

# Driving Under the Influence of Medicinal Marijuana in California

Since the passage of the Compassionate Use Act of 1996 (Cal. Health & Saf. Code section 11362.5 et seq. (the “Act”)), California has been dealing with controversy and debate surrounding the use of marijuana for medicinal purposes. The Act allows qualified patients to possess and cultivate marijuana for personal medical use with a doctor’s “recommendation” (not a prescription). Patients and caregivers are issued identification cards that allow law enforcement to verify that they are qualified to possess, grow, transport or use marijuana legally in California.

Controversy has continued to swirl around this issue for years, mostly concerning the question of whether the legalization of marijuana for any purpose is up to the states to decide or one that should be left up to the federal government alone to regulate. A related issue, however, has recently come to the forefront as medical marijuana use increases throughout California—the arrest and prosecution of qualified patients for driving under the influence of marijuana.

The passage of the Act, and the resulting legal use of marijuana by many California citizens, has not only brought this issue to the attention of the general public, but also to the attention of law enforcement. With medical marijuana use showing no signs of slowing down in California, law enforcement has become more vigilant in the arrest and prosecution of those patients suspected of driving under the influence of marijuana, even if the driver was legally using the drug for medical purposes.

Vincent D. Howard, of Howard | Nassiri PC in Anaheim, specializes in litigation in the areas of loan modification, predatory lending practices and bankruptcy. Mr. Howard can be reached at 800.872.5925.

## NUTS & BOLTS



VINCENT D. HOWARD, ESQ.

### Determining Impairment

Driving under the influence is a common arrest for law enforcement, and one that is relatively easy to prove when it relates to alcohol, but proving without a doubt whether a driver was actually under the influence of marijuana at the time of an arrest or accident can prove challenging for officers, prosecutors, and plaintiff’s counsel. It is such a difficult thing to prove because the presence of marijuana in a user’s system does not indicate whether the driver used the drug a few days or a few minutes prior to the time of the incident.

For a marijuana user, there is a time of active impairment when their ability to operate a vehicle safely is compromised. Then there are residual effects of the drug that last for a period of time after the active impairment, and these will vary from person to person based on the amount consumed and various other factors. Some experts claim these residual effects can last anywhere from two to four hours, but there is no way to establish what that window is in one given situation. The problem

for plaintiff’s counsel and law enforcement is how to accurately determine if someone is actually impaired, or if he or she has passed the point of impairment.

### Problematic Testing

If a driver is pulled over and suspected of drunk driving, a Breathalyzer test or a blood test can determine the exact amount of alcohol in their system. A predetermined number has long been established to show without a doubt if the driver’s blood alcohol level exceeded the legal limit at the time of their arrest. In other words, driving under the influence of alcohol is an offense that law enforcement can concretely and undeniably prove.

Driving under the influence of marijuana is much harder to determine. This is not to say that a driver cannot be convicted of driving under the influence after using marijuana; it just makes circumstantial evidence more crucial to achieve a conviction. A field sobriety test, driving patterns, witnesses or a car accident all become more important in proving that the driver was impaired.

An officer can conduct a sobriety test and, based on his observations, can order a blood or urine test to further investigate; however, there is no Breathalyzer-type test for driving under the influence of marijuana. What law enforcement can test and confirm is that at some point the driver did use marijuana, and at some point that driver was under the influence of its effects. What they cannot test and confirm with a urine or blood test is whether or not that driver was under the influence of the effects of marijuana while behind the wheel of the car. The science is simply not available to guarantee the driver was impaired at that moment.

(Continued)

# Marijuana

This creates a frustrating situation for both patients and law enforcement. A patient who used marijuana for medical purposes in the morning might be in a car accident that evening. While the acute and even residual effects of the drug would probably be long gone by that point, a blood or urine test would still detect the presence of the drug in the patient's system. The patient then faces prosecution for driving under the influence, even though that might not be the case.

Adding to patient frustration are the additional charges that can accompany the DUI charge. When an officer finds the presence of marijuana in a driver's vehicle, the identification card that verifies the driver as a patient qualified to possess the drug does not guarantee that the driver is immune from any additional charges. An officer's suspicion that the marijuana was intended for distribution and not for personal use can lead to additional charge related to drug distribution. This creates another legal battle that these patients must face in the courtroom.

## **Conclusion**

With the rising number of patients arrested for driving under the influence of medical marijuana, the courts are becoming crowded with these kinds of cases. Until science catches up with the law, and there is a more definitive way to test if a driver is actually impaired while behind the wheel, these cases will continue to clog the California court system. Better regulation, possibly on a federal level, might lead to better policing of this issue, but for now, patients must continue to battle the question of whether they were impaired or not impaired. 