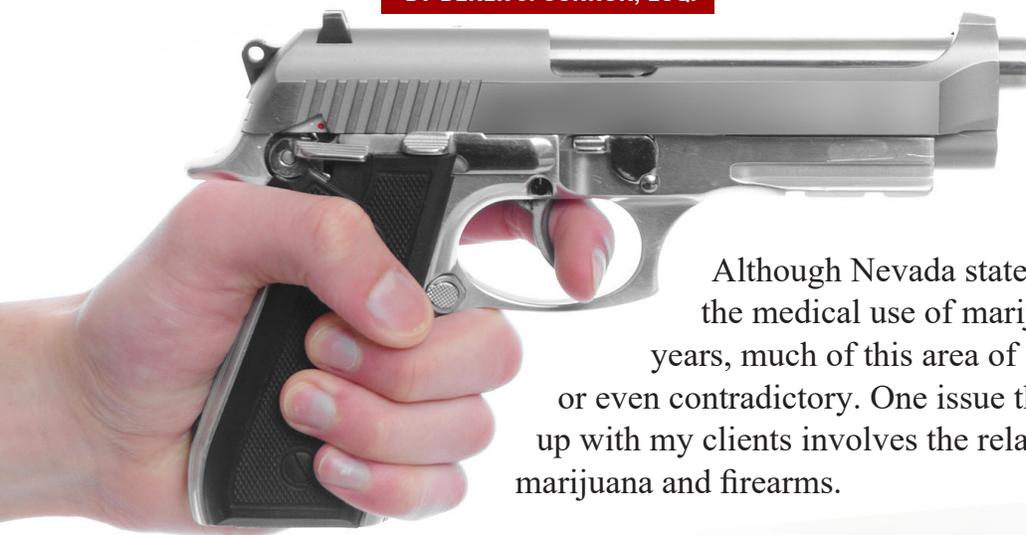


GUNSMOKE: MEDICAL MARIJUANA AND FIREARMS IN NEVADA

BY DEREK J. CONNOR, ESQ.



Although Nevada state law has provided for the medical use of marijuana for roughly 15 years, much of this area of law remains vague or even contradictory. One issue that frequently comes up with my clients involves the relationship between marijuana and firearms.

The Second Amendment

Our right to possess firearms is governed by the Second Amendment to the United States Constitution, which states:

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The U.S. Supreme Court recently held that the Second Amendment does, in fact, guarantee the constitutional right of an individual to keep and bear arms, unconnected with service in the militia. *See, District of Columbia v. Heller*, 554 U.S. 570 (2008). Shortly thereafter, the court held that the individual right to bear arms is incorporated by the due process clause of the 14th Amendment and applies to the states. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

The Federal Prohibition of Marijuana

Pursuant to federal law, it is illegal to cultivate, possess or distribute marijuana. Given that federal law trumps state law, pursuant to the supremacy clause, federal authorities are under no obligation to recognize a medical

Quite simply, under federal law, marijuana users are not allowed to own or possess firearms or ammunition.

marijuana patient card or any other state-issued certification allowing the bearer to possess, distribute or produce marijuana.

Firearms and Marijuana Patients under Federal Law

18 U.S.C § 922(g)(3) prohibits any person who is an “unlawful user of or addicted to” any controlled substance as defined by section 102 of the Controlled Substances Act (21 U.S.C. 802) from possessing firearms or ammunition. Quite simply, under federal law, marijuana users are not allowed to own or possess firearms or ammunition. Legally speaking, we need go no further than this. Attorneys should advise their clients that they are federally prohibited from possessing firearms if they are users of marijuana, whether they have a state issued patient card or not.

Department of Justice Policy regarding Firearms and Marijuana Patients

In a letter to federal firearms licensees, the U.S. Department of Justice stated its position on medical marijuana patients and firearms. *See*, Open Letter to All Federal Firearms Licensees, U.S. Department of Justice, 2011 available at: <http://www.nssf.org/share/PDF/ATFOpenLetter092111.pdf>. The Department of Justice does not believe marijuana patients are allowed to possess firearms or ammunition, and it does not permit federal firearms licensees to sell firearms or ammunition to known medical marijuana patients.

Plaintiffs seeking to challenge the federal restriction on marijuana users have met with little success. In *Wilson v. Holder*, 7 F.Supp 2d 1104, 2014 LEXIS 31905 (D. Nev. 2014), Judge Gloria Navarro of the Nevada District

Court granted the government’s motion to dismiss a challenge to the federal restriction on firearm ownership by a Nevada medical marijuana patient. *See also, United States v. Dugan*, 657 F.3d 998, (9th Cir. 2011) holding that 18 U.S.C § 922(g)(3) did not violate the defendant’s right to bear arms under the Second Amendment to the U.S. Constitution.

Purchasing Firearms as a Marijuana Patient

When purchasing a firearm over the counter from a federally licensed dealer, buyers are required to fill out an ATF Form 4473. Question “11a” of Form 4473 asks buyers whether they are, “an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance.” As stated in its open letter (*See, infra*), the Department of Justice

continued on page 14



Check out the updates to the NV CLE Board website

The NV CLE Board’s website now provides more information and services than ever. As a service oriented regulator, the NV Board of CLE wants to help lawyers meet their continuing education requirement. With that goal in mind, we happily introduce:



Sign up in three easy steps:

- 1) Log onto www.nvcleboard.org and click “Create Account”
- 2) Verify your identity by using your bar number and admission year.
- 3) Create an account with a valid email address and password. (Your email address will become your username.)

In addition to MyNVCLE, a new searchable database of upcoming approved programs is also available at www.nvcleboard.org

Please visit www.nvcleboard.org for information and assistance on meeting your CLE requirements.

Questions? We are here to help.

Contact us at:

Phone: 775-329-4443

Email: nevadacleboard@sbcglobal.net

FIREARMS

MEDICAL MARIJUANA AND FIREARMS IN NEVADA

believes that patients must answer “yes” to the question and that failing to do so could result in a perjury conviction.

Federal Sentencing Enhancements

The penalties under federal law for crimes involving firearms and marijuana can be very severe, particularly in trafficking offenses. *See*, 18 U.S.C. § 924(c).

As a general matter, most patients are unlikely to face federal prosecution for simple marijuana offenses. The federal authorities simply do not have the resources to pursue low-level marijuana users. However, in Nevada where the federal government holds much of the land, patients and users are more likely to have interactions with federal law enforcement than they might in other states.

Marijuana Businesses and Firearms

Given the current banking restrictions, marijuana businesses are largely forced to make their transactions in cash. While the dangers associated with marijuana businesses are often grossly overstated, possession of large amounts of cash and valuable products does make security at marijuana facilities a concern. Some businesses seek to counter the perceived threat by hiring armed security guards or contracting with third-party security companies. Although the presence of armed security may serve its intended purpose, it could also result in federal prosecution. In the Cole Memo, the Department of Justice stated that one of its enforcement priorities is “preventing violence and the use of firearms in the cultivation and distribution of marijuana.” *See*, Memorandum for All United States Attorneys at pg. 2. James M. Cole (2013) Dpt. Atty. General, available at: www.justice.gov/iso/opa/resources/3052013829132756857467.pdf. While they are not binding legal authority, the department has largely adhered to the Cole Memo’s guidelines. Consequently, even though these businesses are generally hiring professional security personnel, they are arguably violating the Cole Memo’s guidelines.

Considerations under Nevada State Law

Nevada state law is largely silent on the issue of medical marijuana and firearms. There does not appear to be anything in Nevada law that would specifically prohibit a marijuana patient from owning a firearm. Unfortunately, this has done little to deter some law enforcement officers from confiscating firearms from otherwise law-abiding patients.

When confiscating firearms from patients, law enforcement has relied on NRS 202.360, which prohibits the ownership or possession of firearms by prohibited persons including: convicted felons, fugitives, or persons who are unlawful users of or addicted to any controlled substance. It appears that some law enforcement officers are of the opinion that simply because a person is a marijuana patient, they are “addicted to a controlled substance” pursuant to NRS. 202.360(1)(c). While some patients may develop a dependency, a blanket assumption of addiction is certainly questionable.

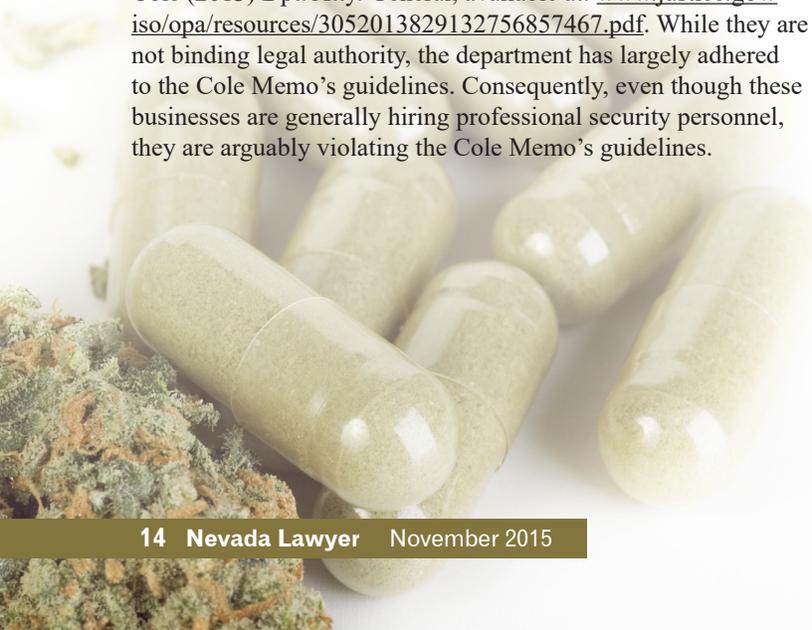
It appears that some law enforcement officers are of the opinion that simply because a person is a marijuana patient, they are “addicted to a controlled substance” pursuant to NRS. 202.360(1)(c).

Use of a Firearm by an Intoxicated Person

While it does not mention marijuana specifically, NRS 202.257 prohibits persons from being in “actual physical possession” of a firearm while under the influence of alcohol or controlled substances to such a degree that would render them incapable of safely exercising control of the firearm. The statute does not prohibit “the actual physical possession of a firearm by a person who was within their personal residence and had the firearm in his or her possession solely for self-defense.” Further, NRS 202.257 specifically states that the firearm is subject to forfeiture only “if the firearm is brandished, aimed or otherwise handled by the person in a manner which endangered others.” Nevertheless, patients should be advised against using marijuana while in control of a firearm.

Concealed Carry Permits and Medical Marijuana Patients

One of the most common questions patients have is whether or not they qualify for a concealed weapons permit (CCW). Pursuant to NRS 202.3657, Nevada residents (and non-residents) may apply to the county sheriff for a CCW; however the law is silent with regard to marijuana patients. Nevada is a “shall issue” state, meaning that once a person has demonstrated they are qualified under the law, the sheriff



must issue that person a CCW. The sheriff must deny an application if the applicant has, within the preceding five years, “habitually used intoxicating liquor or a controlled substance to the extent that his or her normal faculties are impaired.” See, NRS 202.3657(4)(d). It is presumed that a person has so used intoxicating liquor or substances if, during the preceding five years, the person has been convicted of driving under the influence or submitted to civil protective custody. Until as recently as October 2015, the Las Vegas Metropolitan Police Department’s CCW application did not ask if the applicant was a medical marijuana patient. However, the department appears to have reversed course and now, as of this writing, indicates that marijuana patients do *not* qualify for a CCW, due to the federal prohibition on marijuana. Other counties’ applications do not appear to contain such a restriction. Therefore the issue is unresolved at this time.

Pursuant to federal law, there can be only one conclusion: marijuana users may not own or possess firearms or ammunition. Federal prohibition notwithstanding, under Nevada state law the answer is not so clear; there are a scant few laws addressing users of controlled substances and firearms, and none directly dealing with lawful medical marijuana patients. Given the possibility that recreational marijuana use will be legalized in Nevada in 2016, issues relating to marijuana and firearms are only going to increase. Until there is a change at the federal level regarding marijuana’s scheduling under the Controlled Substances Act, marijuana patients and entrepreneurs will continue to be caught in a confusing and often contradictory legal minefield, especially in the case of firearms. **NL**



DEREK J. CONNOR is the co-founder of Connor & Connor PLLC., along with his wife and law partner, Amanda N. Connor, Esq. Derek focuses his practice on business law, civil litigation, regulatory compliance and marijuana law.



Why should you refer to Social Security Lawyers of Nevada?



We only handle Social Security Disability and Supplemental Security Income Cases.

We do not take personal injury or non-disability cases.
We will not give opinions on your client’s non-disability case.
We handle DIB, SSI and DWB claims.

Your client will always be represented by an experienced attorney.

Your clients get the benefit of attorney representation at every level of the disability process. A local, Nevada licensed attorney will always represent your client at the hearing before the Administrative Law Judge.

We have an experienced staff.

Our staff only works on our social security cases. They are dedicated to helping Disability Claimants. They review and summarize relevant medical records.



Know where to send people who are looking for help with Disability Benefits: Social Security Lawyers of Nevada.

(702) 707-2222
www.nvssd.com