Medical Marijuana Premises Leasing and Property Lawyer Dilemmas in Statutorily Altered States

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Digest of Selected Articles

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Medical Marijuana Business Occupancies: Property Lawyer Dilemmas in Statutorily Altered States

It’s chilling to visualize, on the not-so-distant horizon, the growing phalanx of federal enforcers of the Controlled Substances Act of 1970 (the “CSA”) armed with property forfeiture and assorted other prosecutor weapons. In the foreground, states (like primitive tribal gatherers) struggle to implement rules sanctioning the medical use of marijuana—based products. No sooner does a state reach a comfortable regulatory position and its local governments begin siting

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1 21 U.S.C. sec. 801 et seq.

2 See 21 U.S.C. sec. 853, the criminal forfeiture procedure where violations of federal drug laws are implicated (e.g., those offenses codified in Title 21 of the United States Code). This provision is incorporated by reference into all other federal criminal forfeiture statutes through 18 U.S.C. sec. 982(b)(1). See also 21 U.S.C. sec. 881(a)(7), which provides that subject to forfeiture to the United States is: “All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year’s imprisonment.” The specific federal statute governing civil forfeiture of real property is found at 18 U.S.C. Sec. 985 (2000).

3 Procon.org, under its Medical Marijuana tab (http://medicalmarijuana.procon.org/), catalogs adopting states; see http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 for a comprehensive chart of the states (together with the District of Columbia) with pertinent laws, together with their respective years and methods of adoption. The same Website has a chart of the status of pending legislation in those 4 states where bills are pending to legalize medical marijuana as of November 7, 2012, see http://medicalmarijuana.procon.org/view_resource.php?resourceID=002481.
marijuana businesses than threatening mail appears in the state’s governor’s or attorney general’s office.\textsuperscript{4} Warnings from U.S. Attorneys in many judicial districts,\textsuperscript{5} mounting in number and intensity from 2011\textsuperscript{6} to the present, turn calm to maelstrom. Increasingly these warnings incorporate threats of forfeiting real property that medical marijuana businesses occupy. Such warnings are not new; the DEA issued letters threatening forfeitures in California in the first quarter of 2008.\textsuperscript{7} One reason they aroused particular angst in 2012\textsuperscript{8} was that many property owners expected a different result—an unjustified expectation, apparently.

\textbf{Brief Account of Recent Medical Marijuana Extra-Legislative Events}

The brief 21\textsuperscript{st} Century history of federal enforcement ascendancy is this.\textsuperscript{10} First, individual challenges to federal authority to enforce their laws in medical marijuana-adopting states were rejected in 2005, through the Supreme Court opinion of \textit{Gonzalez v. Raich}.\textsuperscript{11} Congress, the \textit{Raich} Court said, has the broad authority under the Commerce Clause to reach even local and non-commercial activities

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{5}Id.
\item \textsuperscript{8}The form correspondence to landlords continues sporadically, and among the latest is a form letter sent to Colorado landlords by John F. Walsh, United States Attorney for the District of Colorado, dated March 23, 2012, which followed upon his earlier letter of January 12, 2012 available at http://www.justice.gov/dea/pubs/states/newsrel/2012/den011212.pdf. This letter threatens to close all stores within 1,000 linear feet of schools. This distance “barrier” enables federal prosecutors to apply enhanced penalties under 21 U.S.C. Sec. 860(a).
\item \textsuperscript{10}An exhaustive historical timeline is at http://medicalmarijuana.procon.org/view.resource.php?resourceID=000143.
\item \textsuperscript{11}\textit{Gonzales v. Raich}, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).
\end{itemize}
\end{footnotesize}
when necessary and proper to bolster legitimate regulatory schemes. The ability to regulate local marijuana production and use was necessary to make interstate regulation effective because, as Justice Scalia penned, the homegrown variety intended for personal use “is never more than an instant from the interstate market.”

Second, federal circuit courts interpreted *Raich* to mean that the CSA pre-empts even the most neatly-tailored state laws enabling use and sale of medical marijuana—thus, possession, use and sale of *Cannabis* remains illegal. Third, the Obama Justice Department in October, 2009, issued a memorandum to U.S. Attorneys around the country saying that optimal use of that department’s resources did not favor prosecuting consumers substantially following state medical marijuana laws. That now-notorious “Ogden Memorandum” did not advise U.S. Attorneys not to prosecute persons in any category of medical marijuana stakeholders. The memorandum merely urged restraint against consumers properly qualifying for medical marijuana use. Fourth, badly-regulated medical marijuana businesses became abundant, creating the appearance that certain states could not effectively control this industry.

Next, certain American cities became outliers, pushing back against the federal government’s authority, perhaps believing that the administration’s illegal drug-fighting apparatus, led by Attorney General Eric Holder, would not enforce the CSA. Two illustrations came from California. The City of Oakland passed an ordinance intending to license growers using commercial warehouses for *Cannabis*.

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13 See, e.g., *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), holding the Controlled Substances Act does not violate the 10th Amendment’s reservation of powers to the states.


cultivation. Second, the City of Los Angeles allowed medical marijuana cooperatives to proliferate without controlling their operations. This behavior met with two responses. Individual U.S. Attorneys’ Offices in medical marijuana jurisdictions clarified that preemption of federal law entitled them to curb excessive behavior. Next, James Cole authored a 2011 Justice Department memorandum that made clear that federal drug enforcement in medical marijuana jurisdictions had not been placed on hiatus. This memorandum triggered a further wave of written threats and federal prosecutor actions.

Here’s an illustration of tough landlord treatment. Melinda Haag’s U.S. Attorney’s Office for the Northern District of California, in September 2011, ordered Mr. Farshid Ezazi of Orinda, California to close down a medical marijuana clinic or face property forfeiture. Ezazi began eviction proceedings against the Marin Alliance for Medical Marijuana (a tenant occupying one, then two, suites in one building over 14 years) but did not conclude them by the prosecutor’s deadline, so federal prosecutors maintained forfeiture (in rem) proceedings filed November 18th against Ezazi’s entire four-building parcel as the eviction lawsuit proceeded. Ezazi had no ownership interest in his tenant’s medical marijuana business. He ultimately regained possession of the Fairfax buildings after stipulating not to lease to another dispensary and to release the United States. Ezazi received no compensation from the United States for losing possession of his buildings (or their


20 See the letters from U.S. Attorneys at procon.org, supra note 3.
income stream) through the date he resumed full control via release in February 2012 of the government’s *lis pendens*.\(^\text{21}\)

Lenders understand the potential impact of forfeitures upon their mortgaged collateral. While the Federal Deposit Insurance Corp., one of three banking regulators, has not issued specific guidance for banks about doing business with the medical marijuana industry, federal law requires banks to report suspicious activity\(^\text{22}\)—therefore, banks have little to gain by cooperating with these landlord-tenant relationships. Deputy U.S. Attorney General James Cole’s memo warned them: “Persons who are in the business of cultivating, selling or distributing marijuana, and those who *knowingly facilitate such activities,*” violate the CSA despite state laws authorizing medical use of marijuana.\(^\text{23}\) The California Bankers Association devoted an issue of its CBA Regulatory Compliance Bulletin to federal forfeiture.\(^\text{24}\) Institutional lender support for the industry is marginal. For instance, Colorado Senate Bill 12-075, proposing a financial cooperative organized exclusively for medical marijuana financial operation, was opposed actively by the Colorado Banking Association and died in the Senate Committee on Finance.\(^\text{25}\)

\(^{21}\)See stipulation and order of dismissal in U.S. District Court (Northern District of California). In the order, No. 3-11-CV-05596-JW filed February 21, 2012, JP Morgan Chase Bank’s lien was recognized as that bank’s “interest” in the defendant real property.


\(^{25}\)See the Bill Summary for SB 12-075, Senate Committee on Finance, available at http://www.leg.state.co.us/Clics/CLICS2012A/commsumm.nsf/b4a3962432b52fa787256e5f00670a71/22d398275c3a0e88872579a4007dd93b?OpenDocument.
Enforcer Intentions in Medical Marijuana Jurisdictions

Citizens, state legislators and governors cry “foul” responding to the threats of aggressive federal enforcement of the CSA stymieing these businesses. The truth, however inconvenient, is that the Ogden Memorandum did not proscribe enforcement on a federal judicial district-by-district basis. The State of Arizona decided to test the limits of federal enforcement where its state’s employees were concerned, and were properly rebuffed by its federal district court since the State could not identify a single prosecution of a state employee. Citizens challenging the federal right to enforce the CSA in view of the Ogden Memorandum have had no success. Federal courts—even one bankruptcy court in a medical marijuana jurisdiction—are making clear that Congress’ Commerce Clause control over drug enforcement, and the illegality of “medical” marijuana under federal law, will not be swept aside by state regulation.

Prosecutors assert that the owner of real property commits a crime leasing to a user knowing that marijuana storage and sale will occur within the leased premises. U.S. v. Wilson, 503 F.3d 195 (2d Cir. 2007) explains:

In the main, Wilson contends that under 21 U.S.C. § 856(a)(2), the government had to prove that, in making her home available to others, it was Wilson’s own purpose to allow them to engage in narcotics trafficking there. This is a fundamental misreading of subsection (a)(2).

Section 856(a)(2) makes it unlawful for a person to:

manage or control any place, whether permanently or tempo-


rarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

The law thus prohibits a person with a premises from knowingly and intentionally allowing its use for the purpose of manufacturing, storing or distributing drugs. The intent of the prohibition is "to prohibit an owner from providing a place for illegal conduct, and yet to escape liability on the basis either of lack of illegal purpose, or of deliberate ignorance". United States v. Tamez, 941 F.2d 770, 774 (9th Cir.1991). Accordingly, “under § 856(a)(2), the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (i.e., others have the purpose).” United States v. Chen, 913 F.2d 183, 190 (5th Cir.1990). The phrase “for the purpose,” as used in this provision, references the purpose and design not of the person with the premises, but rather of those who are permitted to engage in drug-related activities there.

Id. at 197 (emphases added). The landlord needs only to intend to make the lease, knowing the premises will be used for sale of medical marijuana, to have committed a criminal act!

In June, 2011, the U.S. Attorney’s Office filed a claim in Missouri’s federal Eastern District to forfeit defendant James Tebeau’s 330 acres of land used for music camps and occasional festivals known as “Camp Zoe” in Shannon County. Federal agents partnered with the Missouri State Highway Patrol30 to purchase controlled substances from occupants of the property on dozens of occasions. Tebeau’s argued that under 856(a) (2), a defendant landlord’s conviction depends on showing that the defendant himself manufactured, distributed, stored and used controlled substances. The magistrate judge reported to the District Judge, based upon Wilson, Tamez and Chen, that:

§ 856(a)(2) does not require that the defendant himself do the drug trafficking but instead that he make the property available for these illegal purposes even if only by others. The same concept of making property available for unlawful activities is in effect in statutes forbidding maintaining a house of prostitu-

tion or providing premises where illegal gambling takes place. Providing the place for illegal acts is an act in itself.\textsuperscript{31} (Emphasis added)

Today, the CSA is enforced to prevent “scalability”—to preclude organized crime’s growing, wholesaling or retailing the product. Not much creativity is needed to interpret federal agency warnings to target drug syndicate influence and control over the industry. Meanwhile, the 18 medical marijuana-adopting states and the District of Columbia\textsuperscript{32} work earnestly to implement sensible regulatory environments. These schemes include choosing land use categories in which to permit medical marijuana businesses; establishing minimum distances between these uses (thus avoiding dispensary or clinic aggregation); and mandating security of establishments against crime. Most of these determinations are made locally, a delegation of the states’ police power to municipalities and counties. States occasionally also regulate matters of environmental safety;\textsuperscript{33} while cities focus on the regulating odors,\textsuperscript{34} outdoor advertising of the business operations and licensing of medical marijuana businesses.

**Representing Medical Marijuana Leasing Parties:**
**Legal Ethics**

Little guidance emanates from state bars and legal scholars on the real property lawyer’s ethical obligations in this area of counseling. In mid-2012, just two State Bar ethics opinions exist on the subject, from the Maine and Arizona bars. Maine’s Board of Overseers of the Bar, citing Maine

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  \item \textsuperscript{32}See note 3 supra.
  \item \textsuperscript{33}Arizona regulates environmental issues connected with growing Cannabis, see A.C.R. R9-17-317; the California Research Bureau notes gaps in that State’s regulation of medical marijuana cultivation in terms of product safety, worker safety and environmental regulation, see Memorandum to Assembly Member Linda Halderman, April 10, 2012, available at http://www.canorml.org/prop/CRB_Pesticides_on_Medical_Marijuana_Report.pdf.
  \item \textsuperscript{34}Boulder Municipal Code § 6-14-8(h), available at http://www.colocod e.com/boulder2/index.htm.
\end{itemize}
Rule of Professional Conduct Section 1.2(e) and its comments, cautioned great lawyer circumspection in representing anyone in the medical marijuana industry, citing a “significant degree of risk.”35 In dramatic contrast, Arizona’s Committee on the Rules of Professional Conduct in 2011, citing ER 1.2(d), endorsed limited representation of those engaging in the medical marijuana industry36 without specifying the boundaries of an attorney’s consultation. Arizona’s ethics opinion ignored the impact of the Arizona Supreme Court’s Rule 41(b), which requires Arizona attorneys to uphold the Constitution and laws of the United States;37 that federal rule of law encompasses Gonzalez v. Raich and the Controlled Substances Act. The remaining 15 bar groups remain strangely silent; shouldn’t attorney regulators address boundaries of counseling where sale and use of medical marijuana are sanctioned by state law?

Professor Eli Wald of University of Denver’s Sturm College of Law described at that school’s Law Review symposium on January 27, 2012, the role of legal ethics in client representation of controlled drug purveyors in view of Professional Responsibility Rule 1.2(d).38 Professor Wald addressed the dilemma where an attorney is asked by a client to assist


36 Arizona Ethics Opinion No. 11-01 (Scope of Representation) specifically states that a lawyer “ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act,” see the opinion at http://www.myazbar.org/ethics/opinionview.cfm?id=710.

37 See Ariz. R. Sup. Ct. R. 41(b) (2010). Rule 41(b) states that lawyers shall “support the Constitution and laws of the United States and of the State of Arizona,” while Rule 41(d) also states that a lawyer shall “counsel . . . only actions . . . which appear legal and just.” California’s Business & Professional Code Section 608 also requires attorney support of “the Constitution and laws of the United States.”

38 Professor Wald said in some situations, where advice is rendered in negotiating and documenting a lease for a dispensary or clinic for example, that “there is no doubt in my mind that 1.2(d) is violated” by attorneys because it would constituting aiding a client in a commission of a federal crime. See DULR Online, Ethical Issues, Medical Marijuana & the Practice of Law Panel, available at http://www.denverlawreview.org/marijuana-at-the-crossroads/2012/2/8/ethical-issues-medical-marijuana-the-practice-of-law-panel.html; that panel’s video is found at http://mediaserv.law.du.edu//cashvideo/specialevents/marijuana-symposium-2012/marijuanasympoium2012.htm. That does not mean, according to Professor Wald, that advising a client on the state of the law is a violation of the Rules of Professional Responsibility.
in negotiating a lease for a client’s medical marijuana dispensary. Wald concluded that drafting or negotiating a lease constitutes substantive client assistance in violating a federal law. This places dispensary operators in a difficult position because (as Wald noted) clients are entitled to legal counsel to secure a medical marijuana license, but not entitled to advice on how to exploit the rights provided to the licensee. Professor Wald recognized the moral hazard for attorneys seeking to advise these new clients but warned that the moral question does not warrant openly violating the Rules of Professional Conduct. Tenant lawyers may find this view distressing (perhaps particularly in Arizona!); but how does that impact the landlord’s attorneys?

Are landlords a different species? One assumes that a landlord who owns neither business equity nor profits-participation interests (including by accepting percentage rent) cannot, by the mere fact of leasing, engage in unlawful conduct. But 21 U.S.C. § 856(a)(2), as interpreted by several federal circuit courts, provides that a landlord with dominion or control over the premises commits a crime when it knows that storing, using and distributing a controlled substance is involved. Still, landlords essentially lease commercial property for income, not furthering criminal activity. If they do not accept equity or profits interests in their tenant’s operations and decline percentage rent based upon sales of Cannabis, and they believe that their tenants are legitimate business persons (under state statutes) why should they be federal criminal “conspirator” targets?

Many federal real property forfeiture proceedings where criminal defendants do not own fee title are filed as in rem actions where the defendant is the real property, not the owner or lienholder. ( Owners and lenders are “claimants” in those in rem proceedings.) Most proceedings are not brought against landlords under 21 U.S.C. § 856(a)(2), except where the landlord participated in the marijuana business

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40 See id.

41 But see Jonathan Janetski prosecution, infra notes 45–49 and accompanying text.

operation or its proceeds, or the tenant’s operation neither complied with federal statutes nor the state’s medical marijuana law.

Pinhead-dancing meditations aside, any lawyer counseling a landlord with a proposed medical marijuana tenant must advise that the lease transaction in many federal jurisdictions violates 21 U.S.C. § 856(a)(2), exposing the landlord to possible prosecution in addition to property forfeiture. Second, lawyers immediately must ask the prospective landlord client this essential question—“will you have any ownership or profits stake in the tenant’s business?”—and decline the representation if the question is answered affirmatively.34 Third, the lawyer should counsel the client using this analogy. The IRS only audits about 2% of federal tax returns filed annually; however, particular triggers appearing in returns (like exaggerated deductions) substantially increase likelihood of an audit. The federal government today must be selective in its prosecutions due to limited resources. If the medical marijuana tenant, dear landlord client, violates state law atop violating federal law, your premises will be targeted for forfeiture by federal authorities, probably aided by local authorities. The landlord must be vigilant and strict in its external control of tenant operations in the premises, if the landlord decides to lease space.

A related professional responsibility of the landlord’s attorney is the duty of competent representation in E.R. 1.1.44 Mr. Jonathan Janetski, a commercial landlord, on January 4, 2012, pled guilty to knowingly and intentionally leasing his building for the purpose of unlawfully manufacturing and distributing marijuana—violating 21 U.S.C. Section 856(a)(2). Barring a miracle, at the date of this Digest’s publication Janetski will be in prison, likely the first commercial building landlord incarcerated for leasing to a medical marijuana tenant. Janetski rented his Kalispell building to

34 Inevitable, because the Arizona attorney’s oath of office to support the U.S. Constitution; the likelihood of a malpractice claim increases when the client ignores its lawyer’s early advice that a crime is committed merely by making the lease to the medical marijuana tenant.

two men for a cultivation site, and, according to his criminal attorney, Janetski “contacted an attorney first and asked if what was proposed to him by Kassner and Roe was legal under state law, which was confirmed.”

The United States District Court in Montana granted the United States’ motion to bar Janetski from presenting evidence in his behalf that he relied on the advice of counsel in concluding his conduct was lawful under federal law.

There’s no basis for any such alleged advice under applicable Montana statutes. Montana has a “caregiver,” non-profit distribution model, where the maximum number of persons who can be served by “home grown” Cannabis is three—and then, only when the grower is individually certified as a patient.

115 Reserve Drive, Kalispell, Flathead County, is a six thousand square foot warehouse from which, on March 14, 2011, federal agents confiscated 718 marijuana plants grown by tenants Kassner and Roe. Janetski’s indictment recites that, among other offenses, Janetski abetted cultivation of more than 100 Cannabis plants.

Criminal law and civil forfeiture law is not the usual province of real property counsel. Representing a proposed landlord in a medical marijuana lease transaction is folly if the property lawyer lacks a basic understanding of applicable federal and state law in this one-of-a-kind leasing transaction.

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47 Montana’s caregiver statutes appear at Mont. Code Ann. sec. 50-46-102 et seq., available at http://data.ogi.mt.gov/bills/mca__toc/50__46__3. htm. In short, there was no basis for Janetski—or his property counsel, if one there was—to believe that his tenants required anything like the quantity of space they were leased to serve a few clients under sec. 50-46-308(3)(a).


Justice for Landlords?

Scholars and practitioners need to address the status of the “innocent owner defense” under CAFRA section 250 (the “IOD”) in this era of blanket notifications by federal enforcers to landlords,51 advising them that their tenants are illegally operating and that their property will be forfeited should the medical marijuana operations not cease. The apparent purpose of these “blanket warnings” is to deprive commercial landlords of IOD use in forfeiture proceedings, based upon the landlord’s ignorance of illegal conduct giving rise to the forfeiture. Federal strategy is that no commercial landlord served with a notice can claim ignorance of federally illegal conduct inside the leased premises. (Indeed, under state law, landlords know the nature of their tenants’ operations in advance, because business licensing and land use entitling requirements require confirmation of landlord consent.) Apparently, the only way the landlord can rely later on the IOD to defeat forfeiture is to evict the tenant from the leased premises promptly upon receiving the federal enforcer’s notice.

Few scenarios exist in which a landlord might not be aware of its tenant’s business; one arises where the successor landlord inherited the premises (the “after—acquired” interest)52 while a second is when the original tenant assigned or subleased to a medical marijuana business operator without landlord knowledge. Even in the second case, there is scant probability of legally-sufficient landlord “ignorance” of conduct if the substituted tenant (or its lender) seeks an estoppel letter from the landlord. If a mere warning letter from enforcement to the landlord eliminates use of the IOD, the Justice Department effectively modifies CAFRA Section 2 and its criminal forfeiture counterpart, 21 U.S.C. § 853(n).53 Separation of powers theorists might puzzle over the power of an executive department’s letter to eliminate a

53 There is a third forfeiture process, so-called administrative forfeiture. It actually is the most common form of the proceedings; but it has no IOD. An administrative forfeiture is essentially a default proceeding, arising when property is seized and no one files a claim contesting the forfei-
statutory defense. The genius of the letter—writing campaign by enforcers is that it saves substantial resources over prosecutions, since landlords typically evict tenants in response to those letters rather than risk losing their assets. Since federal enforcers have limited personnel and other resources allocable to processing forfeitures, threatening letters are a bargain-basement solution.  

One critical element in achieving peaceful co-existence between medical marijuana state (and local) legal schemes with their federal “overlords” is credible governance. If a state, aided by its local governments, “gets it right,” the medical marijuana industry under state control may survive. What industry operators must acknowledge is that their businesses must hold the state regulatory compliance bar very high. California’s recent experience of municipalities reversing their welcome toward medical marijuana businesses indicates the jeopardy facing scofflaw operators. So does recent prosecutions described in the preceding sections.

**Literature from this Field of Dreams**

The following writings aid the real estate industry to understand the gauntlet of challenges facing marijuana businesses and their commercial landlords.


The DULR sponsored a symposium January 27, 2012, constituting four panels on (i) the state of medical marijuana in the states today; (ii) medical marijuana and the Constitution; (iii) ethical issues; and (iv) practice issues. The first two-identified panels covered, with updates, familiar subjects addressed in other literature. By definition, all administrative forfeitures are uncontested. Between 80 and 85% of all forfeitures administered through the Department of Justice fall into this category.  

54 *But see* Mr. Gibson’s article digest beginning on page 410 below.  

review symposia (e.g., Wayne State, McGeorge, Maryland) on the general subjects of preemption, states’ rights and legalization of marijuana for recreational purposes. The last two panels seem more interesting to real property and commercial transactions attorneys. Professor Wald’s remarks are included in this panel’s video-recorded presentation, as are those of John Gleason, Regulation Counsel for the State of Colorado (enforcer of the Colorado Rules of Professional Responsibility) (see http://mediaserv.law.du.edu/flashvideo/specialevents/marijuana-symposium-2012/marijuanasyposium2012.htm). Mr. Gleason remarked that while there have been no disciplinary cases against Colorado attorneys under Rule 1.2(d) and his office does not seek to bring them arising from medical marijuana business representation situations, the policy of his office is to prosecute “clear violations” of E.R. 1.2(d). DULR staff members wrote pithy summaries of some of the panel presentations, enabling reading or watching symposium segments of greatest interest. DULR’s video archiving and commentary demonstrates the present and future utility of law journal blogging.

2. Patricia E. Salkin and Zachary Kansler, Medical Marijuana Zoned Out: Local Regulation Meets State Acceptance and Federal Quiet Acquiescence, 16 Drake J. Agric. L. 295 (2011). Professor Salkin and Mr. Kansler (a 2012 graduate of Albany Law School) survey the community land use arena in states with medical marijuana laws. The authors note that state statues leave “on the ground” challenges to municipalities where citizens are concerned for their personal safety and public health. Of course, legislatures sometimes recognize these are matters more appropriately addressed on the local level, where community standards and values are held and best understood. The authors also correctly note that state and local governments enjoy substantial revenue generation from steep application licensing and approval fees.

Beginning with outright bans and prohibitions (engendering controversy under state law), the authors catalog varieties of land use regulations chosen by local

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communities. They note that the main state concerns are ensuring separating these occupancies from sites of vulnerable populations and ensuring that cultivation sites are enclosed and secured. Beyond these few characteristics of medical marijuana businesses, most land planning decision-making resides at the local level. Salkin and Kansler observe that many communities combine functions of land use entitlements with initial licensing of local business enterprises by a municipality; thus local governments make their own determinations of suitability of operations and operators independent of state oversight.

An interesting local dilemma is controlling facilities’ security obligations. Some municipalities, the authors say, require dispensaries to be highly visible from public rights of way, a two-edged sword depending on the aesthetic elements of the operation like exterior façades, window treatments and signage. There is some debate whether siting these facilities in less obvious locations compromises public safety for the benefit of streetscape aesthetics. Medical pot clubs in parts of Los Angeles and San Francisco illustrate the conflict in these community values.57 While some local ordinances attempt to ensure neighborhood cleanliness, there are few re-
sources to police this business operator obligation. Another interesting observation is the authors’ citation of communities where the scent and visibility of Cannabis products are restricted by local ordinances, especially in cultivation sites.

The authors conclude by encouraging greater communication between state and local governments when states develop their regulatory schemes, facilitating a “local viewpoint” for the benefit of the communities enforcing whatever the state sanctions. Salkin’s and Kansler’s survey is most useful for a local community adopting regulations, as the reader will learn about practices already in force.


David Gibson, a 2012 graduate of Hastings College of Law, presents a compelling, if arguably sinister, vision: that federal and local law enforcers might work together increasingly to optimize illegal drug law enforcement, sharing wealth in the bargain. In short, more cooperation between federal and local enforcement enhances public safety yet avoids “commandeering” by federal authorities. (The anti-commandeering principle was pronounced in New York v. United States in 1992, there, the U.S. Supreme Court articulated that incentivizing local cooperation in increasing compliance with federal law was permissible.) Could the “carrot” approach of federal law enforcement in sharing forfeiture revenues be more lucrative to local communities than revenues obtained from dispensary licensing, zoning application and building permit fees?

Joint federal and local forfeiture proceedings are not unusual. In September 2009, the Massachusetts U.S. Attorney’s Office filed a claim in U.S. District Court, seeking to forfeit the Motel Caswell at 434 Main St., Tewksbury, because of an alleged continuing pattern of

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at 3, 6 (notes California cities are banning dispensaries or placing moratoria on further development of these businesses).

criminal activity, primarily drug trafficking, on site.\(^\text{59}\) In its claim, the government cited an affidavit by Detective Sergeant Thomas Casey of the Tewksbury Police Department, in which Casey mentions more than 100 narcotics investigations relating to the motel since 1994. A second affidavit, submitted by Special Agent Vincent Kelley of the Drug Enforcement Administration, describes the history of DEA investigations relating to the motel. The government claims that as a private landlord, Caswell, who lives next door to the motel, has knowledge of the ongoing activity and does not curtail it, divesting Caswell of his innocent owner exculpation.\(^\text{60}\)

Gibson observes that one advantage to local governments of “tag-teaming” in drug law enforcement with federal authorities is community expression of their basic standards. Communities with strong anti-illegal drug policies can closely aid federal enforcement agencies in forfeiture matters. Conversely, jurisdictions having more liberal views about the use of certain drugs can decline the opportunity. Communities thereby indirectly determine what level of drug use, or what controlled substances, to tolerate. Other advantages noted by Gibson include that a community may abate public nuisances and curtail future drug activity and bank its share of forfeited assets convertible to cash for combating other crime. In the future, Gibson suggests, “guided local control of [national] drug enforcement policies will develop”; that, he argues, will aid communities to accept presently contentious national laws and policies.

Gibson concedes the potential for abuse by the local community, as powerful incentives to bank its share of forfeited assets may convert local police actions into an agenda of seizures purely for increasing crime-fighting resources. This is a familiar theme: journalist Radley Balko has noted in the Huffington Post and elsewhere.

\(^{59}\) See United States of America v. 434 Main Street, Tewksbury, Massachusetts, Civil Action No. 1:2009cv11635–JGD. Russell Caswell is the Trustee of the Tewksbury Realty Trust, the motel’s title owner. As Trustee, Caswell is the Claimant in the civil forfeiture action. This matter was filed in September, 2009; the forfeiture trial was held in November 2012 and was under advisement at publication of this digest.

how illegal drug-fighting revenue may cause police officers to divert resources to increase drug arrest frequency instead of solving more violent crimes. From the perspective of federal enforcers, however, tag-teaming enables federal law enforcement to cast its net more broadly. Additionally, Gibson observes, federal agents can condition the transfer of seized assets (or portions thereof) upon the successful prosecution of traffickers or their assets, improving local police work and limiting the potential for local enforcement abuses.

Gibson does an outstanding job sketching the history of federal forfeiture law and recent CAFRA amendments affecting those statutes, focusing on changes to the elements of burden of proof shifting (initially the government’s burden, by a preponderance of the evidence, to connect the offenses charged with the assets to be forfeited) and “innocent owner” defense implementation. Gibson objects to the double jeopardy inherent in civil forfeiture processes, when the government seeks asset forfeiture (which he labels “lower stakes” prosecution) where criminal prosecution fails. He understates two related concepts there. Procedurally, under federal forfeiture jurisprudence, the property is a separate juridical person in initial jeopardy. Second, forfeiture justifiably deprives some actors of assets otherwise usable to pursue illegal aims. The deterrence goal in asset forfeiture is not unworthy simply because a desired conviction of assets’ owners will not succeed.


Kirk Carson, a 2012 graduate of California Western School of Law and former real estate professional, has done an excellent job from the real estate broker’s and lawyer’s perspectives of suggesting how California landlords best cushion themselves from the enforcement juggernaut’s impact. Carson’s paper begins with a
quickly—grasped and reality—grounded illustration of how tough times (lease rates are down but mortgage interest rates are fixed or escalating) compel tough choices among landlords. After a fine primer on California’s medical marijuana statutory regime and the recent history of local government challenges in implementing state statutes, Carson discusses at length potential grounds for a commercial landlord’s liability under federal and California law and some local ordinances. The last 40% of the paper is Carson’s specific recommendations on two fronts. The first is how California landlords during their lease negotiation processes may leverage their natural advantage (insufficient inventory of eligible locations to meet demand) to obtain substantial rights to terminate a lease and to be indemnified by a prospective tenant. The second is how to document those rights and create those critical tenant obligations.

In the initial phase of negotiating the lease, Carson recommends landlords:

- Obtain a far larger than conventional security deposit (applicable to delinquent rent);
- Require a detailed business plan from the Tenant, and extracting a lease covenant to comply with the regulatory requirements set forth in that plan;
- Obtain background screening from OFAC’s List of Specifically Designated Nationals and Blocked persons (which contains the names of some international drug traffickers);
- Escrow a pre-rent commencement payment as a hedge against “early law enforcement” costs (this might violate the landlord’s mortgage covenant not to collect rent more than one month in advance, characterization notwithstanding); and
- Tie commencement of a lease in a multi-tenant building to the landlord’s obtaining liability releases under other tenant leases (by which Carson refers to being released from the tenants’ quiet enjoyment covenants).

Carson notes that the lender-landlord relationship initially must be reviewed, especially by studying security documents and the loan agreement. Wisely, Carson reminds landlords that a non-recourse obligation can be converted to recourse liability for individual guarantors by a borrower’s committing certain “bad acts” described...
in these documents—one of which may be violating laws applicable to the premises leased. Carson correctly notes that even where lenders don’t have pre-approval rights over particular tenancies, the landlord cannot avoid addressing its choice of tenants with the lender. For example, someone in the transaction may insist on joint execution of a subordination, non-disturbance and attornment agreement, whether the lender or the tenant. This cautions landlords to study their loan obligations before negotiating with a medical marijuana business.

In the phase of lease documentation, Carson advocates that landlords must:

- Avoid accepting percentage rent or equity position assumption in the tenant entity;
- Secure clauses permitting lease termination if third parties assert nuisance claims or law-enforcer commencement of aggressive action against the landlord;
- Require the tenant to upgrade premises as required under the ADA or state equivalents for clients of the premises with mobility challenges;
- Compel landlord periodic premises inspections for confirmation that mold is not present;
- Require the tenant to pay directly for excess (above building standard) utilities consumption for cultivation activities; and
- Secure the right to elect to convert a lease term to a short interval (like month to month) for the landlord’s advantage in the event changes in administration of enforcement spell increased forfeiture proceedings that may include the premises.

This final suggestion seems more ambitious than palliative. While this maneuver may support a landlord’s asserting an IOD in the event of forfeiture proceedings, documenting the landlord’s intention to recast the lease term demonstrates the landlord knew the operation was illegal and was trying to salvage the tenancy until the last available moment. Carson has done a genuine service to California landlords and members of the real property bar by compiling sensible advice for a broader readership of landlords and their counsel in the Golden State.

5. Mike Widener, Joint Tenancies: Landlords and Medical Marijuana Businesses (Yeoman Timber, LLC, 2012,
$9.95, available online at http://www.terraincogito.com/).

Mike Widener’s e-book is the commercial landlord’s risk management compendium, describing how to recognize and walk around quicksand bogs. Potentially menacing the landlord are these “nemeses”: federal CSA law enforcement personnel, state and local environmental regulators, the landlord’s lender, casualty, liability and title insurers, local zoning authorities, neighboring landowners, adjacent tenants and occasionally property owners’ associations and development districts. Each of the initial seven chapters focuses upon these myriad challengers, one at a time. Widener’s experience in a variety of roles (commercial landlord’s counsel, local government land use official and commercial real estate investor) aids him in navigating the overlapping agendas of these parties. This is the first monograph on medical marijuana business leasing; and the book addresses pertinent issues from multiple legal and property disciplines. Widener discusses environmental, bankruptcy, financing, insurance, zoning, utilities consumption and restrictive covenants problems, addressing how each subject should be treated in the commercial lease. The book ends with an extensive commercial lease appendix, inserting sample provisions conceptually addressed in the text.

Widener’s book contains certain non-intuitive insights, according to readers, for instance:

Federal bankruptcy courts may not allow a bankrupt tenant to reorganize, if the plan of reorganization calls for revenue generation from activity banned under federal law—which ought to affect the landlord’s course of action in court, should the tenant file a petition under Chapters 11 or 13 of the Code for reorganization (such as filing for conversion or dismissal of the petition).

Environmental problems (such as mold or indoor air contamination from herbicides, pesticides and fertilizers) damaging the premises’ interior can be as hurtful to the landlord as a drug—related forfeiture of the building. Accordingly, controls over the tenant’s environmental behavior inside the premises and frequent inspections of conditions are obligatory landlord acts.

In a shared-metering building, since a cultivation site consumes significant volumes of water and electricity, so the landlord must address separate metering or sub-
metering, or document excess consumption common area charge responsibilities, to avoid landlord conflict with other tenants.

Private contracts among owners, commonly known as CC&Rs, can cause more trouble than zoning regulations in limiting a person’s use of portions of a project for a medical marijuana tenancy.

HIPAA regulations may restrict what a landlord can do with marijuana-certified patient records, so the surrender provisions of the lease must address the Tenant’s obligations to comply with federal regulations indirectly pertaining to medical marijuana (throwing boxes of patient documents into a dumpster, as happened in Denver,62 may be bad for business).

The book is high-tech, as e-books these days tend to be, with hyperlinks to Table of Contents to beginnings of chapters and QR Codes placed at the beginning of most chapters that direct the smart-phone or tablet computer reader to cases and documents from federal departments and an illustration of CC&Rs impacting medical marijuana uses. The chapter titles themselves are entertaining, mildly offsetting Widener’s grim reminders of complexities of leasing in the environment where the intended use is illegal under federal law. One advantage to purchasing the book from the publisher’s Web site is that the reader finds the location of the blog where Widener will update the content of the book with snippets of new information.

This is a circumstance of leasing unlike any other; a landlord’s rewards are increased by being very calculating in the negotiation and drafting of the lease. Widener’s e-book, especially the form lease included as an appendix, offers numerous ideas on recognizing and managing the risks of leasing to a medical marijuana tenant—assuming, of course, the landlord can persuade its lender to share its thrill ride.


Widener’s 2011 article spawned his e-book, and is itself available digitally on www.ssrn.com (check on the

search engine under the author’s name) and on the American Bar Association Website for the *RPTEL Journal*.

The article does not contain the extensive form commercial lease, is more dated and is shorter than his e-book, and lacks much of his book’s textual material and sources for further reading. It nonetheless remains a useful outline of “first principles” for landlords. Of course, it is more affordable than his book, since it can be downloaded for free.

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In closing, kudos to recent law journal writers and editors for contributing much to this unique area of practice. Their generation will make complex decisions about the sticky social ramifications of welcoming use of this familiar, albeit federally controlled, substance.

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