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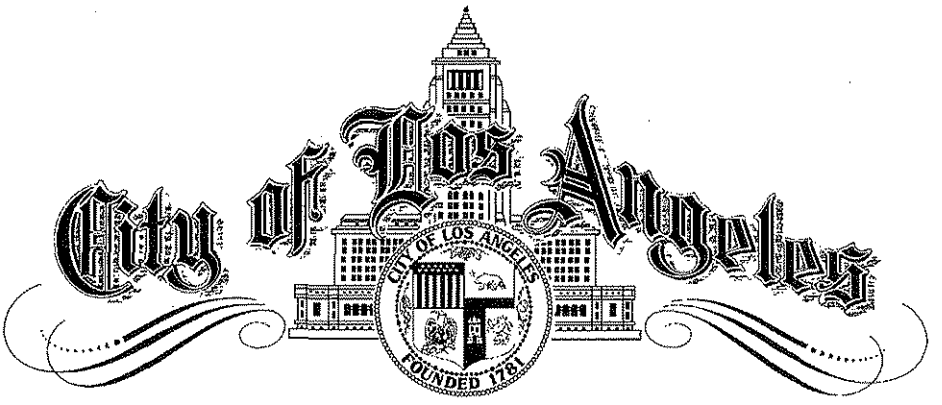

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REPORT NO. R09-0334

SEP 28 2009

REPORT RE:

REVIEW OF CASE LAW REGARDING COLLECTIVE CULTIVATION OF MEDICAL MARIJUANA UNDER CALIFORNIA LAW

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Council File No. 08-0923

Honorable Members:

Pursuant to the request of your Honorable Body, this office has prepared a response to your Motion requesting review and analysis of specified appellate cases. We have also included a discussion of the Compassionate Use Act, the Medical Marijuana Program Act, the Attorney General Guidelines, and other applicable law.

Compassionate Use Act

The Compassionate Use Act of 1996 (CUA) provides a narrow affirmative defense to individual patients and their primary caregivers who are charged with criminal prosecution for the possession and cultivation of medical marijuana. The Act contemplates that a patient will have access to marijuana either by (1) cultivating it for personal medical use, or (2) obtaining it from his or her primary caregiver, who cultivated the marijuana for the personal medical purposes of the patient.

The CUA was enacted by the passage of Proposition 215. It states: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Health and Safety Code §11362.5(d)[1] A "patient," under the CUA, is a "seriously ill" Californian whose use of marijuana "has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." §11362.5 (d). A "primary caregiver" is defined as "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." §11362.5(e).

Medical Marijuana Program

The Medical Marijuana Program (MMP) was passed by the Legislature in 2003 to "[c]larify the scope of the application of the [Compassionate Use] act" Stats. 2003, ch. 875, §1. (Sen. Bill No. 420)." (§11362.7 *et seq.* Section 11362.775 provides: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and person with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11370."

The MMP expressly confirms that none of its provisions shall "authorize any individual or group to cultivate or distribute marijuana for profit." Section 11362.765. Rather, the MMP immunizes from prosecution a range of conduct ancillary to the collective or cooperative provision of medical marijuana to qualified patients and circumscribes the manner of this immunity. In rejecting a broad interpretation of the MMP, the Supreme Court explained how the immunities afforded under section 11362.765 are to be applied:

> "...the immunities conveyed by section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws. *People v. Mentch*, 45 Cal.4th 274 (2008) at 290-291.

The MMP does not use the term "dispensary." Case law, culminating in *People v. Mentch*, has conclusively established that "one who merely supplies a patient with marijuana has no defense under the CUA. (*People v. Mower, supra*, 28 Cal.4th at

[1] All further statutory references are to the Health and Safety Code, unless otherwise noted.

p. 475 [defendant who claimed he cultivated 31 marijuana plants for himself and two others did not qualify as a primary caregiver]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773 [33 Cal. Rptr. 3d 859] [trial court did not err in concluding the CUA defense was not available to one who helped others obtain medicinal marijuana]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152 [128 Cal. Rptr. 2d 844] ["We also reject defendant's claim that the limited immunity afforded under Proposition 215 to patients and primary caregivers should be extended to those who supply marijuana to them."].)" *People v. Windus* (2008) 165 Cal.App.4th 634, 644.

California Sherman Food, Drug, and Cosmetic Law

On its face, placing federal controlled substance preemption questions aside, the California Sherman Food, Drug and Cosmetic Law (Sherman Law) would appear to apply to medical marijuana because medical marijuana falls within the law's definition of a drug. The law prohibits the manufacture, holding, distribution, delivery, receipt, sale and offer for sale of any adulterated, misbranded or falsely advertised drug or unapproved new drug. The law also requires labeling of drugs to be compliant with federal law. California Health and Safety Code Section 109875, *et seq*. In addition, we enclose a summary of the pertinent provisions of the Sherman Law for your information.

Attorney General's Guidelines

The Attorney General's non-binding Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, issued in August 2008, prior to the *Mentch* decision, endorse a "formalized business organization" approach to interpreting the MMP. In the section of the Guidelines regarding these entities, the "supply" issue is addressed as follows: "Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (§§11362.765. 11362.775.)" Unfortunately, neither section of the MMP cited to in this passage relates to or authorizes transportation by, or distribution to, "members of a collective or cooperative." Section 11362.765 authorizes transportation of marijuana by a qualified patient only for his or her own personal medical use and by a primary caregiver only for delivery (a very limited form of "distribution") to his or her own qualified patient(s), within the allowable quantity limits. The non-binding Guidelines, while consistent with our interpretation of the law in many respects, diverge from our strict reading of state law, which is consistent with the Supreme Court's analytical approach in *Mentch.*

Relevant Court Decisions

Pursuant to your request, below is a discussion of cases which have interpreted collective cultivation under section 11362.775.

***People v. Hochanadel* (2009) 176 Cal.app.4th 997**: The Court of Appeal (4th Appellate District, Div. 1) held that a search warrant for a storefront dispensary should not have been quashed because the officers had probable cause to believe that the defendants did not comply with the CUA. The court held that a storefront medical marijuana dispensary did not qualify as a primary caregiver within the meaning of the CUA or MMP. This holding is entirely consistent with *People v. Mentch*, numerous previous appellate court decisions, and our long-standing view that storefront dispensaries have no "primary caregiver" defense under state law.

Regarding section 11362.775 of the MMP, the *Hochandel* court explicitly relied on the Attorney General's Guidelines in holding that it does not constitute an amendment to the CUA but, rather, "identifies groups [collectives and cooperatives] that may lawfully distribute medical marijuana to patients under the CUA." The actual language of section 11362.775 provides that the specifically authorized conduct is collective or cooperative cultivation, not distribution or sale. This office diverges from the Attorney General's Guidelines in our strict interpretation of state law, in accordance with the California Supreme Court's analysis in *Mentch*, which was published after the Guidelines.

***County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729**: Plaintiff, a qualified patient under the CUA, was one of seven members of a collective of medical marijuana patients who grew marijuana at plaintiff's home. Each member of the collective "agreed to contribute comparable amounts of money, property, and/or labor to the collective cultivation of medical marijuana; each then would receive an approximately equal share of the marijuana produced." A sheriff's deputy ordered plaintiff, on threat of arrest, to destroy all but 12 of the 41 plants at the collective. Plaintiff complied then sued Butte County, alleging various constitutional violations.

The Third District Court of Appeal ruled that plaintiff was entitled to bring a civil action for money damages for the destruction of the collective's marijuana plants. The court held that plaintiff could maintain a cause of action, based on a constitutional right to due process, challenging the deputy's lack of probable cause in ordering him to destroy the plants.

This case does not concern a local jurisdiction's authority to regulate dispensaries or collectives. Rather, it stands for the proposition that a qualified patient can sue for money damages. In fact, it is noteworthy that the collective which plaintiff was a member of appears to have been a true collective within the meaning of section 11362.775: It was comprised of a group of qualified patients who came together and directly contributed in some manner—through provision of labor, money, and/or property—to collective cultivation of medical marijuana for their own medical purposes. A monetary contribution in this context is clearly correlated to the costs associated with that particular cultivation project, which would logically be borne by the collective members themselves. This is far different from the sale of marijuana from a storefront

dispensary, a commercial activity which is not immunized under state law and involves distribution to "members"/customers far removed from the cultivation process. Even if the cost of the marijuana at such an ostensible collective is characterized as a "suggested donation," the monetary exchange clearly constitutes a sale. The CUA did not establish an affirmative defense for this activity, nor did the express language of section 11362.775 or any other provision of the MMP.

***People v. Urziceanu* (2005) 132 Cal.App.4th 747**: This case involved a qualified patient defendant who cultivated marijuana and distributed it from his home to the members of his cooperative called "FloraCare." Some of the members, comprised of qualified patients and primary caregivers, participated in the cultivation process. The Third District Court of Appeal reversed Defendant's conviction for conspiracy to sell marijuana and remanded it for a new trial on that count. In Part IA of the court's discussion, the court held that the defendant had no defense under the CUA. "To the extent that the authors of the initiative wished to include these types of organizations [private enterprises and collectives] in its ambit, they could have expressly authorized their existence in the statute." It found support for this view in a comprehensive review of relevant case law to date, which had established that the CUA did not authorize a cannabis club to sell or give away marijuana to qualified patients (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383; even the nonprofit sale of marijuana violated the CUA (Peron); the CUA decriminalized cultivation and possession for the personal medical purposes of the patient, but the sale and possession for sale of marijuana remained criminal after its passage (Peron); the ballot materials in support of the CUA stated that the police could still arrest those who grow too much or try to sell it; and, the limited defense provided by the CUA does not extend to those who supply marijuana to qualified patients or their primary caregivers.

Though the court held that the defendant had no defense under the CUA, it found, in part II of its discussion, that section 11362.775 of the MMP did provide him a potential defense. (The MMP was enacted while the case was pending.) The court stated that the statute "represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers. Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana. Contrary to the People's argument, this law did abrogate the limits expressed in the cases we discussed in part IA which took a restrictive view of the activities allowed by the Compassionate Use Act." *Urziceanu*, *supra*, 132 Cal.App.4th at 785. While this language has been extensively relied on by advocates of the commercial model of dispensing medical marijuana, it should be considered in light of the California Supreme Court's analysis in *Mentch*, discussed above. The "itemization of the marijuana sales law" in section 11362.775 is part of the listing of other criminal laws related to marijuana for which the "specific group of people" (qualified patients, caregivers, and those with identification cards) have immunity based

solely on a "specific range of conduct" (collectively or cooperatively cultivating marijuana for medical purposes). Put another way: The criminal activity encompassed by the marijuana sales law and other marijuana laws is not the "immunized range of conduct" in section 11362.775. Rather, solely on the basis of associating to collectively or cooperatively cultivate, the specified individuals shall not be subject to enforcement of those laws. *Mentch*'s three-pronged analytical approach to application of the additional immunities afforded under the MMP compels that conclusion.

While the above-quoted passage from *Urziceanu* indicates that section 11362.775 represents an expansion of the CUA, *Mentch* unequivocally embraced a strict reading of the law. In holding that the CUA is "a narrow measure with narrow ends," the Supreme Court cited to, among other cases, *Urziceanu*, and approvingly quoted from its "restrictive" part IA: "[S]ee also *People v. Urziceanu*, *supra*, 132 Cal.App.4th at pp. 772-773 [the Act 'is a narrowly drafted statute,' not an attempt to 'decriminalize marijuana on a wholesale basis']. We must interpret the text with those constraints in mind." *Mentch, supra,* 45 Cal. 4th at p. 286. Clearly, our Supreme Court also takes a restrictive view of the activities allowed by the CUA and, in *Mentch*, applied that approach to analyzing the MMP. Using that analysis, section 11362.775 clearly authorizes the conduct of collective cultivation only—not collective distribution, collective sales, collective transportation, or other non-specified activity.

***People v. Newcomb* (2009) 2009 Cal.App. Unpub. LEXIS 4508**: This is an unpublished decision from the Second Appellate District (Division Seven), wherein the Court of Appeal affirmed the convictions of three defendants (qualified patients) for cultivating marijuana at various locations throughout Los Angeles County. The marijuana was to be "supplied to medical dispensaries" which had approximately 7,000 members. Defendants maintained that they were employees of the dispensaries (West Hollywood Patients Collective and West Hollywood Caregivers) and were entitled to a defense under section 11362.775 for cultivating marijuana for the patient members of the dispensaries. The appellate court found that none of the asserted defenses—including the "collective, cooperative cultivation" defense—applied.

However, the court reached this clearly correct conclusion in a manner which is markedly inconsistent with the Supreme Court's analytical approach in *Mentch.* The appellate court stated: "The enumeration of certain activities and the grammatical structure of the statute are instructive on the nature of collectives and cooperatives that fall within the protection of Health and Safety Code section 11362.775. The section provides a defense for the following activities: the possession, cultivation, sale, transportation, furnishing, giving away, preparing, and administering of marijuana and the maintaining and managing of a location for marijuana related purposes." But, as emphasized in *Mentch*, the additional affirmative defenses in the MMP must be broken down into three constituent elements, one of which is the range of conduct to which the enumerated criminal law immunities (the third element) apply. The *Newcomb* court apparently conflated the second and third elements, leading to the over-broad

conclusion that the conduct of collectively/cooperatively cultivating marijuana and the activities proscribed by the specific set of laws to which the immunity applies are protected activity. Thus, the court did not interpret section 11362.775 in accordance with the *Mentch* standard.

Nonetheless, based on its own three-part test, the court rejected the application of the collective cultivation defense. Defendants failed to establish the third prong of that test by showing that the members of the two dispensaries "came together [with defendants] and worked on some aspect indirectly or directly related to cultivating and distributing marijuana for medical purposes." *People v. Newcomb, supra*, p. 34. The court was troubled by the fact that "three members cultivated marijuana and distributed that marijuana to the 7,000 other members," who were mere purchasers, which gave rise to "the potential for abuse." *Id.* at 35. Nowhere in the *Newcomb* opinion does the court discuss the application of the court's holding in *People v. Galambos*, reaffirmed in *Urziceanu*, *People v. Windus* (2008) 154 Cal.App. 4th 634, 644, and *Mentch*: The limited defense provided by the CUA to patients and primary caregivers does not extend "to those who supply marijuana to them." *People v. Galambos* 104 Cal.App. 4th at 1152. Interpreting section 11362.775 in a broad manner that completely abrogates this proposition is inconsistent with both *Mentch* and the plain language of the statute.

***People v. Northcutt* (2009) B20388** is another unpublished decision from our Second Appellate District (Division One) which was filed the same week as *Newcomb*, on June 5, 2009. We believe this case should be brought to your attention considering the fundamentally different analytical approach the court employed in interpreting the collective cultivation defense under section 11362.775. The defendant was convicted of cultivating marijuana and, in his appeal, asserted that the court erred in failing to instruct the jury on a collective cultivation defense. The appellate court agreed with defendant and reversed the lower court's judgment.

The defendant cultivated the marijuana in a warehouse along with a dozen other qualified patients. Every member of the group "contributed to the cooperative in their own way" some by helping with the growing, some with the cleaning, or some combination of money or labor. Because the defendant "paid for just about everything up front" relative to the cultivation costs, he asked the others to "make donations, but they were not wealthy people." *Id.* at p. 4. The court held that substantial evidence supported defendant's collective cultivation defense. Not only were all of the members qualified patients, defendant "testified about the collective and cooperative efforts of the participants to grow the marijuana: about five of the dozen participants were 'really active members who would come all the time, every day or every other day' to 'work on the plants' or contribute other labor; other participants (most notably appellant) contributed money; and everyone contributed something, based on his or her ability. Appellant did not charge anyone for the marijuana they received." *Id.* at p. 14.

In finding that the facts supported the collective cultivation defense, the Northcutt court explicitly rejected the attempt of the prosecution (through the State Attorney General's Office) to "condition application of section 11362.775 upon numerous requirements not set forth in the statute. First, respondent attempts to import inapplicable meanings and requirements from the Food and Agriculture Codes by replacing the adverbs 'collectively' and 'cooperatively' used in the statute to modify the verb 'to cultivate' with the nouns 'collective' and 'cooperative,' respectively. Respondent similarly attempts to replace the verb 'associate' in the statute with the noun 'association,' and thereby limit the collective cultivation defense to groups that have 'formalized' their existence in a manner similar to the associations mentioned in the Civil, Corporations, and Food and Agriculture Codes. None of respondent's [Attorney General's] arguments find support in either the language of the statute or the legislative declarations of purpose accompanying Senate Bill 420. Indeed, imposing such cumbersome requirements would frustrate the Legislature's declared goal of [e]nhancing the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." *Id.* at p. 10.

This office, like the court in *Northcutt*, does not believe the collective cultivation defense should be predicated upon a business model which is not statutorily required. Rather, the defense properly applies to those qualified individuals who simply join together to cultivate medical marijuana, an activity which they may be unable or unwilling to do individually. Given the varying abilities of such individuals to engage in physical labor, it is reasonable to expect that the nature of the individuals' participation may vary in the cultivation project, but everyone must contribute something. "To warrant instruction on collective cultivation, appellant merely needed substantial evidence showing that his operation fell within the scope of section 11362.775, *i.e.*, that it entailed patients who had written or oral recommendations or approvals from a physician for the use of marijuana for medical purposes (and/or primary caregivers of patients with such recommendations or approvals) associating to collectively or cooperatively cultivate marijuana for their own medical purposes and/or those of the patients for whom they care." *Id.* at p. 11. (Emphasis added.) Clearly, this model is non-commercial in nature, involving a "do-it-yourself" approach, and necessarily excludes a "collective" acquiring/purchasing marijuana from outside suppliers (possibly the black market) and re-selling it to members at storefront locations. Our draft ordinance contemplates precisely the *Northcutt* court's description of a true collective.

***City of Claremont v. Kruse* (2009) B210084**. This critical case, also out of the Second Appellate District, was just published on September 22, 2009. The appellate court upheld the trial court's issuance of a permanent injunction preventing defendants from operating a medical marijuana dispensary anywhere in the City. The City had adopted a moratorium preventing the approval or issuance of any permit, license, or other entitlement to establish a dispensary in the city. In violation of that moratorium, defendants opened a dispensary, resulting in the City's action for a temporary restraining order and injunction to abate a public nuisance.

The court upheld the trial court's determination that defendants' dispensary constituted a nuisance per se based on violations of the City's municipal code. The court also addressed the applicability of both the CUA and the MMP and found that neither preempted the City's actions. In fact, both the CUA and MMP expressly allow local regulation. Significantly, in discussing the CUA, the court noted the narrow nature of the initiative, and the abundant case law supporting this view. "For example, courts have determined that the CUA did not create a 'constitutional right to obtain marijuana,' and they have refused to expand the scope of the CUA to allow the sale or nonprofit distribution of marijuana by medical marijuana cooperatives. (*Ibid.*; *Peron*, *supra*, at pp. 1389-1390.) *Kruse* at p. 17.

Conclusion

On September 22, 2009, this Office presented a Third Revised Draft Ordinance regulating the collective cultivation of medical marijuana. The draft ordinance does not include a permitting scheme, which we view as granting a right to engage in conduct in violation of federal law, nor does it authorize any activity beyond the limited scope of this state's medical marijuana laws.

The California Supreme Court has explicitly endorsed, in *Mentch* and numerous other cases involving medical marijuana, strict construction of the CUA and cautioned against a broad interpretive approach. As proposed in the Office's draft ordinance, we can adhere to this approach and also provide compassionate access to medical marijuana through the recognition and regulation of collective cultivation projects.

If you have any questions regarding this matter, please contact Deputy City Attorney Heather Aubry at (213) 978-8380. She or another member of this office will be available when you consider this matter to answer any questions you may have.

Sincerely,

CARMEN A. TRUTANICH, City Attorney

By 
WILLIAM W. CARTER
Chief Deputy City Attorney

WWC:SSC:HA:AA
Transmittal

MEDICAL MARIJUANA: PERTINENT PROVISIONS OF
THE CALIFORNIA SHERMAN FOOD, DRUG AND COSMETIC LAW
("SHERMAN LAW")

On its face, placing federal controlled substance preemption questions aside, the California Sherman Law applies to medical marijuana, because medical marijuana falls within the law's definition of a drug. The law prohibits the manufacture, holding, distribution, delivery, receipt, sale and offer for sale of any adulterated, misbranded or falsely advertised drug or unapproved new drug. It also requires labeling of drugs to be compliant with federal law.

Definition of Drug
The Sherman Law defines a drug, in part, as:
"(b) Any article used or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings....
(c) Any article other than food, that is used or intended to affect the structure or any function of the body of human beings...." (Health & Saf. Code, § 109925.)

Unsafe Drug
Any added poisonous or deleterious substance is considered unsafe for use with respect to any drug unless a regulation has been adopted pursuant to state law. (Health & Saf. Code, § 111240.)

Adulterated Drug
A drug is considered adulterated if "the methods, facilities, or controls used for its manufacture, processing, packing, or holding do not conform to, or are not operated or administered in conformity with current good manufacturing practice to assure that the drug or device meets the requirements of this part as to safety and has the identity and strength, and meets the quality and purity characteristics that it purports or is represented to possess." (Health & Saf. Code, § 111260.) A drug is also considered adulterated, if its strength, purity or quality is misrepresented. (Health & Saf. Code, § 111285.)

Misbranded Drug
A drug is considered misbranded unless it has a label on which is prominently placed, the name and place of business of the manufacturer, packer, or distributor and an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count; the name of the drug; the ingredients in the drug; adequate directions for use and adequate warnings. (Health & Saf. Code, §§ 111340; 111345; 111355; 111375.) Further, a drug is misbranded if it is manufactured in an unlicensed facility or one that is not duly registered with the U.S. Secretary of Health, Education and Welfare. (Health & Saf. Code, §§ 111425; 111430.)

New Drug

A new drug may not be sold, delivered or given away unless a new drug application has been approved for the drug by the State Department of Health Services. The new drug application must include a report of investigations of the safety and efficacy of the drug; the articles used to compose the drug; the composition of the drug; manufacturing, processing, packing methods; samples of the drug and specimens of the labeling and advertising proposed to be used. (Health & Saf. Code, § 111550.)

Licensing

A drug may not be manufactured without a license from the State Department of Health Services. (Health & Saf. Code, § 111615.)

Violations

A violation of the Sherman Law is a misdemeanor punishable by one year in the county jail and/or a $1000 fine. (Health & Saf. Code, § 111825.) The fine increases to $10,000 for a subsequent violation or if the violation was committed with the intent to defraud. (*Id.*) Civil penalties may be assessed by the Department of Health Services of up to $1000 a day or up to $10,000 a day for a subsequent violation or if the violation was committed with the intent to defraud. (Health & Saf. Code, § 111855.)