

Proposition 64 Discussion: Cannabis Distribution and Delivery

League of California Cities
City Attorney's Spring Conference
May 3 – 5, 2017

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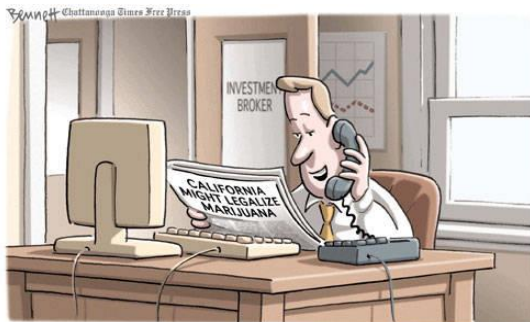
Presenters

Jeff Dunn
Best Best & Krieger, LLP

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Legislative Representative, League of California Cities



PROPOSITION 64: ADULT USE OF MARIJUANA ACT



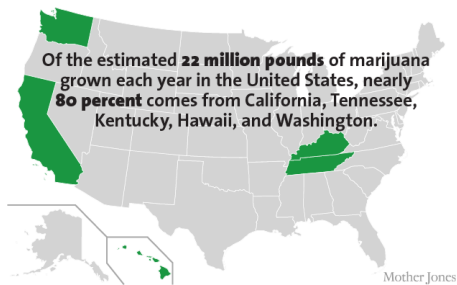
'My advice - buy Frito-Lay.'



Presentation Outline

- **Introduction: A Proposed Analytical Framework for Prop 64 issues**
 - City Attorney's ethical obligations
 - Current federal law and federal enforcement policy
 - Current state law as it relates to the federal law
 - Current municipal authority to regulate marijuana cultivation and distribution
- **Summary of Proposition 64 (AUMA)**
 - Key Differences: AUMA vs. MMRSA
- **Proposition 64 (AUMA) and Regulation**
 - Personal Use and Personal Cultivation
 - State Licensing of Commercial Operations
 - Local Regulation of Commercial Operations





In 2013, California authorities seized **329 outdoor grow sites** and hauled away:



Trespass grows accounted for **72 percent** of outdoor plants seized in California in 2013.



Nearly half of the cannabis eradicated by law enforcement nationwide was on public or tribal land.

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During California's growing season, outdoor grows consume roughly **60 million gallons** of water a day—**50 percent more** than is used by all the residents of San Francisco.



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An estimated **one-third** of America's pot crop is grown indoors.



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An indoor grow module accommodating **4 plants** sucks as much electricity as **29 refrigerators**.

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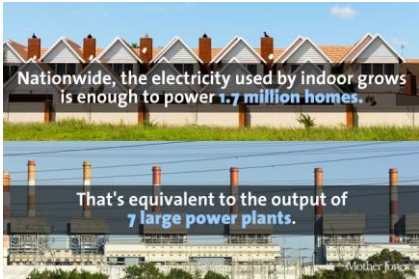
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In California, indoor marijuana grows account for about **9 percent** of household electricity use.

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Nationwide, the electricity used by indoor grows is enough to power **1.7 million homes**.

That's equivalent to the output of **7 large power plants**.

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The energy needed to produce a single joint



is enough to produce 18 pints of beer



and creates emissions comparable to burning a
100-watt lightbulb for 25 hours.



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**Proposition 64: The City Attorney's
Ethical Obligations**

**Existing ethical rules and proposed
legislation for attorneys advising
clients on marijuana cultivation,
distribution and use.**



**"It is the duty of an attorney to . . .
support the Constitution and laws of the
United States and of this state."**

Business and Professions Code section 6068, subdivision (a).



**"A member shall not advise the violation
of any law . . . unless the member believes
in good faith that such law . . . is invalid."**

Rule 3-210 of the Rules of Professional Conduct



“The city attorney shall advise the city officials in all legal matters pertaining to city business.

Government Code section 41808

“The city attorney shall frame an ordinance or resolution required by the legislative body.”

Government Code section 4102



Ethical Principles for City Attorneys¹

Adopted October 6, 2005

City Attorneys Department Business Session

• Fundamental Principles

- **Principle 1 (Rule of Law).** As an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law's purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations.
- **Explanation.** *The city attorney's advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society. Because the public's business is involved, within the city organization the city attorney should consistently point out clear legal constraints in an unambiguous manner, help the city to observe such constraints, identify to responsible city officials known legal improprieties and remedies to cure them, and if necessary, report up the chain of command to the highest level of the organization that can act on the client city's behalf.*

¹When used in this document, the term "city attorney" refers to all persons engaged in the practice of municipal law. This includes attorneys in firms that provide legal services to cities on an ongoing basis that are the functional equivalent to services provided by assistant or deputy city attorneys (for example, on redevelopment and personnel issues).

City Attorney Ethical Principles
Adopted October 6, 2005
https://www.cachters.org/Resources/Documents/Member_Engagement/Professional_Departments/City_Attorneys/City_Attorney_Ethics_Resource/Ethical_Principles_for_City_Attorneys



Examples

1. The city attorney should give advice consistent with the law and the policy objectives underlying those laws, but may consider and explain good faith arguments for the extension or change of a legal principle.
2. The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney's good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be "creative" to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city's actions.



Examples (continued)

3. The city attorney's guiding principle in providing advice and services should be sound legal analysis. The city attorney should not advise that a course of action is legal solely because it is a common practice ("everyone else does it that way"), a past practice ("we have always done it that way"), or because the risk of suit or other consequence for action is considered low.
4. The city attorney's advice should reflect respect for the legal system.



Examples (continued)

5. If the city has made a decision that the city attorney believes may be legally harmful to the city, the city attorney should encourage the city to take any necessary corrective action but do so in a way that minimizes any damage to the city's interests.
6. The city attorney should be willing to give unpopular legal advice that meets the law's purpose and intent even when the advice is not sought but the legal problem is evident to the attorney.



GOVERNMENT CODE SECTION 37100



"The Legislative Body (City Council) may pass ordinances *not* in conflict with the Constitution and the laws of the State or the United States." (Emphasis added.)





CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

CJEO Formal Opinion 2017-010
[Issued April 19, 2017]

On April 19, 2017, the California Supreme Court's Committee on Judicial Ethics issued an opinion advising judges that any interest in a business that involves medical or recreational marijuana is incompatible with a judge's obligation to follow the law. The drug remains illegal under federal law despite California voters approval of Proposition 64.



"An attorney is an officer of the court."

Ruszovan v. Ruszovan (1969) 268 Cal.App.2d 902



Federal Law

- **Controlled Substances Act**
 - Marijuana used for any purpose is a federal crime; Schedule I Drug.
- Aiding and abetting liability;
- Any distribution of marijuana in any premises is illegal.



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Gonzales v. Raich (2005) 545 U.S. 1

- Federal law enforceable despite Compassionate Use Act or Medical Marijuana Program
- No federal medical necessity defense
- Commerce Clause gives Congress power to regulate controlled substances including marijuana for all purposes

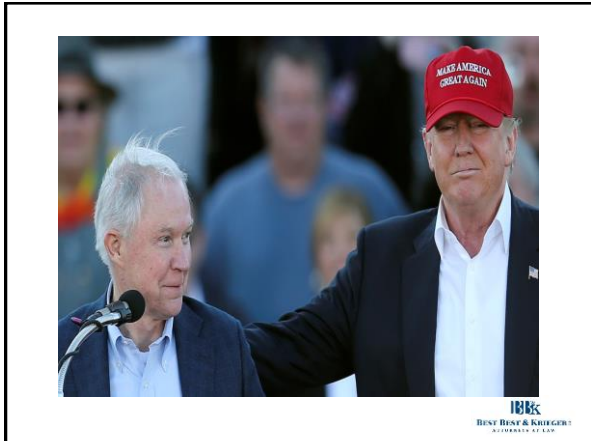
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AN ANALYTICAL FRAMEWORK FOR PROP 64 ISSUES: INTERPLAY BETWEEN FEDERAL, STATE, AND LOCAL LAWS

- **Federal Situation**
 - Illegal – Schedule 1 Controlled Substances Act
 - DOJ memos re Enforcement Priorities
 - Sale/Distribution to Minors
 - Interstate Commerce
 - Use of revenues for other illegal activity
 - Trafficking of other illegal substances
 - Violence and firearm use
 - Driving under the influence
 - Cultivation and use on public/Federal land

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2008

• *Ross v. Raging Wire Telecommunications*
(2008) 42 Cal.4th 920

- No duty to accommodate an employee's use of marijuana under the Compassionate Use Act.
- No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users (see *Gonzales v. Raich*, *supra*, 545 U.S. 1, 26–29).

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ILLUSTRATION BY LEO



Cities and counties are not preempted by state law from enacting ordinances regulating the location of marijuana distribution facilities.

City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc. (2013) 56 Cal.4th 729



Cities and counties are not preempted by state law from regulating outdoor cultivation of marijuana.

Kirby v. County of Fresno (2015) 242 Cal.App.4th 940
and
Maral v. City of Live Oak (2013) 221 Cal.App.4th 975





Summary: Proposition 64 The Adult Use of Marijuana Act (AUMA)

- Legalizes the nonmedical use of marijuana by persons 21 years of age and over and the personal cultivation of six (6) marijuana plants
- Creates state regulatory and licensing system for the commercial cultivation, testing, and distribution of nonmedical marijuana, and the manufacturing of nonmedical marijuana products
- Allows local governments to prohibit or regulate and license commercial nonmedical marijuana
- Takes effect November 9, 2016



Key Differences: MMRSA and AUMA

Medical Marijuana Regulation & Safety Act (MMRSA) v Adult Use of Marijuana Act (AUMA)

	Medical Marijuana Regulation & Safety Act (MMRSA)	Adult Use of Marijuana Act (AUMA)
Focus	Regulates medical marijuana	Regulates nonmedical marijuana
Taxation	Authorizes counties to impose excise taxes	<ul style="list-style-type: none"> • Exempts medical marijuana from state/local sales tax • Imposes state taxes on purchase and cultivation marijuana • Local taxation is not pre-empted, except for sales tax.
Local Regulations	Local governments may allow, regulate, or prohibit commercial marijuana businesses within their jurisdictions. This should be reflected in an ordinance that contains express language.	
Personal Cultivation	Does not alter local authority to prohibit all personal cultivation	<ul style="list-style-type: none"> • Locals can reasonably regulate but cannot ban indoor cultivation for personal use. • Local government may still regulate or prohibit commercial indoor cultivation.



Personal Use

- AGE: 21 years of age or older
- POSSESSION: May possess, process, transport, purchase, obtain, or give away
 - 28.5 grams of non-concentrated non-medical marijuana, or
 - 8 grams of concentrated marijuana products
- USE: May smoke or ingest marijuana or marijuana products
- CULTIVATION: May possess, plant, cultivate, harvest, dry or process up to 6 plants per residence for personal use



Restrictions on Personal Use

- No smoking in a public place (except where authorized locally)
- No smoking where smoking tobacco is prohibited
- No smoking within 1,000 feet of a school, day care center or youth center
- No smoking while driving or riding in a vehicle
- Cities may prohibit smoking and possession in buildings owned, leased, or occupied by the city
- Employers may maintain drug-free workplaces



Personal Cultivation

- Local governments may “reasonably regulate” but not prohibit personal indoor cultivation of up to 6 marijuana plants within a private residence.
- Includes cultivation within a greenhouse or other structure on the same parcel of property that is not visible from a public space.
- Local governments may regulate or prohibit personal outdoor cultivation.



Questions about Personal Cultivation

- What are “reasonable regulations” on personal cultivation of 6 plants within a personal residence?
- Examples:
 - A local requirement for a residential cultivation permit, with an appropriate fee;
 - Requiring as a condition of the permit, that the permit holder agree to periodic inspections (upon appropriate notice), to ensure that cultivation is not:
 - In excess of the six-plant limit
 - Drawing more electrical power from the grid that the structure/house is designed to withstand, thereby causing a fire hazard
 - Presenting a health hazard such as mold accumulation
 - Using more water than is reasonably required to cultivate six plants
 - Express local regulations requiring cultivation to comply with the Fire Code, Building Code and reasonable limitations on the use of water



State Licensing of Commercial Operations

- All nonmedical marijuana businesses must have a state license
- State license cannot be issued to an applicant whose operations would violate the provisions of any local ordinance or regulations
- State license will be valid for one year.
- Separate state license required for each business location.



Local regulation/prohibition of Commercial Operations

- **Cities/counties may regulate or completely prohibit state-licensed marijuana businesses (recreational and medical)**
but may not prohibit use of public roads for deliveries in another jurisdiction
- **State standards are minimum standards.**
Cities/counties may establish additional standards, regulations re: health & safety, environmental protection, testing, security, food safety, and worker protections



Local regulation/prohibition of Commercial Operations

- Proposition 64 does not require a city to enact a regulatory scheme or prohibition by certain date.
- League anticipates that State will not begin issuing licenses before January 1, 2018.
- If city prohibition or regulations in place before business applies for state license, state license either will not issue or be subject to local regulations.



Excise Taxes, Sales & Use Taxes

- **Excise Tax:** All taxes are either property taxes or excise taxes.
 - **Property tax** = tax on ownership of (real or personal) property
 - is triggered by the mere ownership of property.
 - **Excise tax** = tax on the *privilege* of using, doing something with property.
 - Examples of local excise taxes:
 - ✓ business license tax ✓ transient occupancy tax ✓ parcel tax
- **State and Local Sales and Use Tax**
 - The sales tax is a tax on the “privilege of selling tangible personal property at retail” (Calif Rev&TaxCode §6051).
 - The use tax is imposed on the storage, use or other consumption of tangible personal property purchased from a retailer (R&TCode § 6201).



Prop. 64 and Taxation of Marijuana

- Adds state excise tax of 15% on the privilege of purchasing marijuana at retail (Section 34011(a)). *Effective January 1, 2018*
- Adds excise tax of \$9.25/dry-weight ounce (flowers) and \$2.75/dry-weight ounce leaves on the privilege of cultivating marijuana. *Effective January 1, 2018*
- Prop. 64 does not affect local governments’ authority to impose taxes on medical or non-medical marijuana.
- Exemptions:
 - Marijuana cultivated for personal use is exempt from cultivation tax.
 - Medical marijuana is exempt from state/local *sales tax* but NOT other state or local taxes. *Effective November 9, 2016*

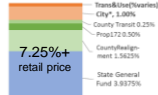


Taxes and Fees on Marijuana under Proposition 64

Applies to non-medical only

Applies to medical and non-medical

Sales and Use Tax



Effective November 9, 2016

State Marijuana Excise Tax

15%
gross receipts
of retail sale

State Cultivation Taxes

\$9.25/oz flowers
\$2.75/oz leaves

Effective January 1, 2018

*city if in unincorporated county

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Allocation* of State Excise Taxes on Marijuana under Proposition 64

*may be altered by majority vote of the Legislature after 2027

60%
youth programs, substance abuse
education, prevention and treatment

20%
environmental cleanup, remediation

20%
Reduce DUI, reduce negative health
impacts re: marijuana legalization

- A city (or county) that bans cultivation, including outside personal cultivation, or the retail sale of marijuana, is not eligible for some grants.

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Local Taxes and Fees on Marijuana

- Prop. 64: The new state excise taxes are "in addition to any other tax imposed by a city, county or city and county" (Calif Rev&TaxCode §34021)
- New, increased, or extended local taxes require voter approval (2/3 for special tax; majority vote for general tax)
- The most common local excise tax is a **business license tax**:
 - Dispensing
 - Manufacturing
 - Cultivation
 - Transportation
- Local governments' sales tax may not differ from Bradley-Burns Uniform Sales and Use Tax Law in either what is taxed or the rate of the tax.

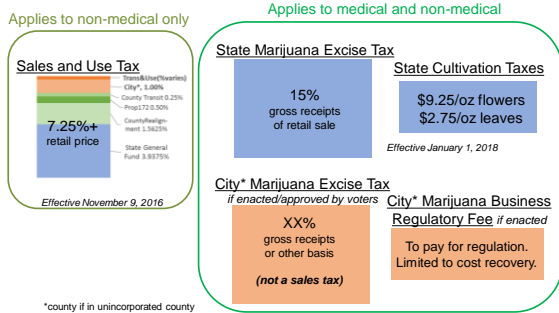
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Local Taxes and Fees on Marijuana Taxes vs. Fees

- **Business License Taxes** allow revenue to be appropriated for any municipal purpose unless the tax has been approved as a “special tax” for a specific purpose.
- **Business Regulatory Fees** may recover the reasonable regulatory costs for issuing licenses and permits, performing investigations, inspections, and audits and enforcing these regulations – and should be scaled appropriately.



Taxes and Fees on Marijuana under Proposition 64



Exemptions from Taxation of Marijuana

- Proposition 64 exempts:
 - marijuana cultivated for personal use from the new state cultivation tax.
 - medical marijuana from state/local sales tax.
- ... but not state or local excise taxes.



State and Local Sales Tax Exemption

- Exempts medical marijuana sales to a patient (or primary caregiver) who has an identification card and a valid government-issued identification from state and local sales and use taxes:

H & S 34011 (g). *The sales and use tax imposed by Part 1 of this division shall not apply to retail sales of medical cannabis, medical cannabis concentrate, edible medical cannabis products or topical cannabis as those terms are defined in Chapter 3.5 of Division 8 of the Business and Professions Code when a qualified patient (or primary caregiver for a qualified patient) provides his or her card issued under Section 11362.71 of the Health and Safety Code and a valid government-issued identification card.*

- NOTE:** Physician's recommendation is not sufficient but is required by Prop. 64.
- Effective November 9, 2016.



State and Local Sales Tax Exemption

- State Department of Public Health required under existing law to establish voluntary program for issuance of identification cards to "qualified patients."
- County health departments process applications and issue identification cards
- Prop. 64: All identification cards must be supported by a physician's recommendation
- Prop. 64: Identification card application system/database may not contain personal information of qualified patients (unique user ID number)
- Prop. 64: County fees limited to \$100 per application. Reimbursement from State is available.



State and Local Sales Tax Exemption

- State Board of Equalization, ***Tax Guide for Medical Cannabis Businesses***
 - intended for the industry but may be helpful to local governments.
 - http://www.boe.ca.gov/industry/medical_cannabis.html
- Statewide, the top five cities levying a sales tax on medical marijuana yield \$6,158,000. (Source: HdL Companies)
- Offsetting sales tax revenue gain from sales of non-medical marijuana: unknown.
- Cities will first experience a reduction in revenues from this source for the fourth quarter of 2016 as of March 2017.



State and Local Sales Tax Exemption Mitigating Sales Tax Revenue Losses

Engage with dispensaries and enforce the terms under which the sales tax exemption applies.

- Patients who wish to claim the sales tax exemption must display a valid medical marijuana card and government-issued identification card.
- The card should be issued by either the California Dept. of Public Health or your county's health department.
- A physician's recommendation alone is not sufficient to obtain the sales tax exemption but is required in support of the application for a card.
- Cities may wish to consider adopting a regulation requiring dispensaries to check for card compliance.

Loss of sales tax revenue from medical marijuana sales will be offset to some degree by sales tax revenue from non-medical marijuana sales.



Local policy issues

Does your city want to:

- Take steps to mitigate anticipated loss of sales tax revenue from medical marijuana in the short term?
- Enact business regulations of non-medical marijuana businesses?
- Require retailers of medical marijuana to enforce eligibility for medical marijuana sales tax exemption?
- Impose local taxes on marijuana?



Issues of Concern

- Local approval in licensing process
- Drugged driving, need for sobriety test
- Banking issues
- Taxation



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Proposed Cannabis Legislation Tuesday, April 25, 2017

Assembly Bills

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AB 1090 (Cunningham R) Marijuana use: location restrictions.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:** 04/21/2017 *Assembly Health (text 3/28/2017)*
- **Status:** 3/29/2017-Re-referred to Com. on HEALTH.
- **Is Urgency:** N
- **Summary:** The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative statute enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, authorizes a person 21 years of age or older to possess and use specified amounts of marijuana. AUMA specifies that this authorization is not construed to permit a person to smoke marijuana or marijuana products within 1,000 feet of a school, day care center, or youth center while children are present at those locations. AUMA also specifies that possessing, smoking, or ingesting marijuana or marijuana products in or upon the grounds of a school, day care center, or youth center while children are present is not permitted. AUMA makes a violation of these location restrictions punishable as an infraction or a misdemeanor, as specified. AUMA authorizes the Legislature to amend its provisions with a 2/3 vote of each house of the Legislature, provided that the amendments are consistent with and further the purposes and intent of the act. This bill would prohibit the possession, smoking, or ingesting of marijuana around a school, day care center, or youth center, as specified, regardless of whether children are present. By expanding the scope of a crime, this bill would impose a state-mandated local program. This bill contains other existing laws.
- **Laws:** An act to amend Section 11362.3 of the Health and Safety Code, relating to marijuana.
- **Calendar:** 4/25/2017 1:30 p.m. - State Capitol, Room 4202 ASSEMBLY HEALTH, WOOD, Chair



AB 1159 (Chiu D) Marijuana: legal services.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:**
- **Status:** 3/29/2017-Re-referred to Com. on JUD.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act, establishes a program for the licensing and regulation of medical cannabis. Existing law authorizes a city, county, or city and county to adopt an ordinance that establishes additional standards, requirements, and regulations for local licenses and permits for commercial medical cannabis activity and provides that statewide standards, requirements, and regulations are the minimum standards for licensure. The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, authorizes the consumption of nonmedical marijuana by persons over 21 years of age and provides for the licensure and regulation of certain commercial nonmedical marijuana activities. This bill would provide that medical cannabis or commercial marijuana activity conducted in compliance with state law and any applicable local standards and regulations is a lawful object of a contract, is not contrary to an express policy or provision of law or to good morals, and is not against public policy. Existing law grants a lawyer's client a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and lawyer, as defined, if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder, or the person who was the lawyer at the time of the confidential communication, as specified. Existing law excepts communications from the privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit, or plan to commit, a crime or fraud. This bill would provide that the above exception does not apply to legal services rendered in compliance with state or local laws on medical cannabis or adult use of marijuana and that confidential communications provided for the purpose of rendering those services are confidential communications, as specified. This bill contains other existing laws.
- **Laws:** An act to add Section 1550.5 to the Civil Code, and to amend Section 956 of the Evidence Code, relating to marijuana.



AB 1578 (Jones-Sawyer D) Marijuana and cannabis programs: cooperation with federal authorities.

- **Current Text:** Amended: 4/17/2017
- **Current Analysis:** 04/21/2017 *Assembly Floor Analysis (text 4/17/2017)*
- **Status:** 4/20/2017-Read second time. Ordered to third reading.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA) provides for the licensure and regulation of medical cannabis, which responsibility is generally divided between the Bureau of Marijuana Control within the Department of Consumer Affairs, the Department of Food and Agriculture, and the State Department of Public Health. The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, provides for the licensure and regulation of commercial nonmedical marijuana activities, which responsibility is also generally divided between those same state entities. Existing law requires the State Department of Public Health to establish and maintain a voluntary program for the issuance of identification cards to qualified patients who have a physician's recommendation for medical marijuana. Existing law requires the counties to process applications and maintain records for the identification card program. This bill would prohibit a state or local agency, as defined, from taking certain actions without a court order signed by a judge, including using agency money, facilities, property, equipment, or personnel to assist a federal agency to investigate, detain, detect, report, or arrest a person for commercial or noncommercial marijuana or medical cannabis activity that is authorized by law in the State of California and transferring an individual to federal law enforcement authorities for purposes of marijuana enforcement.
- **Laws:** An act to add Section 11362.6 to the Health and Safety Code, relating to marijuana.
- **Calendar:** 4/27/2017 #41 ASSEMBLY THIRD READING FILE - ASSEMBLY BILLS



SJR 5 (Stone R) Federal rescheduling of marijuana from a Schedule I drug.

- **Current Text:** Amended: 3/30/2017
- **Current Analysis:** 04/05/2017 [Senate Floor Analyses \(text 3/30/2017\)](#)
- **Status:** 4/6/2017-Read. Adopted. (Ayes 33. Noes 1.) Ordered to the Assembly. In Assembly. Held at Desk.
- **Is Urgency:**
- **Summary:** This measure would request that the Congress of the United States pass a law to reschedule marijuana or cannabis and its derivatives from a Schedule I drug to an alternative schedule and that the President of the United States sign such legislation.
- **Laws:** Relative to federal rescheduling of marijuana from a Schedule I drug.

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The California Supreme Court has granted review in *Union of Medical Marijuana Patients, Inc. v. City of San Diego*

"The City of San Diego did not have to conduct an environmental analysis prior to enacting an ordinance regulating the establishment and location of medical marijuana consumer cooperatives because the ordinance did not have a potential for resulting in a reasonably foreseeable indirect physical change in the environment from increased traffic, building development or indoor cultivation of marijuana and thus was not a project within the meaning of the California Environmental Quality Act (CEQA), [Pub. Resources Code, § 21000 et seq.](#); [2]-The enactment or amendment of a zoning ordinance will not constitute a project unless it also may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."

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Thank you for attending.

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