Attorney General of New Mexico

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August 6, 2007

Dr. Alfredo Vigil
Cabinet Secretary Designate
New Mexico Department of Health
1190 St. Francis Drive, N-4100
Santa Fe, NM 87502-6110

Re: Request for Opinion - Exposure to Federal Prosecution

Dear Dr. Vigil:

You have asked our advice whether a Department of Health ("Department") employee, or representative acting on behalf of the Department, may be subject to federal prosecution under the Controlled Substances Act ("CSA"), 21 U.S.C.A § 801 et seq., for implementation or management of the medical use marijuana registry and identification card program, if acting in accordance with the statutory mandate of the Lynn and Erin Compassionate Use Act ("Compassionate Use Act" or "Act"). You have also asked whether the Department may facilitate by regulatory authority the licensing of independent producers and production facilities for the purposes of cultivating, possessing and distributing medical marijuana pursuant to the Compassionate Use Act. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that a Department employee, or representative acting on behalf of the Department, may be subject to federal prosecution under the Controlled Substances Act. Assuming arguendo that the Compassionate Use Act does not violate federal law, the Act grants express statutory authority to the Department to promulgate rules that list the requirements for the licensure of producers and cannabis production facilities and procedures to obtain a license.

There is a nationwide public policy debate regarding the propriety of state medical marijuana laws. The 2007 New Mexico legislature enacted the Lynn and Erin Compassionate Use Act to govern the use of medical marijuana in New Mexico. See 2007 N.M. Laws, Ch. 210. The law's enactment raised questions concerning the Department's exposure to federal prosecution under the CSA resulting from its implementation of the Compassionate Use Act and the scope of the Department's authority under that Act.

There are three rules of statutory construction that apply to this matter. First, the United States Supreme Court sets "the law of the land." Bradley v. Milliken, 519 F.2d 679, 680 (1975). Second, a state legislature can enact a statute that authorizes an agency to adopt implementing regulations. See New Mexico Petroleum Marketers Ass'n v. New Mexico Environmental Improvement Bd., 2007-NMCA-060, ¶ 13, 2007 WL 1593294. Third, an agency's authority is limited by statute and therefore regulations must be fully authorized by and consistent with the directions of the governing statute. See Howell v. Heim, 118 N.M. 500, 504, 882 P.2d 541 (1994); Chalamidas v. Environmental Improv. Div., 102 N.M. 63, 67, 691 P.2d. 64 (Ct. App.1984).

1. Exposure to Federal Prosecution Under the CSA

A series of United States Supreme Court and federal court cases govern the topic of legal exposure to federal prosecution for medical marijuana activity. In 2001, the Supreme Court ruled: "The Controlled Substances Act...prohibits the manufacture and distribution of various drugs, including marijuana." United States v. Oakland Cannabis Buyers' Co-Op., 532 US. 483, 486 (2001). The Court rejected the concept of a medical marijuana exemption. This means the Court has concluded that the manufacture and distribution of marijuana, even for medical marijuana use, is illegal. Federal authorities have relied on this ruling to enter into homes to destroy medical marijuana and to prosecute citizens for growing medical marijuana--even when those citizens were acting pursuant to state medical marijuana laws. See Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the federal Commerce Clause prohibits the manufacture, distribution, or possession of marijuana by intrastate growers and users of marijuana for medical purposes--under a preliminary injunction relief analysis); United States v. Rosenthal, 266 F.Supp.2d 1068, 1077 (N.D. Cal. 2003) (defendant who openly grew marijuana for use in a local medical marijuana program authorized by California state law was prosecuted and convicted of federal criminal violation and served one day in jail) aff'd in part, rev'd in part, 454 F.3d 943 (9th Cir. 2006).

The Attorney General's Office has the statutory duty to provide legal advice and representation to state agencies. See NMSA 1978, § 8-5-2 (1975). Therefore, while proponents of state medical marijuana laws may argue that federal authorities have shown little enthusiasm for prosecuting patients beyond the above-mentioned cases and that federal authorities have shown no interest in prosecuting state agencies for implementing a marijuana registry and identification card program, we must caution that the Department and its employees, or representatives acting on behalf of the Department, may be subject to federal prosecution for implementing the Compassionate Use Act.[1]

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[1] As discussed in the text, patients who use medical marijuana pursuant to the Compassionate Use Act are also at risk of federal prosecution. The Legislature's Fiscal Impact Report on Senate Bill 523, the bill enacted as the Compassionate Use Act, noted: "The Office of the Attorney General has noted that until such time as the U. S. Attorney General or the Congress make possession of medical cannabis lawful under federal law, a contrary state law gambles with the personal liberty of those who use medical cannabis as authorized by state law but that still subjects them to criminal prosecution under federal law."
www.legis.state.nm.us/Sessions/07%20Regular/firs/SB0523.html.
See also www.legis.state.nm.us/Sessions/05%20regular/firs/SB0492.html.

Should an employee or a representative of the Department be charged with violating the CSA, that person likely would be unable to seek legal representation from the Attorney General's office. By statute, "the attorney general of New Mexico is directed to act, if requested, as attorney for any officer, deputy, assistant, agent or employee of the state or of a state institution in the event such person is named as a party in any civil action in connection with an act growing out of the performance of his duty...." NMSA 1978, § 8-5-15 (1959) (emphasis added). See also NMSA 1978, § 36-1-21 (1905) (providing for fine and removal from office if attorney general "shall consult with any accused defendant, or in any other manner shall aid the defense of any person accused of any crime or misdemeanor in this state...."). This means the legislature has not authorized our office to defend state officers and employees in criminal cases.

2. Department's Authority to Promulgate Implementing Regulations

The Department's authority to regulate the licensing of independent producers and production facilities for the purposes of cultivating, possessing and distributing medical marijuana is governed by the Compassionate Use Act. Assuming arguendo that it does not violate federal law, the Compassionate Use Act grants express statutory authority to the Department to promulgate "rules in accordance with the State Rules Act...[that] identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain a license." 2007 N.M. Laws, Ch. 210, § 7(A)(5). The deadline for these regulations is October 1, 2007. "[R]egulations...are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes." See New Mexico Mining Ass'n v. New Mexico Water Quality Control Comm., 2007 -NMCA- 010, ¶12, 141 N.M. 41, 46. Thus, the regulations will be presumptively valid under state law if promulgated in a manner that is procedurally and substantively consistent with the governing statute.[2]

Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

STEVE SUTTLE
ZACHARY SHANDLER
Assistant Attorneys General

cc: Albert J. Lama, Chief Deputy Attorney General

[2] It is our understanding that the Department initially deliberated whether to promulgate regulations for the marijuana registry and identification card program by emergency regulation, but elected to follow the Act's provisions governing the issuance of temporary certificates for patient participation in medical use of cannabis program. See 2007 N.M. Laws, Ch. 210, § 10.