

Michigan AG: Portion of Medical Marihuana Act Unconstitutional

On November 10, 2011, Michigan Attorney General Bill Schuette took another slice out of the Michigan Medical Marihuana Act by concluding a subsection of the Act is preempted by federal law.

In [Attorney General Opinion Number 7262](#), the AG concluded that Section 4(h) of the MMA, which states that lawfully possessed medical marihuana must not be seized or forfeited, would require police officers to violate federal law:

[U]nder section 4(h) a law enforcement officer must return marihuana to a registered patient or caregiver if the individual's possession complies with the MMMA. But the [federal Controlled Substance Act] prohibits the possession or distribution of marihuana under any circumstance. If a law enforcement officer returns marihuana to a patient or caregiver as required by section 4(h), the officer is distributing or aiding and abetting the distribution or possession of marihuana by the patient or caregiver in violation of the [federal Controlled Substance Act]. Thus, a Michigan law enforcement officer cannot simultaneously comply with the federal prohibition against distribution or aiding and abetting the distribution or possession of marihuana and the state prohibition against forfeiture of marihuana. In other words, it is "impossible" for state law enforcement officers

to comply with their state-law duty not to forfeit medical marihuana, and their federal-law duty not to distribute or aid in the distribution of marihuana.

In coming to this conclusion, the AG quickly brushed aside Section 855(d) of the federal Controlled Substances Act, which grants state police officers immunity in the “enforcement” of a law related to controlled substances. It’s worth noting that California and Oregon courts reached opposite conclusions on a similar issue. *City of Garden Grove v Orange County*, 157 Cal App 4th 355 (2007) ([PDF](#)); *State v Kama*, 178 Or App 561 (2002) ([Google Scholar](#)).

Medical marijuana has been the topic of three out of the last four Attorney General opinions. With a Legislature unable or unwilling to move on the numerous bills before them, and an excruciatingly slow judicial process, the Attorney General is providing some of the only state sanctioned opinions on this law.

And when the person with the loudest voice is the same person who led the failed opposition to medical marihuana in 2008, it’s a safe bet this isn’t the last we hear from him.