

LEGAL MEMORANDUM

FROM: Jesse Kelley, legislative counsel, and Karen O’Keefe, director of state policies,
Marijuana Policy Project

RE: Implementing Medical Marijuana: Prescribe vs. Recommend

Question Presented

What are federal criminal, civil, and other liabilities facing physicians who prescribe, rather than recommend, medical marijuana?

Brief Answer

Any state that requires doctors to “prescribe” some form of medical marijuana could expose that person to the possible loss of their DEA registration to prescribe controlled substances and to criminal liability.

Discussion

I. No federal provision exists which would protect doctors who prescribe medical marijuana.

If a state medical marijuana law requires a physician to prescribe medical marijuana — specifically requiring a written notice to a dispensary containing an amount of usable marijuana a patient may be dispensed — then the prescription exceeds any patient-physician discussion protected by the First Amendment. A prescription would be an overt action with the specific intent to facilitate the use of marijuana, and therefore, the doctor would be in violation of federal law by “aiding and abetting” a patient with the means to acquire marijuana by knowing that it is the intent of the patient to indeed obtain marijuana.¹

II. The only federally protected speech for a physician is to recommend medical marijuana.

The Ninth Circuit Court of Appeals has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship.² In *Conant*, a federal court examined the differences between a prescription for medical cannabis and a recommendation resulting in a finding that while a prescription for medical

¹ *Conant v. Walters*, 309 F.3d 629 (9th Cir., 2002).

² *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991) (noting that regulations on physician speech may “impinge upon the doctor-patient relationship”).

marijuana is unlawful, a recommendation could be distinguished and is allowed. A physician may discuss treatment options, including treatment with cannabis or cannabis products; discuss the pros and cons of treatment with medical cannabis; recommend that a patient consider the use of medical cannabis to offset the symptoms; and sign a form to that effect.³

III. A physician adding a patient's name to a medical marijuana registry is covered under the protections of First Amendment free speech.

Since a physician is allowed to write a certification stating that a patient has a qualifying condition and has been recommended medical marijuana, and since patient registry is dependent on that certification, a physician adding a patient's name to a registry would not venture beyond the protections of the First Amendment.

As the California Medical Association has explained to its members, to avoid risking running afoul of federal law, "A physician should avoid the following:

- a) Providing cannabis to a patient;
- b) Describing to a patient how the patient may obtain cannabis, for example, by giving the name and address of a cannabis distributor;
- c) Communicating with a cannabis distributor, such as a cannabis dispensary, to confirm a recommendation made to a patient in an office dialogue;
- d) ***Offering a specific patient individualized advice concerning appropriate dosage timing, amount, and route of administration.***⁴ (emphasis added)

Within these specific limitations, nothing clearly indicates that a physician adding a patient to a registry would breach established free speech protections. Furthermore, dozens of states have relied on physicians issuing certifications that allow patients to be added to registries.⁵ Adding additional requirements asking physicians to provide instructions on amounts or ingestion methods would effectively remove any First Amendment shields.

IV. The Drug Enforcement Administration could revoke a physician's registration for prescribing medical marijuana.

Under the authority of the Controlled Substances Act, the Drug Enforcement Administration issues registration numbers to qualifying physicians authorizing the doctor to dispense Schedule II, III, IV, and V controlled substances.⁶ Physicians may not issue prescriptions for Schedule I substances. Medical marijuana in nearly every form, including

³ "Prescribing' Versus 'Recommending' Medical Cannabis." Marijuana Policy Project. September 2016.

⁴ Source: CMA Legal Counsel, Document #1315, The Compassionate Use Act of 1996: The Medical Marijuana Initiative. January 2007.

⁵ The Ohio Department of Health is in the process of drafting implementation rules, which include a provision that physicians should add patients to a registry. The proposed rules do not require physicians take any further prescribing steps. Proposed Rules 4731-32-03 (D) and (D)(1).

⁶ 21 U.S. Code § 829.

low-THC varieties and extracts, is classified as a Schedule I drug and therefore may not be prescribed. A physician who engages in conduct violating the CSA may have his or her DEA registration revoked, leaving that physician unable to prescribe any controlled substances.

V. The Rohrabacher-Farr Amendment may reduce — but does not eliminate — the risk to prescribing physicians.

Congress has included the Rohrabacher-Farr Amendment to the Department of Justice's annual Appropriations bill in 2015 and 2016. The rider provides, "[n]one of the funds made available in this Act to the Department of Justice may be used, with respect to [medical marijuana states] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

In August 2016, the Ninth Circuit Court of Appeals held that the rider prohibits the federal prosecution of individual conduct that is allowed by the state's medical marijuana law.⁷ While the *McIntosh* ruling did not specifically list physicians prescribing medical marijuana, that may be because almost no laws include such a provision.⁸ However, the *McIntosh* decision did not touch on whether physicians could lose their DEA registration to prescribe controlled substances, which is very different than a criminal prosecution.

There is also no guarantee that the rider will be included in future Department of Justice Appropriations bills. In the spring of 2017, Attorney General Jefferson Sessions asked Congress not to renew the rider.⁹

VI. Numerous authorities recognize that physicians cannot prescribe cannabis.

Federation of State Medical Boards (April 2016)

"Although states have enacted laws permitting the use of both medical and recreational marijuana, **the prescribing of marijuana remains illegal under federal law**...additionally, a person who aids and abets another in violating federal law... may be punished to the same extent as the individual who commits the crime."¹⁰

The American Bar Association (December 2016)

"Physicians in medical marijuana states do not prescribe marijuana, but rather certify that a patient has a statutorily covered medical condition and meets other criteria to receive a medical marijuana permit or authorization."¹¹

⁹ Bill Railes, "Sessions Asks Congress To Undo Marijuana Protections," WKRG.COM, June 13, 2017.

¹⁰ *Model Guidelines for the Recommendation of Marijuana in Patient Care*, Report of the FSMB Workgroup on Marijuana and Medical Regulation, Adopted as policy by the Federation of State Medical Boards, April 2016

¹¹ American Bar Association: *The Health Lawyer*, Vol. 29, No. 2 by Douglas B. Marlowe, J.D., Ph.D. National Association of Drug Court Professionals Chadds Ford, PA

American Society of Addiction Medicine (September 2010)

“Since marijuana is a Schedule I substance under federal law, a physician cannot prescribe ... Instead, physicians may “recommend” the medical use of cannabis to a specific patient.¹²

Texas Department of Public Safety (December 2015)

Relating to regulations associated with the Compassionate Use Program, RenEarl Bowie, Assistant Director, Regulatory Services Division:

Subchapter E: There was comment regarding the term "prescribe" rather than "recommend" by doctors, but the rule tracks the statute. Of course, as the Commission was advised in October, that is something that will have to be addressed by the Texas Legislature.¹³

Conclusion

Physicians cannot legally *prescribe* marijuana. Physicians can only write letters of recommendation that the patient is suffering from a qualifying condition and meets the criteria for a certification to use medical marijuana. While a federal rider — which must be reauthorized each year — may shield physicians from prosecution, it is less likely that it would prevent the physicians’ DEA registrations from being revoked.

Given that physicians tend to be risk averse, it is very unlikely that they would be willing to openly break federal law in significant numbers by “prescribing” marijuana. Enacting an implementation law requiring physicians to engage in detailed prescribing practices would thus severely limit access to patients and could effectively serve as a poison pill.

¹² President’s Action Committee on Medical Marijuana of the American Society of Addiction Medicine: *The Role of the Physician in “Medical” Marijuana* (FN 8)

¹³ http://www.dps.texas.gov/public_safety_commission/documents/2015/1217/audio20151217.mp3 (2:14:30)