"Prescribing" Versus "Recommending" Medical Cannabis

The regulation of cannabis for use by certain qualified individuals presents many unique challenges for state governments, particularly in an environment in which federal law considers cannabis illegal — except in the case of rare and typically short-term clinical trials.

When it comes to participation of physicians and other members of the medical community, state medical marijuana laws must be carefully crafted to avoid placing them at risk of federal penalties. This is due to the way federal laws regulate controlled substances and the doctors who prescribe them for use as medicine. A "prescription" for the medical use of cannabis is illegal and carries significant penalties for doctors. By contrast, a "recommendation" or "certification" that a patient has a certain condition and could benefit from medical cannabis is permissible as long as it avoids mirroring a prescription by doing things like specifying dosage. For that reason, certifications or recommendations form the basis of every workable medical cannabis program in the U.S.

Why are cannabis prescriptions illegal?
Under the authority of the Controlled Substance Act ("CSA"), the Drug Enforcement Administration issues registration numbers to qualifying doctors who become authorized to dispense Schedule II, III, IV, and V controlled substances.[1] Doctors may not issue prescriptions for Schedule I substances. Cannabis in nearly every form, including low-THC varieties and extracts, is classified as a Schedule I drug and therefore may not be prescribed. A physician who violates the provisions of the CSA may have his or her DEA registration revoked, leaving that physician unable to prescribe controlled substances.

In addition, it is a criminal offense for a doctor to aid or abet the purchase, cultivation, or possession of cannabis,[2] or to engage in a conspiracy to cultivate, distribute, or possess cannabis.[3] Because a prescription is an order for a patient to consume a controlled substance and for a pharmacist to distribute it, such activity is not only unauthorized by federal law, it could also be seen as criminal conduct. Accordingly, any state that requires that doctors "prescribe" some form of cannabis could expose that person to not only the possible loss of a DEA registration but also to criminal liability. The same is true of a medical cannabis law that requires doctors to order the dispensing of cannabis, or that requires them to specify dosage or otherwise involve themselves in the procurement of cannabis.

Why are cannabis recommendations permitted?
By contrast, federal courts have found that "recommending" the use of cannabis for medical purposes is permitted, even if it is reasonably foreseeable that a recommendation would be used to obtain medical cannabis.

A series of cases in the Ninth Circuit closely examined the differences between a prescription for medical cannabis and a recommendation. The result was a finding that while a prescription for cannabis is unlawful, a recommendation could be distinguished and allowed.

[1] 21 U.S. Code § 829.
[2] 18 U.S.C. § 2
[3] 21 U.S.C. § 846

Recommendations are not only allowed but also, in fact, are *protected* under federal law. The Ninth Circuit Court of Appeals was the last court to review the matter, and the U.S. Supreme Court refused to further consider the matter upon appeal.[4]

In particular, the court noted that an integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients, and such speech strikes at the fundamental interests behind the adoption of the First Amendment. This freedom to discuss medical treatment is so important that it overcomes even those situations in which a doctor reasonably foresees that a recommendation may be used to obtain medical cannabis in violation of a federal law.

The key distinction between a prescription and a recommendation is the legal effect each has. In the case of a prescription, a doctor is initiating an order authorized under federal law directing a patient to obtain and consume a controlled substance. A recommendation, by contrast, has no legal effect under federal law — it is merely a discussion about the pros and cons of consuming a substance, a statement that the benefits of use would likely outweigh the harms, and a suggestion that the patient consider it an option. The doctor is not ordering the patient to consume it, providing instructions on how to do so, or authorizing that substance to be distributed to the patient. If the doctor crosses those lines, he or she would likely be aiding and abetting a federal crime and would not be protected by the First Amendment.

Under workable medical cannabis laws, following a recommendation, the state steps in. It establishes legal protections for patients for whom a doctor has made such a recommendation, along with a regulatory framework for the production and distribution of that substance to qualifying patients. These types of regulations are consistent with the policy guidelines established in a Department of Justice Memo sent to U.S. Attorneys General in August 2013.

Summary

A doctor 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 of a disease or effects of treatment.
- Sign a form or “certification” to that effect.

A doctor may not:

- Order a patient to consume medical cannabis.
- Provide instructions on the amount to consume.
- Provide instructions on the form in which medical cannabis must be taken.
- Order that medical cannabis be prepared or distributed to the patient.

[4] Conant v. Walters, 309 F.3d 629, (9th Cir 2002), cert denied Oct. 14, 2003. See also Conant v. McCaffrey, 172 F.R.D. 681 (N.D. Cal. 1997), and Conant v. McCaffrey, 2000 WL 1281174 (N.D. Cal. Sept. 7, 2000).