 215. The appeals court first examined the issue of raising an implied defense to a charge of transporting narcotics and conceded that "practical realities dictate that there be some leeway in applying [Health and Safety Code] Section 11360 in cases where a Proposition 215 defense is asserted to companion charges." n13 If the quantity transported and the method, timing, and distance involved were reasonably related to the patient's current medical needs, there is an implied defense to the Section 11360 charge, according to Trippet. n14

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n12 People v. Trippet, 56 Cal. App. 4th 1532 (1997).

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n13 Id. at 1550.

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n14 Id. at 1551.

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The Health and Safety Code [*22] Section 11359 charge is a specific intent crime, n15 which means that the prosecutor must show that the defendant intended

to possess the marijuana for sale. If such a showing is not made, then a Proposition 215 defense may lie because a lesser-included-offense instruction for Section 11357(b) or (c) may be available. If the trier of fact finds that there was no intent to sell, then the shield of the new law may be raised to provide protection to the patient or caregiver from prosecution.

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n15 People v. Peck, 52 Cal. App. 4th 351 (4th App. Dist. 1996), review denied .

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It is important to note that the amount of marijuana does not dictate circumstantial evidence for sale: the possession of as few as five marijuana cigarettes has been the basis for bringing sales charges in cases. The prosecution looks at the packaging of the marijuana in question, as well as the presence of scales, baggies, and other indicia of sales versus usage. If a trier of fact can be convinced that the usage was for a purpose intended under Proposition 215, an acquittal under the Health and Safety Code Section 11360 implied defense should carry over to a Section 11359 charge as well.

In contrast to the Trippet decision, with its primary focus on the scope of the new law in connection with a defense to a marijuana charge, the Peron case specifically addressed Proposition 215's definition of a "primary caregiver." It is apparent from the Peron decision that courts may limit the scope of who can qualify as a primary caregiver, but the primary caregiver's right to be responsible for more than one patient may not be so restricted.

In Peron, a preliminary injunction had been issued against the state attorney general to prevent that office from closing a cannabis buyers' club in San Francisco. The primary concern of the Peron court was analyzing whether the stipulated primary caregiver was a legitimate designee. Even though the court seemed fixated on the statutory language stating that the primary caregiver "consistently provides for the housing, health, or safety of the designating patient," n16 the court expressly rejected the attorney general's argument that a primary caregiver cannot serve more than one patient. n17

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n16 Lungren v. Peron, 59 Cal.App. 4th 1383, 1399 (1997).

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n17 Id. at 1399.

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The court implied that a director of a convalescent home or nursing home

could be designated a primary caregiver for more than one patient. Further, if a primary caregiver's function is to provide marijuana to a patient, there is no reason why a patient should be compelled to rely on just one person for that task. Also, the court expressly allowed for reimbursement of a primary caregiver's actual expenses incurred in obtaining or growing marijuana for patients. n18 Nevertheless, the Peron court did not permit importation or cultivation of marijuana by large commercial enterprises such as the one run by the defendants. n19

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n18 Id.

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n19 Id. at 1400.

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In the wake of Peron, all potential caregivers should make sure that they are so designated in writing, do more for the patient than just sell or give away marijuana in a commercial operation and, finally, proceed with caution when they move from being a caretaker of a dying AIDS patient to operating a Macy's of marijuana clubs. There is a gray area that can be navigated safely by caregivers such as a director of a hospice, but only with careful planning and documentation.

As for equitable protection from the courts, there currently is a federal district court injunction in place against the prosecution of any doctor who recommends marijuana to his or her patients. Last year, a case was brought against the director of the U.S. Office of National Drug Control, Barry R. McCaffrey, among others, and a preliminary injunction was obtained that prevents all the defendants, and all others acting in concert or participating with them,

from threatening or prosecuting physicians, revoking their licenses, or excluding them from Medicare/Medicaid participation based upon conduct relating to medical marijuana that does not rise to the level of a criminal offense. n20

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n20 See Conant v. McCaffrey, 172 F.R.D. 681, 701 (1997).

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Simple Possession

A simple possession charge--less than 28.5 grams of marijuana--carries a maximum fine of no more than $ 100, n21 and the Department of Motor Vehicles will suspend a person's driver's license for six months even if the conviction for possession is unrelated to driving. n22 There are two ways to attack a possession charge. The first begins with examining the circumstances surrounding the arrest to see if a suppression motion is appropriate. Small amounts of marijuana found during a pat-down search for weapons in a person's pockets usually are not enough to rise to the level of justifying an entry into the

pocket to retrieve it. This is because the scope of the officer's pat-down search is limited to weapons. The next step is to determine if the arresting officer took the person into custody, because a custodial arrest is specifically prohibited by statute. n23 If this has occurred, a motion for the suppression of evidence or statements obtained after a custodial arrest is appropriate. There have been cases in which officers have arrested individuals for possession of three to four joints and have called it possession for sale, but hopefully a court would scrutinize such claims and hold that the felony arrest was without probable cause.

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n21 See HEALTH & SAFETY CODE @ 11357(b).

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n22 See VEH. CODE @ 13202.3.

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n23 See HEALTH & SAFETY CODE @ 11357(b); PENAL CODE @ 853.6.

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The second way to attack a possession charge is to present a Proposition 215 defense--though practitioners should realize that their biggest problem with mounting this defense is measuring the effort versus the reward. Because the six-month license suspension makes a plea to a marijuana charge worse than a driving under the influence conviction, the penalty is too severe to give up the fight. Unless the court finds "compelling" circumstances, the DMV must suspend the license of the defendant. The $ 100 fine is really only a secondary problem.

The first task facing the defense attorney is to convince the prosecutor that the defendant has a physician's oral or written recommendation. The only means for convincing the prosecutor of an oral recommendation's existence or validity is through live testimony, since an oral recommendation is hearsay. The better choice is a written recommendation, drafted for the doctor, citing Health and Safety Code sections. The recommendation should include the name of the patient, the date of the recommendation's commencement and expiration, and a recommended dosage amount. The following language can be inserted to protect the physician against federal interference:

This recommendation is in no way to be interpreted as a prescription as defined under federal law. It is only a recommendation that adopts the legal provisions of California Health and Safety Code Section 11362.5 and is only intended to be used and applied under California law.

The next hurdle facing practitioners is to get the recommendation into evidence, or at least in a form that the prosecutor will believe. Serving a subpoena on the doctor is always the worst choice. The doctor does not want unnecessary exposure, and the client may not be able to afford the fees for

travel or other expenses. Also, it is impractical for the doctor to be subpoenaed to court every time a prosecutor decides to get tough.

The best and easiest method is a business records subpoena pursuant to Code of Civil Procedure Section 1985, accompanied by an affidavit for a duces tecum. The practitioner should also prepare a model declaration under Evidence Code Section 1561 for the doctor as the custodian of records sufficient to satisfy

any challenge. Finally, an affidavit checklist accompanying the subpoena will ensure that the doctor follows all the rules required to prove trustworthiness and reliability. When practitioners present these records to the prosecutor, they have met two burdens: 1) a recommendation exists, and 2) it was issued by a physician.

The prosecutor can either proceed to a jury trial to secure a no-probation sentence [*23] with a $ 100 fine, or dismiss the case. What should occur is a dismissal pursuant to Penal Code Section 1385. n24 This would be a fair and just disposition, because the reason for a no-probation sentence is to prevent the defendant from suffering a probation violation that is worse than the substantive offense. Also, conditions of probation can include search-and-seizure conditions that would allow the police to search the probationer at any time with or without probable cause. Further, a marijuana conviction can be completely removed from one's record, along with the arrest, n25 which is a preferable resolution of a client's case in comparison to expungement. n26

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n24 PENAL CODE @ 1385 is a catchall section that allows dismissal in the interest of justice.

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n25 See HEALTH & SAFETY CODE @ 11361.5.

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n26 PENAL CODE @@ 1203.4a and 1203.45 expunge records for civil purposes but not for prior criminal offenses or for offenses related to certain professional licenses.

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The new law grants a patient or caregiver a full exemption from prosecution for cultivation under California law, n27 but that exemption does not extend to the federal district courts. The penalties for simple possession pursuant to 21 U.S.C. Section 844 can range from probation to one year for a first offense, and from 90 days to 3 years for two or more offenses. The minimum fines can be as high as $ 5,000. n28 Cultivation is covered under 21 U.S.C. Section 841, which

states that 1,000 or more plants subject the cultivator to a 10-year minimum prison sentence. n29 A 5-year maximum applies if there is less than 50 kilograms of marijuana and/or less than 50 plants. A small amount of marijuana that is

given away for no money will be treated as simple possession. n30

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n27 HEALTH & SAFETY CODE @ 11362.5(d).

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n28 21 U.S.C. @ 844(a).

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n29 21 U.S.C. @ 841(b)(vii) (1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight).

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n30 See 21 U.S.C. @ 841(b)(D)(4).

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Clients must be warned, then, to cultivate with caution. The federal government will not prosecute a person with one plant or 40 plants, but as cultivators inch toward 50 plants, they run the risk of becoming manufacturers. n31

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n31 A man whose Bel Air residence was found to contain 4,000 plants is being prosecuted by the federal government for distribution.

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Other Strategies

A motion to suppress n32 will almost always fail as a substantive defense because the new statute specifically provides defendants with an affirmative defense, not a pretrial remedy. Practitioners can apply for an Evidence Code Section 402 hearing to ensure that physician records are admitted and to lay a foundation that may discourage further prosecution. Also, practitioners can argue that if the patient is exempt from possession charges, the issue should be addressed in a 402 hearing, not a full-blown jury trial. A trial date must be set before the 402 hearing takes place, but judges can be lenient when it comes to marijuana cases containing Proposition 215 issues. The bench officer, the prosecutor, and the defense all have an interest in a methodology that encourages timely disposition.

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n32 See PENAL CODE @ 1538.5.

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Another argument that should be made is that the new law prohibits criminal prosecution of patients and their caregivers. n33 Also, since a preliminary hearing should be held prior to any criminal prosecution, and a complaint and trial by the prosecution constitute a criminal prosecution, there may be some jurisdictional issues for the court to explore.

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n33 HEALTH & SAFETY CODE @ 11362.5(b)(1)(B).

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If there are no legitimate Fourth Amendment violations, the choices narrow to a stipulation to possession, followed by establishing the exemptions. A court trial may be a good alternative for certain defendants and their lawyers.

Once charges are dismissed, defendants can retrieve the marijuana that was taken by the police and booked into evidence by a motion for return of property. n34 As long as the patient shows a valid recommendation, with the term of the

recommendation and the recommended dosage, the judge will order the police to return the marijuana--there is no legal reason for the state to continue to hold it. n35

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n34 See PENAL CODE @ 1539.

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n35 HEALTH & SAFETY CODE @ 11473.5 only allows a forfeiture if the person was in unlawful possession of the marijuana.

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Californians embarked on a courageous journey when they decided to decriminalize usage of a Schedule One narcotic n36 for medicinal use. n37 However, judges, prosecutors, [*48] and lawyers seeking to harvest, cultivate, and package this new legalization of marijuana for certain individuals must still wait for the smoke to clear. Further incarceration of American citizens under a criminal code that grants exemptions to users, providers, and manufacturers without explicit guidelines can become unfair and undemocratic, and a conflict with federal law looms. Cooperation among all participants in the justice system is needed to protect the sick and dying from further pain.

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n36 See HEALTH & SAFETY CODE @ 11054(d)(13).

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n37 A petition to the Drug Enforcement Administration has been filed to remove marijuana as a Schedule One narcotic.

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