

Information On Delaware's New Medical Marijuana Affirmative Defense

The Delaware Medical Marijuana Act, which is largely based on the Marijuana Policy Project's model bill, will protect Delaware patients with serious medical conditions from arrest and prosecution for the doctor-recommended, medical use of marijuana. However, protection from arrest is only available to patients with state-issued ID cards, and the cards may not be issued until after July 1, 2012. Patients will not be able to grow their own medical marijuana. Beginning by January 1, 2013, the program will also include tightly regulated, limited distribution of medical marijuana by licensing at least three not-for-profit compassion centers, one in each of Delaware's counties. In the meantime, more limited protections are available to patients.

On July 1, 2011, a limited affirmative defense went into effect. It does not prevent an arrest or a prosecution, but it can be raised and proven in court to prevent a conviction.

If all of the conditions are met, the prosecution is supposed to be dismissed. The defense only applies if:

- The patient is in possession of no more than six ounces of marijuana and no plants.
- The patient possessed marijuana *solely* to treat or alleviate the patient's serious or debilitating medical condition.
- The patient's physician has stated that, "in the physician's professional opinion, after having completed a full assessment of the individual's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from marijuana to treat or alleviate the individual's serious or debilitating medical condition or symptoms associated with the individual's serious or debilitating medical condition."
- The patient was not doing any of the activities prohibited in §4904A of the law, such as driving under the influence of marijuana; possessing marijuana on school grounds, on a school bus, in a jail, or in a state-funded health care or treatment facility; or smoking marijuana in a public place or in any form of transportation.

It is important to remember that this affirmative defense will only be consistently available from July 1, 2011 until 75 days after ID card applications have been made available.

Suggestions For Patients Who May Need To Assert The Affirmative Defense

The following are some suggestions about how qualifying patients could prepare should they need to assert an affirmative defense in court. *However, while this info sheet is based upon the statutory language and the legislative intent behind it, none of these provisions have been tested in court, and there is no certainty that any particular approach will be successful.* In addition, this is not intended as legal advice. You and your lawyer ultimately will make any legal decisions. Nonetheless, here are some suggestions:

- **Determine whether you have a qualifying condition.**
Here is a list of the current qualifying conditions in the law: cancer; HIV/AIDS; decompensated cirrhosis; amyotrophic lateral sclerosis (ALS); agitation of Alzheimer's disease; post traumatic stress disorder (PTSD); or a medical condition that produces wasting syndrome, severe debilitating pain that has not responded to other treatments for more than three months or for which other treatments produced serious side effects, intractable nausea, seizures, or severe and persistent muscle spasms (including but not limited to those characteristic of multiple sclerosis).
- **Talk to your doctor.**
Educate your doctor about the benefits of medical marijuana and why you think medical marijuana might be able to alleviate the symptoms of your condition. Doctors are accustomed to patients bringing ideas to them about best treatment options, and medical marijuana should not be different. However, we have heard of cases of doctors not approving of medical marijuana, and in some cases, doctors have even refused to continue prescribing opiates to patients already using marijuana. You should bring [this document](#) (<http://www.mpp.org/assets/pdfs/library/MedConditionsHandout.pdf>) summarizing some of the major studies for all of the listed conditions, and use it as an educational tool. If your doctor needs further studies or information about medical marijuana's efficacy, you can email Nmamber@mpp.org to request the specific information your doctor lacks.

There will not be a list of Delaware doctors that understand the benefits of medical marijuana. The law anticipates patients receiving recommendations from their own physicians. It requires patients and doctors to have an ongoing bona fide physician-patient relationship, and patients must be under the physician's care for primary care or for their debilitating medical condition. A bona fide relationship may not be limited simply to consultation and authorization for a patient to use medical marijuana, and the doctor must complete an assessment of the patient's medical history and current medical condition.

Doctors should be informed that they are protected when providing a written certification or statement by specific language in the Delaware Medical Marijuana Act from arrest, prosecution, or penalty in any manner, or denial of any right or

privilege, including but not limited to civil penalty or disciplinary action by the Delaware Medical Board or any other professional licensing board. In addition, a federal court of appeals – the Ninth Circuit — ruled in *Conant v. Walters* that, under the First Amendment, the federal government could neither punish nor threaten a doctor merely for recommending the use of marijuana to a patient.¹

If your doctor is convinced that marijuana will be beneficial for your condition, you can ask your doctor to provide a unofficial written statement. Once DHSS has finalized the regulations and ID card process, you will have to return to your doctor with an official written certification form for your doctor to fill out, which will have to be sent to DHSS, along with a completed application and a fee, to get an ID card. However, during this interim period before ID cards are available, patients can use the following [draft form](http://www.mpp.org/assets/pdfs/general/DE-Law-written-certification.doc) (<http://www.mpp.org/assets/pdfs/general/DE-Law-written-certification.doc>) if there is any possibility they will have to assert the defense in court. Doctors can simply print the form on office stationery (and make slight edits if necessary).

You can also note to your doctor that he or she does not need to register anywhere in order to provide you with a written statement. It is also possible that, as a qualifying patient, if you use medical marijuana before ID cards are available and are arrested, you may need to call your doctor to provide further proof of the consultation, such as a signed affidavit or possibly even testimony in court.

- **Follow the rules and use common sense.**

Patients who use medical marijuana before ID cards are available should be aware that they will probably be arrested and prosecuted if they are discovered, which can be costly and stressful. Also, there is no certainty that the affirmative defense will be interpreted as intended and protect their conduct. For those who rely on it out of necessity, it would be wise to always carry a copy of their doctor’s written statement if they are in possession of marijuana and to store any marijuana with a copy of the certification. It is possible an officer may have sympathy or decide that proceeding on a case that should be dismissed is not worthwhile.

Patients must also follow all of the rules on the first page of this handout to qualify for the defense. In addition, they cannot provide marijuana to unauthorized persons or make any fraudulent representation (i.e. lie) to a police officer of any fact or circumstance relating to their medical use of marijuana. Also, please do not do anything you know would be risky or would reflect badly upon other Delaware medical marijuana patients and the medical marijuana movement at large. If you become aware of someone else doing something like that, let him or her know it’s not okay and that we want things to work well here in Delaware. It’s a small state, and word will get back to legislators of shady behavior. Hopefully, everyone will obey the letter and the spirit of the law, and

¹ *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

Delawareans will show the rest of the country how a model medical marijuana program works.

Be safe, and good luck!

Affirmative Defense and Limitations Language

§4913A. Affirmative Defense and Dismissal for Medical Marijuana.

(a) Except as provided in §4904A (Limitations) and this section, an individual may assert a medical purpose for using marijuana as a defense to any prosecution of an offense involving marijuana intended for the patient's medical use, and this defense shall be presumed valid and the prosecution shall be dismissed where the evidence shows that:

(1) A physician states that, in the physician's professional opinion, after having completed a full assessment of the individual's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from marijuana to treat or alleviate the individual's serious or debilitating medical condition or symptoms associated with the individual's serious or debilitating medical condition; and

(2) The individual was in possession of no more than six ounces of usable marijuana; and

(3) The individual was engaged in the acquisition, possession, use, or transportation of marijuana, paraphernalia, or both, relating to the administration of marijuana to treat or alleviate the individual's serious or debilitating medical condition or symptoms associated with the individual's serious or debilitating medical condition.

(b) The defense and motion to dismiss shall not prevail if the prosecution proves that

(1) the individual had a registry identification card revoked for misconduct; or

(2) the purposes for the possession of marijuana were not solely for palliative or therapeutic use by the individual with a serious or debilitating medical condition who raised the defense.

(c) An individual is not required to possess a registry identification card to raise the affirmative defense set forth in this section.

(d) If an individual demonstrates the individual's medical purpose for using marijuana pursuant to this section, except as provided in §4909A (Issuance of Registry Identification Cards), the individual shall not be subject to the following for the individual's use of marijuana for medical purposes:

(1) disciplinary action by an occupational or professional licensing board or bureau; or

(2) forfeiture of any interest in or right to non-marijuana, licit property.

(e) (1) §4913A shall only apply for arrests made after the enactment of this chapter until 75 days after registration for qualified patients is available, and (2) thereafter, for arrests made after a valid an application for a qualifying patient has been submitted and before the registry identification card has been received.

§4904A. Limitations.

(a) This chapter shall does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal, or other penalties for engaging in, the following conduct:

- (1) Undertaking any task under the influence of marijuana, when doing so would constitute negligence or professional malpractice;
- (2) Possessing marijuana, or otherwise engaging in the medical use of marijuana:
 - (A) in a school bus;
 - (B) on the grounds of any preschool or primary or secondary school; or
 - (C) in any correctional facility.
- (3) Smoking marijuana:
 - (A) on any form of public transportation; or
 - (B) in any public place.
- (4) Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana, except that a registered qualifying patient or visiting qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentration to cause impairment.
- (5) Using marijuana if that person does not have a serious or debilitating medical condition.
- (6) Transferring marijuana to any person who is not allowed to possess marijuana under this act.