

BOARD OF PHARMACY EXAMINERS

Petition by Carl Olsen and others
for Declaratory Order explaining the
effect of marijuana rescheduling

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PETITION FOR
DECLARATORY ORDER

This is a petition for a declaratory order clarifying the impact of the Iowa Board of Pharmacy's February 17, 2010, recommendation that the Iowa Legislature remove marijuana from schedule I and reclassify it as a schedule II controlled substance here in Iowa, currently Senate Study Bill 1016. The clarification being requested in this petition is that reclassification of marijuana from schedule I to schedule II in Iowa will not have the effect of allowing a physician to issue a prescription for marijuana in Iowa.

STATEMENT OF FACTS

657 Iowa Administrative Code § 27.1(1)

In the "EXPLANATION" of Senate Study Bill 1016 (PROPOSED DEPARTMENT OF PUBLIC HEALTH/BOARD OF PHARMACY BILL) the Legislative Services Agency has erroneously stated that the effect of reclassification of marijuana from a schedule I controlled substance to a schedule II controlled substance in Iowa will permit a physician to issue a prescription for marijuana. See **Exhibit #1**, Senate Study Bill 1016.

CITATION OF RELEVANT STATUTES

657 Iowa Administrative Code § 27.1(2)

The criteria for Iowa schedule I are found in Iowa Code § 124.203. The list of substances in Iowa schedule I are found in Iowa Code § 124.204. The criteria for Iowa schedule II are found in Iowa Code § 124.205. The list of substances in Iowa schedule II are found in Iowa Code § 124.206.

This petition is brought pursuant to Iowa Administrative Code 657 Chapter 27 and Iowa Code Chapter 17A.

Iowa Code § 124.206 (Schedule II) contains two plant substances which cannot be prescribed by a physician in Iowa: Iowa Code § 124.206(2)(c) Opium poppy; and Iowa Code § 124.206(2)(d) Coca leaves.

QUESTIONS PETITIONERS WANT ANSWERED

657 Iowa Administrative Code § 27.1(3)

1. Are pharmacists lawfully allowed to dispense schedule II controlled substance in Iowa

- without federal authorization?
2. Are physicians lawfully allowed to prescribe schedule II controlled substances in Iowa without federal authorization?
 3. Is the explanatory language in Senate Study Bill 1016 (SSB 1016) factually correct?
 4. As a matter of Iowa law – as opposed to federal law – would it be legal for an Iowa pharmacist to dispense marijuana if marijuana is reduced to schedule II?

ANSWERS TO PETITIONERS' QUESTIONS
657 Iowa Administrative Code § 27.1(4)

1. As a matter of Iowa law, an Iowa pharmacist may not dispense marijuana in Iowa without federal authorization, regardless of state scheduling.
2. As a matter of law, an Iowa physician may not prescribe marijuana in Iowa without federal authorization, regardless of state scheduling.
3. The explanatory language added to Senate Study Bill 1016 (SSB 1016) by the Legislative Services Agency is not factually correct.
4. Iowa law requires an Iowa pharmacist to comply with federal law as a condition of maintaining a state controlled substances registration with the Iowa Board of Pharmacy.

REASONS FOR THE DECLARATORY RULING
657 Iowa Administrative Code § 27.1(5)

Physicians in Iowa cannot prescribe or dispense marijuana without federal approval. See *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002) ("a doctor who actually prescribes or dispenses marijuana violates federal law").

The reasoning supporting these answers is essentially the same for all of them. All pharmacies in Iowa dispensing controlled substances must have a federal registration to dispense controlled substances and must comply with all state and federal regulations as a condition of maintaining that registration. Similarly, all physicians in Iowa prescribing controlled substances must have a federal registration to prescribe controlled substances and must comply with all state and federal regulations as a condition of maintaining that registration.

Grounds for the denial of state registration include: "Suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense controlled substances as authorized by federal law." Iowa Code § 124.303(1)(f).

Grounds for revocation of state registration include: "The registrant has had the registrant's federal registration to manufacture, distribute, or dispense controlled substances suspended, revoked, or restricted." Iowa Code § 124.304(1)(b).

Iowa law allows physicians to prescribe controlled substances in federal schedule I. Iowa Code § 124.303(3) (“Practitioners registered under federal law to conduct research with schedule I substances may conduct research in schedule I substances within this state upon furnishing the board evidence of the federal registration”). The sentence just quoted from Iowa Code § 124.303(3) refers to federal schedule I not state schedule I. See Title 21, Code of Federal Regulations, § 1308.11(d)(22).

Opium poppy and coca leaves are in both state and federal schedule II and they cannot be dispensed or prescribed in Iowa simply as the result of being in schedule II in both the state and federal controlled substances acts. See Iowa Code §§ 124.206(2)(c) and 124.206(2)(d). See Title 21, Code of Federal Regulations, §§ 1308.12(b)(3) and 1308.12(b)(4).

On February 18, 2011, Petitioner Carl Olsen received a letter from an executive branch agency authorized to speak to drug policy under Iowa Code Chapter 80E, the Governor’s Office of Drug Control Policy (ODCP), stating the following:

- You are correct in saying that ODCP has no formal process for determining scheduling of controlled substances. This is not a task that is legislatively required of us. It is required of the Pharmacy Board. We are, however, required to speak to drug policy.
- I reported that I had reviewed the Pharmacy Board’s bill and the scheduling language of chapter 124 and found the explanatory language in the bill to be correct. I said that as a matter of Iowa law—as opposed to federal law— an Iowa pharmacist may dispense marijuana if marijuana is reduced to schedule II.

See **Exhibit #2**, February 18, 2011, e-mail from Mark Schouten, Director of the Governor’s Office of Drug Control Policy.

If the Governor’s Office of Drug Control Policy is unable to discern the meaning of SSB 1016 because of the error in the explanation added by the Legislative Service Agency (LSA) to the pharmacy board’s recommendation, then it is the belief of the petitioners that a substantial number of Iowans will not understand the LSA’s explanation is false and support for the bill will be diminished as a result. Indeed, if you look at the list of lobbyist declarations for SSB 1016, you’ll see medical professionals in support of it and law enforcement groups against it. What is critical to note is that the Governor’s Office of Drug Control Policy is lobbying against the bill representing the Governor of Iowa and with the full weight of an enabling statute, Iowa Code Chapter 80E, which says nothing about scheduling of controlled substances. If the explanation in the bill were accurate, the Director of the Governor’s Office of Drug Control Policy tells me he would have no other objection to the bill. The explanation essentially says the bill will legalize the medical “use” of marijuana in Iowa, which is simply not true.

Further clarification of this issue can be found in the U.S. Department of Justice memo from October 19, 2009:

Of course, no State can authorize violations of federal law, and the list of factors

above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

<http://www.justice.gov/opa/documents/medical-marijuana.pdf>

Furthermore, the Iowa Board of Pharmacy clearly explains the effect of federal law on state law on its website:

Every practitioner who administers, prescribes, or dispenses any controlled substance must be registered under both state and federal Controlled Substances Acts. Federal registration is with the Drug Enforcement Administration (DEA). State registration is with the Iowa Board of Pharmacy Examiners.

http://www.iowa.gov/ibpe/controlled_substance/index.html

Even the Iowa Board of Medicine warns physicians they cannot violate federal law and that state law does not allow physicians to prescribe controlled substances until the federal rules allow it:

New DEA Regulation Regarding Multiple Schedule II Controlled Substance Prescriptions

DEA has finalized a rule authorizing prescribers to issue multiple prescriptions for Schedule II controlled substance pursuant to specific requirements. The final rule, which will become effective December 19, 2007, includes a link to the DEA's rulemaking document. There is nothing in Iowa law that would prohibit the practice authorized by the federal rule. Therefore, the authority included in the federal rule will be effective for Iowa prescribers on December 19, 2007.

http://medicalboard.iowa.gov/licensure/DEA_reg.html

Quoting again from **Conant v. Walters**, 309 F.3d 629, 635 (9th Cir. 2002), cert. denied, **Walters v. Conant**, 540 U.S. 946 (2003):

If, in making the recommendation, the physician intends for the patient to use it as the means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then a physician would be guilty of aiding and abetting the violation of federal law.

If the Iowa Board of Pharmacy, the Iowa Board of Medicine, and the federal courts all find it necessary to explain that state law does not allow pharmacists and physicians to violate federal law, it would be absurd to think the average person would understand physicians cannot prescribe controlled substances in federal schedule I without federal approval by reading the explanatory language added by the Legislative Services Agency to SSB 1016. The inaccurate explanation that "reclassification of marijuana from a schedule I controlled substance to a schedule II controlled substance permits a physician to issue a prescription for marijuana" is so misleading and prejudicial that it violates the concepts of justice and due process of the law.

DISCLOSURE OF INTEREST
657 Iowa Administrative Code § 27.1(5)

Petitioner George McMahon currently resides in Livermore, Iowa, and has been receiving marijuana from the federal government continuously in Iowa since 1990 under Iowa Code § 124.303(3). George McMahon's affidavit is attached to the decision in **Conant v. Walters**, 309 F.3d 629, 648 (9th Cir. 2002).

Petitioner Ladd Huffman, who resides in Calumet, Iowa, was approved to receive marijuana from the federal government in 1991. **Kuromiya v. United States**, 37 F. Supp. 2d 717, 720-721 (E.D. Pa. 1999):

The complaint states that three of the plaintiffs, Ladd Huffman, Jackie Rickert, and Ron Shaw, had their applications to the program approved but subsequently were denied marijuana supplies because of the government's decision to stop admitting new participants. See id. P 194. n4

n4. According to the complaint, Ms. Rickert has Ehlers-Danlos Syndrome, which "causes recurrent and extremely painful dislocation of most of the joints of the body," Compl. P 129; Mr. Huffman has Multiple Sclerosis, see id. P 62; and Mr. Shaw suffers from Post-Polio Syndrome. See id. P 140.

And, see, **Kuromiya v. United States**, 78 F. Supp. 2d 367 (E.D. Pa. 1999). See **Exhibit #3**, Motion to Dismiss in **Ladd Huffman v. Food and Drug Administration**, Civil No. 93-0237 NHJ (United States District Court for the District of Columbia), dated June 17, 1993, which gives the details of Ladd's application for federal approval and the reasons for its denial. See **Exhibit #4**,

Letter from U.S. Senator Tom Harkin dated August 4, 1993. Ladd Huffman's testimony was read by Jimmy Morrison at the Mason City, September 2, 2009, public hearing at transcript pages 22-27.

Petitioner Robert Manke, who resides in Nevada, Iowa, has severe injuries from several automobile accidents and currently receives schedule II narcotics to control his pain from repeated surgical procedures. Robert Manke must travel to Oregon to use marijuana legally to reduce his need for narcotics. He has a valid Oregon Medical Marijuana Act card issued by the state of Oregon which he submitted to the Iowa Board of Pharmacy during the public hearings on medical marijuana held by the Iowa Board of Pharmacy in 2009. Excerpts from the transcript of his testimony at the Des Moines public hearing, August 19, 2009, at pages 29-30, follow: "I've been in three severe traffic accidents." "I have a broken spine. I have two Harrington rods, six fused joints in my back, had four blown disks in my cervical spine and two jellied locations in my brain as evidenced by CT scans." Robert Manke testified at the Des Moines, August 19, 2009, public hearing at transcript pages 29-36, at the Iowa City, October 7, 2009, public hearing at transcript pages 98-108, and at the Council Bluffs, November 4, 2009, public hearing at transcript pages 70, and 173-183.

Petitioner Dr. Alan Koslow, who resides in Des Moines, Iowa, is a vascular surgeon who prescribes schedule II narcotics for post-operative neuropathy and some of his patients have had to move to other states to obtain marijuana legally to avoid taking so many narcotics. Dr. Koslow also testified at the Iowa Board of Pharmacy hearing in Des Moines on August 19, 2009. Dr. Koslow's testimony can be found at transcript pages 84-99.

Petitioner Carl Olsen, who resides in Des Moines, Iowa, is a paralegal who formed the group Iowans for Medical Marijuana in 1990 with George McMahon and Barbara Douglass. Mr. Olsen and Mr. McMahon met sometime prior 1990. See **Exhibit #5**, Des Moines Register, October 7, 1990; **Exhibit #6**, Des Moines Register, March 22, 1992. Barbara Douglass' affidavit is attached to the decision in **Conant v. Walters**, 309 F.3d 629, 648 (9th Cir. 2002). Sometime in 1990, Carl Olsen informed Mr. McMahon that he would stop using marijuana and work with Mr. McMahon to obtain marijuana legally under state and federal law for patients in Iowa, which is when Mr. Olsen, Mr. McMahon, and Ms. Douglass began using the name "Iowans for Medical Marijuana." See **Exhibit #7**, Des Moines Register, August 6, 1995. See **Exhibit #8**, Letter to Carl Olson (sic) from Iowa Department of General Services dated June 2, 1995, recognizing medical use of marijuana by Mr. McMahon and Ms. Douglass at the Iowa Capitol Building. See **Exhibit #9**, Letter to Carl Olson (sic) from Iowa Department of General Services dated August 16, 1996, recognizing medical use of marijuana by Mr. McMahon and Ms. Douglass at the Iowa Capitol Building.

Carl Olsen, George McMahon, and Barbara Douglass, incorporated Iowans for Medical Marijuana in the state of Iowa in October of 2006 for the purpose of pursuing the reclassification of marijuana with the state of Iowa. See **Exhibit #10**, October 6, 2006, Incorporation Acknowledgement from the Iowa Secretary of State.

George McMahon and Barbara Douglass are founding members of the Board of Directors for Patients Out of Time, a Virginia based non-profit corporation under IRS Code §503(c)(3), incorporated in Virginia on April 10, 1995, that conducts continuing education for medical professionals on the topic of medical marijuana and Carl Olsen is an original member of its Board of Advisors. Patients Out of Time held its first clinical conference at the University of Iowa in April 6-8, 2000, hosted by both the School of Medicine and the School of Nursing, with qualified CME (Continuing Medical Education) for doctors and CEU (Continuing Education Units) for nurses. In 2009 Patients Out of Time supplied the bulk of the medical and scientific evidence at the public hearings that resulted in the Iowa Board of Pharmacy's decision to recommend reclassification of marijuana in February of 2010. Several members of the Board of Directors of Patients Out of Time testified at the public hearings held by the Iowa Board of Pharmacy. Ralph Smith, Esq., testified at the Des Moines, August 19, 2009, public hearing at transcript pages 181-184, and at the Council Bluffs, November 4, 2009, public hearing at transcript pages 124, and 120-146. Mary Lynn Mathre, RN, MSN, CARN, testified at the Council Bluffs, November 4, 2009, public hearing at transcript pages 113-124. Barbara Douglass' testimony was read by George McMahon at the Mason City, September 2, 2009, public hearing at transcript pages 18-22. George McMahon, testified at the Des Moines, August 19, 2009, public hearing at transcript pages 200-202, and at the Council Bluffs, November 4, 2009, public hearing at transcript pages 184-186. Advisory Board member Carl Olsen testified at the Des Moines, August 19, 2009, public hearing at transcript pages 212-213, at the Iowa City, October 7, 2009, public hearing at transcript pages 12-13 and 31-33, and at the Council Bluffs, November 4, 2009, public hearing at transcript pages 18-19, 62, 68-69, and 88-94.

OTHER PROCEEDINGS

657 Iowa Administrative Code § 27.1(6)

None of the petitioners are currently a party to another proceeding involving the questions at issue and, to the petitioners' knowledge, the questions have not been decided by, are not pending determination by, and are not under investigation by, any governmental entity.

PERSONS AFFECTED BY THE QUESTIONS

657 Iowa Administrative Code § 27.1(7)

Carl Olsen, 130 E. Aurora Ave., Des Moines, IA 50313-3654
515-288-5798, carl-olsen@mchsi.com, Paralegal

Ladd Huffman, 210 S 2nd Street, Box 102, Calumet, IA 51009
712-446-2463, Medical Patient

George McMahon, 902 4th Street, Livermore, IA 50558
515-379-1370, mmcmahon@trvnet.net, Medical Patient

Robert Manke, 1603 10th St., Nevada, IA 50201
515-382-0108, globalsymetry@mchsi.com, Medical Patient

Alan Koslow, 2716 Jordan Grove, West Des Moines, IA 50265-6462
515-491-7313, koslow@mchsi.com, Physician

The class of persons affected by or interested in the questions presented in this petition are too numerous to identify. Many of them testified at the Iowa Board of Pharmacy hearings held in four locations around the state in 2009.

**REQUEST FOR MEETING PROVIDED BY RULE 27.7(17A).
657 Iowa Administrative Code § 27.1(8)**

Petitioner requests a meeting with a representative of the Iowa Board of Pharmacy to discuss the action being proposed in this petition.

**ORIGINAL SIGNATURE OF PETITIONER AND DATE SIGNED
657 IAC § 27.1**

Dated this 14th day of March, 2011.

Carl Olsen
Post Office Box 4091
Des Moines, IA 50333
515-288-5798 home phone
515-343-9933 cell phone

Exhibit #1, Senate Study Bill 1016
http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_01.pdf

Exhibit #2, February 18, 2011, e-mail from Governor's Office of Drug Control Policy
http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_02.pdf

Exhibit #3, Motion to Dismiss in *Ladd Huffman v. Food and Drug Administration*
http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_03.pdf

Exhibit #4, Letter from U.S. Senator Tom Harkin
http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_04.pdf

Exhibit #5, Des Moines Register, October 7, 1990

http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_05.pdf

Exhibit #6, Des Moines Register, March 22, 1992

http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_06.pdf

Exhibit #7, Des Moines Register, August 6, 1995

http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_07.pdf

Exhibit #8, Letter to Carl Olson (sic) dated June 2, 1995

http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_08.pdf

Exhibit #9, Letter to Carl Olson (sic) dated August 16, 1996

http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_09.pdf

Exhibit #10, October 6, 2006, Incorporation Acknowledgement

http://petition.iowamedicalmarijuana.org/pdf/ibpe_20110314_exhibit_10.pdf