Section Eight

Michigan Medical Marihuana Act's Affirmative Defense Provision

By Allison M. Arnold, Mary Chartier, and Bernard A. Jocuns

Under Michigan law, it is a crime to use, possess, manufacture, or deliver marijuana.[1] This law was not changed with enactment of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq.* Rather, the act provides protection from state prosecution under two independent sections. An immunity provision under MCL 333.26424 (Section 4) allows registered patients or their caregivers to possess up to 2.5 ounces of "usable marihuana" and up to 12 plants contained within an "enclosed, locked facility" for medical use. There is also an affirmative defense provision under MCL 333.26428 (Section 8), which does not impose these registration, quantity, or storage restrictions, but has separate elements. The Michigan Supreme Court has held that the act is designed to benefit those who properly register and comply with the immunity provision of Section 4, and that "the elements of [Section] 8 are clearly more onerous than the elements of [Section] 4."[2] This article details the necessary requirements to present a Section 8 defense.

The Michigan Medical Marihuana Act provides that Section 8 is applicable to patients and their primary caregivers regardless of whether they are registered under Section 4. Under the act, a "patient" is one who has been diagnosed by a physician as having a "debilitating medical condition,"[3] which is defined by a list of serious qualifying illnesses within the act.[4] A "caregiver" is required to be an individual at least 21 years old who has agreed to assist the patient's medical use

of marijuana and who has never been convicted of a felony involving illegal drugs or certain serious assaultive crimes or any felony within the last 10 years.[5]

Individuals who meet the patient or caregiver definitions may assert a Section 8 defense to any prosecution involving marijuana. The defense is presumed valid when:

- a physician has given a professional stated opinion after completing a full assessment of the patient's medical history and current medical condition, made in the course of a "bona fide physician-patient relationship," that the patient is likely to receive benefit from the medical use of marijuana to treat the patient's serious or debilitating medical condition;
- the patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marijuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marijuana for the above treatment; and
- the patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia for the above treatment.[6]

The first prong of a Section 8 defense is showing the existence of an appropriate physician recommendation. If the patient is registered under the Michigan Medical Marihuana Act, the determination will have already been made and attested to by the physician who completed the Michigan Medical Marihuana Physician Certification Form. The form itself may be used as proof since it meets the Michigan Rule of Evidence 803(6) Records of Regularly Conducted Activity hearsay exception, commonly referred to as the "business records" exception.[7] The timing of the physician's stated opinion is important because the Michigan Supreme Court has held that the physician's statement must have been made after enactment of the Michigan Medical Marihuana Act but before the charged offense, as the act was not intended to give defendants an after-the-fact exemption for otherwise illegal activity.[8]

The more difficult aspect of the first prong is showing the existence of a "bona fide physician-patient relationship." It is defined as a treatment or counseling relationship in which:

- the physician has reviewed the patient's relevant medical records and completed a full assessment of his or her medical history and current medical condition, including a relevant, in-person medical evaluation;
- the physician has created and maintained records of the patient's condition in accord with medically accepted standards;
- the physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marijuana as a treatment of the patient's debilitating medical condition; and
- if the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the use of medical marijuana to treat that condition.[9]

The easiest way to show a bona fide physician-patient relationship would be to establish an ongoing professional connection with the physician who recommended medical marijuana for treatment and present the testimony of that physician, but the nature of some physician-patient relationships make this aspect of a Section 8 defense challenging.

The second prong of Section 8 is the demonstration by a patient and the patient's caregiver, if any, that they did not possess more marijuana than was "reasonably necessary" to ensure an "uninterrupted availability" of marijuana for the appropriate use. The Michigan Supreme Court in *People v Hartwick*[10] clarified this requirement, ruling that it may be satisfied by patient and caregiver testimony. The Court indicated that patients may determine through experience and then testify regarding the specific amount of marijuana needed to treat their debilitating conditions, and that caretakers may rely on the amounts their patients state are necessary for treatment.[11] Further, caregivers may testify about the number of plants and the quantity of marijuana necessary to ensure the uninterrupted availability of the medical marijuana.[12]

FAST FACTS

Under the Michigan Medical Marihuana Act, both an immunity provision (Section 4) and an affirmative defense provision (Section 8) offer protection against prosecution for the medical use of marijuana.

Establishing the elements of a Section 8 defense is more difficult than establishing the elements of a Section 4 defense, but the affirmative defense is available when the requirements of Section 4 cannot be shown.

Before a Section 8 defense may be presented at trial, the defendant must present prima facie evidence of each element at an evidentiary hearing before the court.

Although the law appears straightforward, the realities of presenting a Section 8 defense can be challenging.

The final prong of Section 8 is establishing that marijuana-related activities by the patient and any caregiver were for a medical purpose. This requirement could be verified by patient or caregiver testimony. However, it may be refuted by the prosecution.

A Section 8 affirmative defense is not raised for the first time during trial; rather, a trial court must first determine, as a question of law, whether a Section 8 defense may be submitted to the jury.[13] It must be asserted in a pretrial motion by the defense and set for an evidentiary hearing as to its applicability, where the defendant has the burden of proof.[14] If the defendant presents prima facie evidence on the elements and there are no material factual disputes remaining after the hearing, the case is dismissed.[15] If the defense presents evidence on all the elements and factual disputes remain, the defense is presented to the jury.[16] If the defense fails to present at least prima facie evidence of each element of Section 8, the defendant is precluded from asserting the affirmative defense at trial.[17] During the hearing, the court may not weigh evidence, assess credibility, or resolve factual issues, as questions of fact are the province of the jury.[18] Because applicability of Section 8 is a question of law, an appellate court reviews this decision de novo.[19] If the trial court rules the defense may not be raised, the defendant's remedy is to file for an interlocutory appeal.[20] When a Section 8 defense is permitted to be raised at trial, the defendant must prove it by a preponderance of the evidence.[21]

It is critical to note that conduct falling under Section 8 must not be prohibited under Section 7 of the act.[22] Also of note is that Section 8 is not restricted to the use of only the leaves and flowers of the plant as in Section 4, but that edibles and oils made of resin fall under its protection.[23]

Although the law appears straightforward, the realities of presenting a Section 8 defense can be challenging. Most courts are new to conducting Section 8 hearings and are unfamiliar with its requirements. Practitioners should advise their clients of the uncertainties of a Section 8 hearing. Clients would be best served by consulting with an experienced attorney when pursuing a Section 8 affirmative defense. ■

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ENDNOTES

1. MCL 333.1101 *et seq.*
2. *People v Hartwick*, 498 Mich 192, 228; 870 NW2d 37 (2015).
3. MCL 333.26423(i).
4. MCL 333.26423(b).
5. MCL 333.26423(h).
6. MCL 333.26248(a).
7. See *Hartwick*, 498 Mich at 231 n 77.
8. *People v Kolanek*, 491 Mich 382, 408–410; 817 NW2d 528 (2012).
9. MCL 333.26423(a).
10. *Hartwick*, 498 Mich 192.
11. *Hartwick*, 498 Mich at 234.
12. *Id.* at 235.
13. *Kolanek*, 491 Mich at 410–411.
14. *Id.*
15. *Kolanek*, 491 Mich at 411–412.
16. *Id.*
17. *Id.*
18. *Id.*
19. *People v Anderson (On Remand)*, 298 Mich App 10, 16; 825 NW2d 641 (2012)
20. *Kolanek*, 491 Mich at 413.
21. *Hartwick*, 498 Mich at 203.
22. MCL 333.26427.
23. *People v Carruthers*, 301 Mich App 590; 837 NW2d 16 (2013).