

From: **Carolyn Short** <carolyn@keepazdrugfree.com>
Date: Wed, Feb 16, 2011 at 1:49 PM
Subject: Prop 203
To: Will Humble <Will.Humble@azdhs.gov>

Hi Will,

On January 10, 2011, Paul Charlton and I met with Attorney General Horne to discuss our conclusion that implementation of Prop 203 would subject you and other ADHS employees to federal prosecution for violating the Controlled Substances Act ("CSA"). AG Horne suggested that he could file a declaratory judgment action, asking a court to determine whether the implementation of Arizona's law would subject you and other ADHS employees to the risk of federal prosecution under the CSA. Two weeks later, AG Horne indicated that he would not file a declaratory judgment action because his "client, Will Humble" did not want him to do so.

Marijuana is a Schedule I drug under the CSA. Schedule I drugs are those that have a high potential for abuse, lack any accepted medical use and can't be used safely even under the supervision of a physician. As a Schedule I drug, the manufacture, distribution or possession of marijuana is a criminal offense under the CSA. Section 841(a) of the CSA provides that "it is unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 844(a) of the CSA provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner . . ." (This exception does not apply to Schedule I drugs such as marijuana, which has no accepted medical use.) The consequences of violating the CSA include various fines and terms of imprisonment.

Based on current case law, there is no question but that ADHS employees and representatives, by virtue of actions taken as required by Prop 203, will facilitate the possession, manufacture and distribution of marijuana, all of which are illegal under the CSA. Anyone who possesses, cultivates or distributes marijuana, even if such acts are legal under state law, is subject to federal sanctions. See *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), and *United States v. Oakland Cannabis Buyers' Cooperative*, 121 S.Ct. 1711 (2001), and *United States v. Rosenthal*, 454 F.3d 943 (2006).

The federal ban on marijuana makes anyone who possesses, cultivates, or distributes marijuana pursuant to state law, including those state officials who implement such state law, guilty of a federal crime, and subject to

federal prosecution. This is not mere speculation. In a press release dated August 17, 2007, New Mexico Governor Richardson stated that “The Bush Administration earlier this year threatened to target New Mexico state officials with federal prosecution if the Legislature passed a bill making medical marijuana legal for the most seriously ill patients.” http://www.allamericanpatriots.com/48729141_medical_marijuana_new_mexico_governor_bill_richardson_urges_bush_administration_end_heartle ADHS employees or agents facilitating or implementing Prop 203 could be subject to federal prosecution under the CSA, which could result in substantial fines and terms of imprisonment.

I am mindful of the current federal administration's policy of prioritization with respect to enforcing the CSA. In his October 19, 2009 Memorandum, David Ogden, Deputy Attorney General, states that “as a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” Mr. Ogden goes on to say, however, that this guidance for prosecutors does not provide a legal defense to violations of federal law “nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act.” The fact is that the current administration’s philosophy concerning prosecution of those acting under state “medical” marijuana laws (a) does not change federal law; (b) sets priorities which allow a U.S. Attorney to exercise discretion and charge a low priority case where appropriate; (c) could change at any time; and (d) is inconsistent with the policies of the Drug Enforcement Administration, which continues to pursue those acting under state “medical” marijuana laws.

Any ambiguity raised by Ogden's memorandum recently was clarified by the U.S. Attorney for the Northern District of California, Melinda Haag, in her February 1, 2011 letter (attached) to Oakland city officials who were accepting "applications for permits to operate 'industrial cannabis cultivation and manufacturing facilities'" pursuant to an Oakland city ordinance. U.S. Attorney Haag specifically refers to Ogden's memorandum, acknowledging that federal resources should not be focused on "seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law," but stating that federal authorities "will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law." Not only did U.S. Attorney Haag make crystal clear that individuals directly involved in growing and distributing marijuana will be prosecuted under federal law, she also warned that

"others who knowingly facilitate the actions of the licensees, including property owners, landlords, and financiers should also know that their conduct violates federal law." Those who "facilitate," in the meaning of case law, would include State officials. City officials in Oakland apparently have been told by the County Attorney that they, too, could face federal prosecution. <http://www.ajc.com/news/nation-world/feds-to-oakland-pot-827270.html> By the way, note that U.S. Attorney Haag states she consulted the Attorney General, Eric Holder, about the Oakland ordinance, making crystal clear the current federal administration's position with respect to the growing and distribution, as opposed to mere use by seriously ill people, of marijuana.

If I don't hear from you, I will assume that you did in fact instruct Tom Horne not to seek declaratory relief. We then will advise your employees of your stance on the matter and the risks associated with implementing this program. You and I have had a great relationship, Will, and I apologize for the threatening tone, but we are running out of options and it is time for someone to take a stand on this issue.

If you have any doubts about the accuracy of this summary, you should consult with Attorney General Horne (who has been given a more detailed analysis of the law on this subject, including descriptions of criminal sanctions) or your own personal attorney.

Carolyn