SMOKE SIGNALS:

SENATE BILL 276 RELIEVES MEDICAL MARIJUANA INDUSTRY PROBLEMS AND OFFERS NEW LEGAL OPPORTUNITIES

BY JOHN P. SANDE, IV, ESQ.

Ironically, medical marijuana has been a real pain for Nevada's legal practitioners. With the passage of SB 374 in 2013, the medical marijuana program emerged; overseen primarily by the Nevada Division of Public Health, it promised new opportunities for business. Unfortunately, federal legality aside, many other issues have plagued the industry and stalled its progress. Recently, the Nevada Legislature sought to resolve these problems in an effort to allow the industry to advance.

With Republicans controlling majority in both houses, the 78th Legislative session initially seemed unwilling to address medical marijuana issues. Of six bills introduced, only one, AB 70, received a hearing. AB 70 authorizes the Department of Taxation to implement wholesale and retail tax on the sale of medical marijuana. This bill, while important, did little to alleviate industry problems.

The smoke began to clear when Nevada Senator Patricia Farley teamed up with Nevada Senator Tick Segerblom in an effort to pass medical marijuana legislation. Renewing the efforts of then-senator Lieutenant Governor Mark Hutchison, Farley sought to diagnose the problems and prescribe a cure.

Proponents lobbied the legislature to:

1. Revise regulations regarding the transferability of ownership interest;
2. Fix the Incline Village situation; and
3. Fix the Clark County situation.

They argued that these three issues impeded the implementation of Nevada's medical marijuana program and created the greatest amount of consternation among members of the public. A responsible solution to each issue would allow licensed entrepreneurs to finally open their doors.

Transferability of Ownership

The division's original medical marijuana regulations, codified as Nev. Admin. Code ch. 453A (2014), provided that a medical marijuana business must surrender its medical marijuana registration certificate if "10 percent or more of the stock of the medical marijuana establishment was transferred." NAC 453A.326(1)(a). Even though this verbiage seemingly authorized transfers of less than 10 percent of the stock, the regulation provided no mechanism to effectuate these transfers. Additionally, NAC 453A referred solely to the stock of a medical marijuana establishment; it did not reference ownership through other entities, such as partnership interest in a partnership or membership interest in a limited liability company. Thus, whether or not owners of a limited liability company or partnership could transfer any amount of their ownership interest was left to interpretation.

Since violators of NAC 453A.326 must surrender their medical marijuana registration certificate, legal practitioners counseled against the transfer of ownership under any circumstances, even if the proposed transfer was less than 10 percent. The inability to transfer ownership interest burdened many applicants. Investment in medical marijuana establishments is both risky and expensive. Risk-adverse investors and investors who had underestimated the capital requirements of a medical marijuana enterprise could not get out of the business even if the enterprise successfully obtained a medical marijuana certificate. A tourniquet, in the form of the ownership regulation, stopped the progress of the entire enterprise.

Senate Bill 276, passed in June, loosens that restriction. It permits the transfer of ownership as long as the transferee:

1. Meets the requirements of existing law relating to liquid assets;
2. Submits certain information allowing the division to perform background checks; and
3. Provides evidence that the transfer will not violate restrictions preventing the creation of medical marijuana-establishment monopolies.

Although the division has yet to adopt regulations, or otherwise provide the mechanism to effect transfers, legal practitioners can now cite specific law allowing such transfers. SB 276 ensures risk-adverse or cash-strapped investors that they can sell their ownership interests in their medical marijuana establishments; it also allows new investors with additional resources to enter the market and grow the industry.

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The Incline Village Fix

With only 8,777 people, according to the 2010 census, Incline Village hosts 2 percent of Washoe County's population. Despite these figures, the division approved three medical marijuana dispensaries for the Lake Tahoe-adjacent township. With only five dispensaries authorized in Washoe County, Incline Village received over half of the allocations in an area several miles from the population base of Washoe County.[1] All three owners submitted dispensary applications, unaware their neighbors were applying. When the division announced the final approvals, it became apparent that three dispensaries in Incline Village were too many to serve the needs of the area's medical marijuana cardholders. However, regulations disallowed an applicant from relocating an approved location in excess of five miles. While five miles in Las Vegas can mean a dramatic change and provide ample options for relocation, the same cannot be said for Incline Village; the five-mile limit is severely prohibitive there, because Incline Village is surrounded by Lake Tahoe and National Forest area (where the only residents well-placed to become customers for a relocated medical marijuana establishment would be the occasional black bear).

The legislative fix for this situation was fairly simple. Rather than restricting an applicant's ability to relocate to within five miles, SB 276 now permits a medical marijuana establishment to move anywhere within the jurisdiction in which it was approved. One condition remains: prior to local government approval of the relocation, the area residents must be offered an opportunity to address the location in a public forum.

The implications of this legal revision are far-reaching. As with all retailers, location is among the most important of business considerations; the placement of a business can be the key to success or a guarantee of failure. Now, dispensaries in underperforming areas have local government approval to seek the opportunity move to a better market.

Clark County Fix

Perhaps the most controversial aspect of the medical marijuana rollout is the decision by certain local governments to approve special-use permits for medical marijuana dispensary applicants prior to the division's review. Clark County in particular invested significant time and resources in creating an application and review process to vet medical marijuana applicants. However, issues arose when Clark County and the division each approved different sets of applicants. With eight applicants each, the "County 8" (those selected by the county but not the state) and the "State 8" (those selected by the division but not the county) filed lawsuits arguing that the approval they had was a prerequisite for proceeding with a medical marijuana dispensary.

In the preliminary stages of litigation, the courts seemed to side with the State 8, finding that the division, and not the county, should initially vet and rank applicants. However, this was little solace to the State 8. Even with state approval, local governments still needed to approve local land-use applications. In the case of Clark County, the commissioners had little intention of approving any of the State 8, and the case reached an impasse.

Enter the 78th Nevada Legislature. Although the most expedient way to resolve the impasse was to authorize additional medical marijuana dispensary registration certificates, it was a contentious solution. Several legislators took issue with the suggestion to allow more dispensaries without first knowing if the initial number was sufficient to meet demand. Proponents of the legislation needed a solution that wouldn't increase the number of dispensaries initially permitted by SB 374 in 2013. In 2013, the Legislature in SB 374 approved up to 66 dispensaries throughout the state;[2] many counties embraced the program, yet a number of them prohibited, or refused to take action on, approving medical marijuana establishments locally. As a result, only 55 dispensaries emerged statewide. Proponents of SB 276 argued that reallocating the remaining 11originally approved dispensaries would not actually increase the number planned at the outset.

Ultimately, this argument prevailed with lawmakers, and SB 276 was adopted. The division could now reallocate unused medical marijuana certificates to Clark and Washoe Counties, especially to the County 8. And the county was able to reconsider the special use permit applications of the State 8.

Even though the medical marijuana regulation approved by the 2015 Legislature will better support implementation efforts, obstacles remain. This creates opportunities for legal practitioners, who will definitely be consulted by clients in the medical marijuana industry seeking to protect their interests and/or establish their businesses. **NL**

1. Full disclosure: I represented one of the applicants approved in Incline Village; this provides me with some insight into the problems that faced these three groups.
2. Medical marijuana dispensaries were allocated to each county in proportion to its size and a ratio of the number of pharmacies to the number of residents. The allocations were as follows: 40 to Clark County; 10 to Washoe County; 2 to Carson City; and 1 each for every remaining county.

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