EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5544
Facsimile: (415) 703-5480
E-mail: Janezack.simon@doj.ca.gov

Agenda Item 8

April 6, 2007

David T. Thornton
Executive Director
Medical Board of California
1426 Howe Avenue, Suite 54
Sacramento, CA 95825-3236

RE: Review of Federal and California Appellate
Decisions Pertaining to Medical Marijuana

Dear Mr. Thornton:

Pursuant to your request, we have reviewed the current state of the law pertaining to physicians and medical marijuana.

I.
Factual Background
Re Medical Board Policy Statement
On Medical Marijuana

In 1996, California voters passed Proposition 215, the Compassionate Use Act. That Act is codified at Health and Safety Code section 11362.5. Over the next few years, there was confusion among physicians about their role in recommending marijuana to patients. The Medical Board published several statements designed to assist physicians in understanding their role in discussing and recommending marijuana to patients.

In May 2004, the Medical Board of California issued a detailed policy statement setting forth the Board's position. In essence, the policy statement clarified that physicians do not violate the standard of practice when they recommend marijuana to patients, as long as that recommendation is based upon sound principles of medical practice. The policy states that physicians who recommend or approve marijuana for medical use should follow the same

standards "as any reasonable and prudent physician would follow when recommending or approving any other medication, including the following:

1. History and good faith examination of the patient.
2. Development of a treatment plan with objectives.
3. Provision of informed consent including discussion of side effects.
4. Periodic review of the treatment's efficacy.
5. Consultation, as necessary.
6. Proper record keeping that supports the decision to recommend the use of medical marijuana."

II.

Analysis Of Federal And State
Cases Regarding Medical Marijuana

Since the Medical Board issued its policy statement, several cases have been decided by the courts on the broader issue of medical marijuana. While there have been no California state court cases which discuss in any significant way the obligations of the physician in recommending or approving marijuana for medical use, some recent federal court cases have at least mentioned the role of the physician.

Before discussing the recent decisions, however, it is useful to go back to the Ninth Circuit's decision in *Conant v. Walters* (2002) 309 F.3d 629. The *Conant* decision remains the pivotal case for defining the proper role of the physician. The Ninth Circuit concluded that California physicians have a First Amendment right to discuss and recommend the medical use of marijuana to patients, as long as that discussion and recommendation is made in the context of a bona fide physician-patient relationship and is based on sound medical judgment. The court described the role of the physician as that of a designated "gatekeeper" who bears the legal responsibility to make the determination whether the patient is seriously ill and that marijuana use will be limited to medical purposes. As the court observed at pg. 647:

> "[D]octors are performing their normal function as doctors and, in so doing, are determining who is exempt from punishment under state law. If a doctor abuses this privilege by recommending marijuana without examining the patient, without conducting tests, without considering the patient's medical history or without otherwise following standard medical procedures, he will run afoul of state as well as federal law. But doctors who recommend medical marijuana to patients after complying with accepted medical procedures are not acting as drug dealers; they are acting in their professional role in conformity with the standards of the state where they are licensed to practice medicine."

No subsequent cases have altered this well-reasoned and common-sense description of the physician's role and responsibility. In October, 2005, the United States Supreme Court issued its opinion in *Gonzales v. Raich* (2005) 545 U.S. 1. The Supreme Court decision essentially stands for the proposition that the federal government has the authority to regulate

marijuana under the Controlled Substances Act, even where the marijuana use is legally permissible under California law and is purely "local." The Supreme Court did not question the right of physicians to discuss or recommend marijuana. To the extent the role of the physician was addressed, it was only in passing, and specifically notes:

> "Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines."
> (*Gonzales v. Raich, supra,* Thomas J. dissenting.)

In a decision issued in March, 2007, *Raich v. Gonzales*, the Ninth Circuit considered Ms. Raich's case on remand from the Supreme Court. Again, this decision mentions the role of the physician only in passing. There is nothing in the opinion that in any way undermines or questions the Medical Board's policy statement, or the guidelines set forth in the *Conant* decision.

III.
Conclusion:
The Medical Board's Policy Re Medical
Marijuana Is Not Impacted By Recent Case Law

Based upon the above review and analysis, there is no recent legal precedent which would require the Medical Board to revisit its previously issued policy statement on medical marijuana. We will continue to monitor new cases as they are issued by the courts, and will keep you advised of any new developments.

Sincerely,

JANE ZACK SIMON
LAWRENCE A. MERCER
Deputy Attorneys General

For EDMUND G. BROWN JR.
Attorney General

cc: Renee Threadgill, Chief of Enforcement
Carlos Ramirez, SAAG HQE
Jose R. Guerrero, SDAG

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