WHEN MAY A PROBATION CONDITION ALLOWING USE OF MEDICAL MARIJUANA VIOLATE THE CODE OF JUDICIAL CONDUCT? JUDICIAL RESPECT FOR THE LAW AND PROMOTING PUBLIC CONFIDENCE IN THE JUDICIARY

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INTRODUCTION

Judges in states that have legitimatized medical marijuana, such as Colorado, are faced increasingly with the question of whether they must order persons to whom they grant probation in criminal cases to refrain from medical marijuana use. Under federal law it is "unlawful for any person to knowingly or intentionally possess" marijuana.[1] Any person who violates the prohibition may be sentenced to prison for "not more than one year."[2]

Notwithstanding federal law, the Colorado Medical Use of Marijuana Amendment provides an exception from the state's criminal laws for any patient in lawful possession of a "registry identification card," authorizing the holder to use marijuana for medical purposes.[3] While possession of marijuana remains a criminal offense in Colorado,[4] a patient's medical use of marijuana within the limits set forth in the Amendment is deemed "lawful."[5]

Against this legal backdrop, judges recognize that probation is a privilege, not a right.[6] Many convicted persons, including inter alia, im-

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1. 21 U.S.C. § 844(a) (2006); *see also* § 802(6) (2006); § 812(b)(1), (c), sched. I (c)(10) (2006) (defining marijuana as a Schedule I controlled substance).

2. *See* § 844(a). (defining possession of a controlled substance as a federal crime subject to imprisonment of not more than one year); *see also* § 829(a),(b) (2006) (establishing conditions for the lawful prescription of drugs); Gonzales v. Raich, 545 U.S. 1, 27–28 (2005) (holding that, under federal statutes, marijuana has no acceptable medical uses).

3. COLO. CONST. art. XVIII, § 14(2)(b).

4. COLO. REV. STAT. § 18-18-406(1) (2012).

5. COLO. CONST. art. XVIII, § 14(4)(a).

6. *See* People v. Colabello, 948 P.2d 77, 79 (Colo. App. 1997). *Gonzales v. Raich* was decided on commerce clause grounds, not preemption under the supremacy clause (Art. VI). 545 U.S. at 22; *see also* People v. Mentch, 195 P.3d 1061, 1068 (Cal. 2008) (holding that an individual must do more than simply supply a patient with medical marijuana to qualify as a "primary care-giver"); State v. Mullins, 116 P.3d 441, 446 (Wash. Ct. App. 2005) (same).

paired drivers, gain this privilege, especially first offenders. When a defendant is granted probation, the court suspends what might be a harsher punishment, if consistent with the offender's potential for rehabilitation and the safety of the community.[7] In effect, probation is a contract between the court and the convicted person, allowing him or her to avoid jail by good conduct and following all the terms of probation. If the defendant breaches those terms, the judge revokes probation and imposes another sentence.[8] The same reasoning applies to juvenile offenders.[9] The question then becomes, can a judge impose a probation condition banning marijuana use when the defendant is a medical marijuana user.?

ETHICAL CONSIDERATIONS

The American Bar Association's Model Code of Judicial Conduct (the Code) provides a template for each state to adopt as its own Code of Judicial Conduct.[10] Colorado's 2011 Code of Judicial Conduct follows the language of the ABA Code in all pertinent respects: Canon 1 requires in Rule 1.1(A) that "[a] judge shall comply with the law, including the Code of Judicial Conduct."[11] Rule 1.2 states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[12] Canon 2 in Rule 2.2 requires that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.[13] The Code's definition of "'law' encompasses court rules and orders as well as statutes, constitutional provisions, and decisional law."[14] Comment 2 in Canon 2 says, "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."[15]

7. Holdren v. People, 452 P.2d 28, 30 (Colo. 1969).

8. *See* Gagnon v. Scarpelli, 411 U.S. 778, 780, 791 (1973) (defendant's probation was revoked and his original sentence reinstated for "associat[ing] with known criminals" in violation of his probation terms and being "involved in, and arrested for, a burglary;" the Supreme Court, on habeas corpus petition later held that due process entitled defendant to hearing before revocation of probation).

9. *See In re* Gault, 387 U.S. 1, 4–5, 7–9 (1967) (juvenile's probation revoked and juvenile "committed . . . as juvenile delinquent to State Industrial School" until age 21 or "discharge by due process of law;" the Supreme Court, on habeas corpus petition, held that the revocation of probation did not meet procedural due process requirements); *in re* B.L.M., 500 P.2d 146, 147–48 (Colo. App. 1972) (juvenile's probation revoked after state presented evidence that juvenile was involved in criminal activity in violation of terms of his probation).

10. MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990) (amended 2010).

11. COLO. CODE OF JUDICIAL CONDUCT, Canon 1, R. 1.1(A) (2011).

12. *Id.* R. 1.2.

13. *Id.* Canon 2, R. 2.2.

14. *Id.* at 4.

15. *Id.* at Canon 2 cmt. 2.

MANDATORY CONDITIONS OF PROBATION

The American Bar Association Standards Relating to Sentencing Alternatives and Procedures (1968), the ABA Standards Relating to Probation (1968), and the ABA Standards for Traffic Justice (1974) each encourage the use of probation in preference to incarceration as long as such a sentence does not unduly diminish the seriousness of the offense.[16] Probation has been described as "a matter of grace."[17] Trial judges are alert to an offender's potential for rehabilitation, and many face the reality of overcrowded jails when making decisions on whether to grant probation.[18] Drug and alcohol treatment providers are a large part of the therapeutic landscape, and many successes are realized by addicted persons who genuinely desire to recover.

In Colorado, as in all other states, "probation is a statutory creation and the terms of probation must be derived from the applicable statute."[19] Colorado law identifies mandatory and discretionary conditions for probation, and states:

> [C]onditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so. The court shall provide as [an] explicit condition[] of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.[20]

In considering probation, the court necessarily considers community protection, the seriousness of the offense, "and the offender, in that order."[21] Standard conditions of probation require no excessive consumption of alcohol or controlled substances.[22] Monitoring by toxicology testing or Antabuse™[23] may also be a requirement. Persons on probation waive certain privacy rights enjoyed by other members of society, such as the right to be free from unreasonable searches and seizures, and they

16. ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 63–64, 240 (1967) (Probation Standards § 1.3; Sentencing Alternatives Standards §§ 2.3 and 5.3; Traffic Standards § 4.3).

17. Gehl v. People, 423 P.2d 332, 334 (Colo. 1967).

18. Many Colorado county sheriffs place numeric limits on non-violent prisoners the county jail will hold, and may ask judges to release non-violent prisoners to meet the limits. The author has been contacted by county sheriffs in four counties—Adams, Gilpin, Jefferson, and Summit—about such limits and releases.

19. People v. Brockelman, 933 P.2d 1315, 1318 (Colo. 1997).

20. COLO. REV. STAT. § 18-1.3-204(1) (2012).

21. Logan v. People *ex rel.* Alamosa Cnty., 332 P.2d 897, 899 (Colo. 1958); *see Brockelman*, 933 P.2d at 1318–19.

22. *See* COLO. REV. STAT. § 18-1.3-204(2)(a) (2012).

23. 14 ROBERT DIETER, COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 6.46 (2d ed.) (2011).

must accept the inevitable random visit by the probation officer as well as drug and alcohol screening.[24]

State laws also require a person on probation not to violate any federal, state or local laws or orders of court.[25] While the possession of marijuana remains unlawful under federal law,[26] the highly publicized October 19, 2009 Department of Justice memo on marijuana enforcement brings little clarity to the situation.[27] Marijuana remains on the controlled substances list and thus is *ipso facto* illegal, but the memorandum states that the U.S. government will not prosecute compliant patients in states permitting marijuana use by persons with debilitating medical conditions[28]. Under this state of the law, an applicant for probation who participates in a legal marijuana compassionate use program squarely presents a sentencing judge with a real-life conundrum on how to apply seemingly conflicting federal and state laws.[29]

EFFECT OF LOCAL RULES OF COURT ON SENTENCING A MEDICAL MARIJUANA PATIENT TO PROBATION

Six of Colorado's twenty-two judicial districts are governed by blanket chief judge orders forbidding the use of medical marijuana for anyone on supervised probation, thus restricting trial judges' options.[30] Two districts (i.e., the third and nineteenth) allow probationers to continue their prescribed use of medical marijuana.[31] In the remaining districts, judges have addressed the issue on a case-by-case basis,[32] until the recent case of *People v. Watkins*.[33] In that case, the Colorado Court of Appeals vacated a trial court's order approving a defendant's use of marijuana for

24. *See* COLO. REV. STAT. § 18-1.3-204(2)(a)(X) (2012); United States v. Knights, 534 U.S. 112, 118–19 (2001).

25. *See, e.g.*, COLO. REV. STAT. §18-1.3-204 (2012); People v. Colabello, 948 P.2d 77, 78, 80 (Colo. App. 1997).

26. Controlled Substances Act, 21 U.S.C. §§ 801, 812, 844(a) (2006).

27. Memorandum from Deputy Attorney Gen. David W. Ogden to Selected United States Attorneys 1–2 (Oct. 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf. Deputy Attorney General Ogden's memorandum announced that federal prosecutorial priorities should not target "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." *Id.* Nonetheless, it states that the "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority," and that it "does not 'legalize' marijuana or provide a legal defense to a violation of federal law. *Id.*

28. *Id.*

29. Under principles of federalism as expressed in the U.S. Constitution, "states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Addington v. Texas, 441 U.S. 418, 431 (1979). This freedom extends to the "great latitude" given the states "under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

30. Jeffrey Wolf, Deborah Sherman, & Nicole Vap, *Colo. Judges Play Doctor with Medical Marijuana Cards*, 9NEWS.COM (Feb. 4, 2010, 12:27 PM), http://www.9news.com/rss/story.aspx?storyid=132165.

31. *Id.*

32. *Id.*

33. No. 10CA0579, 2012 WL 310776 (Colo. App. Feb. 2, 2012).

medical purposes while on probation.[34] The court of appeals concluded that state criminal law[35] requires that probation sentences include a condition that probationers not commit criminal offenses, including federal offenses, notwithstanding the Colorado Medical Use of Marijuana Amendment.[36]

Appellate courts, faced with the question of whether courts have authority to impose a sentencing condition that denies a qualifying patient the right to use medical marijuana in accordance with permitted state use, have reached divergent results.[37] Some Colorado trial judges have expressed some discomfort with the strictures of the *Watkins* decision and with local chief judge orders limiting their exercise of judicial discretion to fashion the terms of probation to the unique needs of individual cases.[38] They point to cases in other jurisdictions which seem to reach a result contrary to *Watkins*, such as *People v. Tilehkooh*,[39] in which the California Court of Appeal reversed a probation revocation for marijuana possession for "failure to obey all laws" because state courts do not enforce federal law.[40] In *City of Garden Grove v. Superior Court*,[41] that same California court also held that federal law did not preempt state law on the issue of medical marijuana and probation, so that the defendant was entitled to have the marijuana evidence returned to him after criminal charges had been dismissed.[42] Similarly, in *People v. Bianco*,[43] the same court held that trial judges must be free to "impose conditions of probation that [may] impinge on a defendant's constitutional rights if they are 'narrowly drawn' and 'reasonably related to a compelling state interest in reformation and rehabilitation.'"[44]

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34. *Id.* at *7.

35. COLO. REV. STAT. § 18-1.3-204(1) (2012).

36. *Watkins*, 2012 WL 310776, at *7. Attorney Sean McAllister sought review of the decision in the Colorado Supreme Court, stating that "[t]he Court of Appeals is undermining Colorado law and trying to enforce federal law on their own . . . . Judges don't have the expertise to decide what a defendant needs for his health care needs. It should be up to the doctor." Felisa Cardona, *Colorado Court of Appeals Nixes Medical-Pot Use for Those on Probation*, DENVER POST, Feb. 8, 2012, at 4B. However, the Supreme Court denied certiorari, but Chief Justice Bender and Justice Márquez would have granted as to "[w]hether trial courts have the discretion to allow a seriously ill Colorado probationer to use medical marijuana during a term of probation after the court considers the individual circumstances of the case and the offense for which probation is imposed." Watkins v. People, No. 12SC179, 2012 WL 1940753 (Colo. May 29, 2012).

37. *See, e.g.*, People v. Tilehkooh, 113 Cal. App. 4th 1433, 1438, 1447 (2003); City of Garden Grove v. Superior Court, 157 Cal. App. 4th 355, 386 (2007); People v. Bianco, 93 Cal. App. 4th 748, 750–51 (2001).

38. Interviews with trial judges participating in ethics programs the author presented in 2009–11.

39. 113 Cal. App. 4th 1433 (2003).

40. *Id.* at 1438, 1447. *Accord* State v. Nelson, 195 P.3d 826, 833–834 (Mont. 2008) (using the same analysis, the trial court exceeded its jurisdiction requiring defendant to comply with all federal laws).

41. 157 Cal. App. 4th 355 (2007).

42. *Id.* at 386, 391.

43. 93 Cal. App. 4th 748 (2001).

44. *Id.* at 754–55 (quoting People v. Hackler, 13 Cal. App. 4th 1049, 1058 (1993)).

Although the *Watkins* court distinguished the cases permitting judges to authorize medical marijuana patients to continue their use of marijuana while on probation, this decision raises questions regarding judicial independence and the extent to which a judge must exercise judicial restraint under the Code of Judicial Conduct in applying the law, regardless of personal philosophy. The Colorado Supreme Court has expressed its discomfort with a statute that established a classification of marijuana that was contrary to the "overwhelming weight of [scientific] authority."[45] In that case, the court recognized its ethical responsibility to give great deference to a legislative classification, even one with which it strongly disagreed. Although the majority encouraged the legislature to amend the questionable law and demonstrate that it "is in touch with scientific reality," nonetheless it left reforming the law to the General Assembly.[46] In the dissenting opinion, Justice Lee disagreed, quoting Chief Justice John Marshall in *Marbury v. Madison*,[47] who declared "it is emphatically the province and duty of the judicial department to say what the law is,"[48] concluding that "[a] [c]ourt is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared."[49] Later, when the Colorado Supreme Court confronted the same issue in *People v. Bennett*,[50] it again deferred to the legislature, "[a]t least for the time being."[51] After the issue arose for the third time in *People v. Steed*,[52] the Court referred to Canon 2 of the Code of Judicial Conduct[53] saying, "[p]erhaps a dissent may be written in a succeeding case or two, but in our minds the Code of Judicial Conduct should bury the idea of a judge dissenting on the same issue Ad infinitum."[54] The court's comment in *Steed* may be explained by the legislature at last having followed the court's recommendations and amended the law, although not in time to benefit the *Steed* appellant.

Several cases from other jurisdictions are helpful in understanding the tension between judicial reactions to statutes restricting judges' discretion and prevailing notions of judicial independence. A New Mexico judge objected to his chief judge's order transferring juvenile cases out of his court and dispersing them among the other judges' divisions of the court.[55] Enraged, Judge Castellano purported to countermand the chief

45. People v. Summit, 517 P.2d 850, 852 (Colo. 1974).
46. *Id.* at 851–54.
47. 5 U.S. (1 Cranch) 137 (1803).
48. *Id.* at 177.
49. *Summit*, 517 P.2d at 855 (Lee, J., dissenting) (quoting Chastleton Corp. v. Sinclair, 264 U.S. 543, 547 (1924)).
50. 536 P.2d 42 (Colo. 1975).
51. *Id.* at 430.
52. 540 P.2d 323 (Colo. 1975).
53. COLO. CODE OF JUDICIAL CONDUCT, Canon 1, R. 1.1 (2010) (stating that "[a] judge should comply with the law").
54. *Steed*, 540 P.2d at 326 n.3.
55. *In re* Castellano, 889 P.2d 175, 180–81 (N.M.1975).

judge order and held the court administrator in contempt for refusal to follow his directions, sentencing her to jail. The state supreme court stepped in, prohibiting his actions, and ultimately removed him from office for, inter alia, failure to follow the law, in violation of Canons 1 and 2 of the Code.[56] Similarly, an Indiana trial judge was reprimanded for failing to obey an appellate court mandate to vacate an improper sentence, which caused a prisoner to spend an extra year in prison.[57] An Ohio judge was suspended for false and incendiary statements made during a television interview that were critical of the appellate court that had just reversed one of his decisions.[58] A Wisconsin trial judge who refused to follow his chief judge's order setting trial court hours and threatened to "go public" with untruthful stories about the chief judge was suspended for failure to follow the law and attempted extortion.[59]

In jurisdictions with laws permitting use of marijuana by persons diagnosed with debilitating medical conditions and without superseding appellate opinions or other requirements restricting the probation option, the sentencing judge considering probation must carefully review the offender's pharmaceutical regimen. If the offender is demonstrably incapable of controlling his or her behavior when under the influence of any drugs—legal or illegal—probation would be an ill-considered sentence. However, an offender who is prescribed any drug (including medical marijuana) that has the potential to impair ability to drive, but who at the same time is willing to abide by the law and not drive a car while taking that drug, might be a good candidate for probation, if not otherwise indicated by the facts.

Clearly, courts may order a probationer to abstain from alcohol and controlled substances as a condition of probation.[60] Equally certain is that courts may prohibit the use of illegal drugs.[61] Judges know that a probationer who professes to work toward rehabilitation may lead a law-abiding life and be a safer driver if on a program of monitored abstention from either legal or illegal intoxicants.[62] Judges recognize that community safety and protection are furthered when an alcoholic in recovery is on a monitored sobriety program. With alcohol prohibited, this probationer is more likely to work through the recovery program successfully;[63] from this a judge may infer that a successful recovery program will reduce the

56. *See id.* at 182–85.

57. *In re* Newman, 858 N.E.2d 632, 633–36 (Ind. 2006).

58. Office of Disciplinary Counsel v. Ferreri, 710 N.E.2d 1107, 1108, 1111 (Ohio 1999).

59. *In re* Judicial Disciplinary Proceedings Against Crawford, 629 N.W.2d 1, 3, 11 (Wis. 2001); *see also In re* Lokuta, 11 A.3d 427, 43–32, 449–50 (Pa. 2011); Cal. Comm'n on Judicial Performance, *Public Admonishment of Judge Anthony C. Edwards* 2 (Feb. 7, 2012), http://cjp.ca.gov/res/docs/public_admon/Edwards_2-7-12.pdf (ruling that judge abused his authority and violated his duties to "respect and comply with the law" and to "be faithful to the law").

60. COLO. REV. STAT. § 18-1.3-204(2)(a)(VIII) (2012).

61. *Id.* §§ 18-1.3-204(1), (2)(a)(VIII)).

62. *Id.* §§ 18-1.3-204(2)(a)(VIII) (XIV.5), 42-4-1307(7)(b)(VI) (2012).

63. *See id.* § 18-1.3-204(1).

likelihood of the offender returning to drinking or drugging and driving. However, a prohibition of prescribed medication use is rarely a provision of probation.[64]

Should the same rationale governing alcohol use also apply to medical use of marijuana? If the offender demonstrates a propensity to drive a vehicle while impaired by prescribed medications of any kind, a judge may deem the defendant a danger to society and decline to grant probation. Whether the drug of choice is alcohol, Vicodin™, NyQuil™ or marijuana, a judge may regulate its use as a requirement of probation.[65] However, the difference under the law between these substances turns on whether the use is recreational or medically therapeutic. Few have the temerity to argue with a straight face that alcohol use is therapeutic. True, it may relax, relieve tension, and provide a pleasurable high to the drinker, but its medical use is limited to local sterilization. Medication, whether available over the counter or by prescription only, is arguably different. A speaker at the Marijuana at the Crossroads Symposium at the University of Denver Sturm College of Law opined that differentiating marijuana from the other drugs because of its recent history as a recreational drug does not settle the question.[66]

JUDGES' CHOICES

Judges need to examine their own state's law on medical marijuana, in particular whether it provides immunity or an affirmative defense to a marijuana patient or provider. It is reasonable to question the wisdom of

64. While possession of marijuana remains a criminal offense in Colorado, *id.* § 18-18-406(1), a patient's medical use of marijuana within the limits set forth in the Amendment is deemed "lawful" under subsection (4)(a) of the Amendment. COLO. CONST. art. XVIII, § 14(4)(a). Under the Amendment, however, a physician does not prescribe marijuana, but may only provide "written documentation" stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana. COLO. CONST. art. XVIII, § 14(2)(c)(II); Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 973 (Colo. App. 2011) (stating that "a physician's inability to prescribe marijuana under Colorado law is reflected in the very physician certification" which specifies that '[t]his assessment is *not* a prescription for the use of marijuana'"). Therefore, a defendant's physician's certification does not constitute a "written lawful prescription" as required by the terms of his probation.

The Colorado Supreme Court denied certiorari in *Beinor* but Chief Justice Bender and Justice Márquez would have granted as to the following issues:

> Whether the medical marijuana provisions of the Colorado Constitution, article XVIII, section 14, confer a right to use medical marijuana or merely protection from criminal prosecution.
>
> Whether petitioner was erroneously disqualified from receiving state unemployment compensation benefits under 8–73–108(5)(e)(IX.5),for violating his employer's zero–tolerance drug policy by having marijuana in his blood, notwithstanding his authorization to use medical marijuana.

Beinor v. Industrial Claim Appeal Office, No. 11SC676, 2012 WL 1940833 (Colo. May 29, 2012).

65. COLO. REV. STAT. § 18-1.3-204(2)(a)(VIII), (XV) (2012).

66. Jill Lamoureux-Leigh, a representative of Colorado marijuana dispensary owners and active with Colorado state regulatory activities. *See* Chase Squires, *Grass Confusion: DU Law Panel Tackles Tangled Marijuana Laws*, DENVER POST, Feb. 9, 2012, at 14C, http://yourhub.denverpost.com/denver/grass-confusion-du-panels-tackle-tangled-marijuana-laws/VmSaSuasj1UEnxHoawxO8J-ugc.

converting a recreational drug to a medical drug by popular vote.[67] Many judges fear that state initiatives approving medical marijuana are simply a back-door approach to legalizing all drugs.[68] Some are chiefly concerned that marijuana use violates the law regardless of whether the federal government intends to enforce it against medical users and, thus, is incongruous with the requirement that a probationer be law-abiding.[69] In their view, the Code of Judicial Conduct renders unethical a sentencing judge's decision to overlook the illegality of marijuana use under federal law, despite its state-sanctioned medical use.[70]

Each case before a judge must be carefully examined on its own merits and the applicable law. A judge's comfort level may be elevated by evidence at sentencing about the defendant's medical condition and the effects of prescribed marijuana upon it. If any applicant for probation appears to be using any prescribed medication in bad faith, such use may serve as a factor in the judge's weighting of the community safety and protection sentencing goals in deciding the probation issue. Judges may determine that a defendant's marijuana use for medical purposes is in bad faith if there exists no debilitating medical condition to support the patient's placement on the state registry of qualified medical marijuana users.[71] Other factors which may influence a judge to determine bad faith medical marijuana use are: (1) the marijuana use is reasonably related to the crime for which the defendant was convicted; (2) a demonstrated likelihood that the defendant will possess marijuana for non-medical purposes, or in greater quantities than permitted for medical purposes under law; (3) a demonstrated tendency on the defendant's part to become addicted to drugs; or (4) a demonstrated likelihood that medical marijuana use will undermine a court ordered substance abuse treatment program.[72]

Whether marijuana prohibition eventually goes the way of the Eighteenth Amendment to the U.S. Constitution and the Volstead Act is unknowable.[73] It is important not to sentence by rote, formula, and man-

67. As Ninth Circuit Court of Appeals Judge Alex Kozinski stated in his concurrence in *Conant v. Walters*, while the allowance of medical marijuana "may seem faddish or foolish . . . the public record reflect[s] a legitimate and growing division of informed opinion on this issue." 309 F.3d 629, 640 (9th Cir. 2002) (Kozinski, J. concurring). "A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs." *Id.* at 640–41.

68. Interviews with judges attending programs the author presented 2009–11. *See supra*, note 38.

69. *Id.*

70. *Id.*

71. *See* COLO. REV.STAT. § 18-18-406.3(2)(a) (2012).

72. People v. Lent, 541 P.2d 545, 548 (Cal.1975).

73. Alcohol prohibition under the Eighteenth Amendment in 1919, U.S. CONST. amend. XVIII, was repealed fourteen years later by the Twenty-first Amendment in 1933. U.S. CONST. amend. XXI.

datory guidelines.[74] In states where the law provides complete immunity to a qualifying medical marijuana user, appellate courts have resolved the issue without regard to questions of judicial ethics.[75] Resolving inconsistencies and harmonizing conflicting views have always been a part of the judicial job description.[76] The current anomalous state of the law on medical marijuana is one of the challenges judges must face, but it is not insurmountable.

74. In *United States v. Booker*, the Court held that the federal sentencing guidelines, previously mandatory, should be treated as merely advisory to cure a constitutional deficiency in the system. 543 U.S. 220, 259 (2005) (Breyer, J.).

75. *See Tilehkooh*, 113 Cal. App. 4th at 1438, 1447; *City of Garden Grove*, 157 Cal. App. 4th at 386; *Bianco*, 93 Cal. App. 4th at 750–51 n.41; *see also Nelson*, 195 P.3d at 833–34.

76. The Colorado rules of statutory construction offer little guidance. *See* COLO. REV. STAT. § 2-4-201–216 (2012). In particular, the preference favoring local over general applicability of conflicting statutes in § 2-4-205 applies to conflicts in state law, rather than conflicts between federal and state law.