Physician Connection

Not Just Smoke and Mirrors:
Peering Behind the Curtain of Marijuana Use in the Healthcare Field

Professional SOLUTIONS

By Alexandra S. Haar

With the rapid legalization of medical and recreational marijuana across the U.S., the healthcare community faces myriad questions. Should physicians recommend[1] marijuana to patients? What is the best way to treat patients recommended for medical marijuana usage? How should patients be addressed who use marijuana recreationally? Must physicians accommodate employees who use marijuana?

This article addresses all these questions; however, it is advisable to consult with an attorney familiar with local marijuana laws and seek counsel from your state board/state association before implementing protocols in your practice.

BACKGROUND

Under the federal Controlled Substance Act (CSA), marijuana remains an illegal Schedule I substance.[2] The primary psychoactive compound in the plant is delta-9-tetrahydrocannabinol, or THC. Both medical and recreational marijuana products list the amount of THC contained therein, typically in milligrams.

A separate nonpsychoactive compound in the plant is cannabidiol, or CBD. Because CBD is legal in almost every state,[3] products containing CBD can be found in a variety of stores across the country. However, since CBD in food and drink remains illegal under federal law,[4] companies are prohibited from making health-related claims about CBD products.

SO, YOU WANT TO RECOMMEND MEDICAL MARIJUANA

The majority of states have, in some form, legalized marijuana products containing THC.[5] By and large, medical marijuana programs are fairly strict in specifying exactly which health conditions medical marijuana may be recommended to treat. For example, in Missouri, a recent constitutional amendment providing for the legalization of medical marijuana states that medical marijuana may be recommended by a duly licensed physician for the following qualifying medical conditions:

- Cancer
- Epilepsy
- Glaucoma
- Intractable migraines

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unresponsive to other treatment

- A chronic medical condition that causes severe, persistent pain or persistent muscle spasms, including those associated with multiple sclerosis, seizures, Parkinson's disease, and Tourette Syndrome
- Debilitating psychiatric disorders, including post-traumatic stress order (PTSD) if diagnosed by a state licensed psychiatrist
- Human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS)
- A chronic medical condition that is normally treated with prescription medications that could lead to physical or psychological dependence, when a physician determines that medical use of marijuana could be effective in treating that condition and would serve as a safer alternative to the prescription medication
- A terminal illness
- In the professional judgment of a physician, any other chronic, debilitating or other medical condition, including hepatitis C, amyotrophic lateral sclerosis, inflammatory bowel disease, Crohn's disease, Huntington's disease, autism, neuropathies, sickle cell anemia, agitation of Alzheimer's disease, cachexia, and wasting syndrome.[6]

Again, the above conditions must be certified by a state-licensed physician. In Missouri, the certification must also attest that "[t]he physician met with and examined the qualifying patient, reviewed the qualifying patient's medical records or medical history, reviewed the qualifying patient's current medications and allergies to medications, discussed the qualifying patient's current symptoms, and created a medical record for the qualifying patient regarding the meeting;" and "[t]he physician discussed with the qualifying patient risks associated with medical marijuana, including known contraindications applicable to the patient, risks of medical marijuana use to fetuses, and risks of medical marijuana use to breastfeeding infants."[7] However, the Missouri Department of Health and Senior Services has advised a physician may certify patients via telemedicine as long as the standard of care does not require an in-person encounter.[8]

The caveat is: What is the standard of care? What are the ethical implications of recommending medical marijuana, even if legal? Unfortunately, there is very little (if any) precedent in this area, but it may help to consider these factors.

First, physicians who recommend marijuana are suggesting patients use a substance that has not been fully researched or undergone peer-reviewed studies on efficacy and side effects. Although largely associated with recreational marijuana use, hospitals have seen an increase in emergency room patients who present with symptoms of marijuana "overdose" due to a lack of understanding of the timing, potency and effects of certain marijuana products.[9]

For example, it may take several hours for an individual to feel the psychoactive effects of marijuana-infused edibles (e.g., gummy candies, baked goods), and patients who are unaware of this may take additional amounts. As such, a physician should make sure to advise a patient about dosing issues, psychological effects such as increased relaxation, and physical effects such as increased heart rate.

Second, some states require a "bona fide physician-patient relationship" when marijuana is recommended. For example, Colorado's original marijuana law did not include this requirement, but Illinois did. Illinois law dictates that the relationship "may not be limited to issuing a written certification for the patient or a consultation simply for that purpose."[10]

Without this requirement, diagnostic standards could fall below ethical minimums. Patients may not be required to follow up with their recommending physicians on marijuana effectiveness or side effects. Without a holistic relationship, a physician may not be aware of comorbidities presented by a particular patient, especially if the patient is less than forthcoming.

Relatedly, some physicians may hold financial interests in dispensaries, which may be a potential conflict of interest if the physician sends the patient to that dispensary. It also impinges on the physician's duty to treat the patient. Would a physician honestly recommend marijuana without a financial interest in the patient's purchase? If physicians have an interest in a dispensary, they should at least advise the patient of that interest.

Finally, there are the legal ramifications. In the civil arena, medical malpractice claims for recommending medical marijuana are generally unsuccessful. This is likely because physicians do not prescribe marijuana but merely certify that a patient has a qualifying medical condition. However, a malpractice claim may arise from the argument that a physician did not perform

a sufficient examination of the patient or did not sufficiently review the patient's medical history prior to making the recommendation. Therefore, physicians recommending marijuana should document initial examinations, background investigations, medical record reviews, follow-up examinations and other legally required procedures. In reality, anyone can file a malpractice suit — the distinction is whether a person can succeed on such a claim.

In addition, physicians who recommend marijuana may (technically) be criminally aiding and abetting or conspiring to possess a federally illegal substance. The good news is that such charges are incredibly rare. In fact, the U.S. Court of Appeals for the Ninth Circuit has held that "[a] doctor's anticipation of patient conduct . . . does not translate into aiding and abetting, or conspiracy."[11] Rather, "[a] doctor would aid and abet by acting with specific the intent to provide a patient with the means to acquire marijuana," and "a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intent to help the patient acquire marijuana."[12] However, even a miniscule risk is still a risk.

TREATING MARIJUANA USERS

It is inevitable that some patients will be marijuana users — medically or recreationally. Although there is virtually no law in these areas, there are best practices.

Patients should be encouraged to disclose their marijuana use to their healthcare providers. Full disclosure will help providers treat and fully advise patients on side-effects and interactions. As further protection, courts have held that communicating marijuana's risks and benefits is protected by the First Amendment because "barriers to full disclosure would impair diagnosis or treatment."[13]

Another important consideration for healthcare facilities is whether to implement a policy that requires documenting marijuana use in patient charts. The benefit of charting this information is two-fold. First, it would assist with the continuity of care and provide full information to every professional who has a role in treating the patient. Second, it preserves this information in the event of a lawsuit. If a suit is filed, providers will want to show the marijuana use was documented.

How should a healthcare provider ask a patient about it? Patients who consume medical marijuana will likely disclose their use, but patients who recreationally (or illegally) use marijuana may not. Physicians should advise patients that information about their marijuana usage will be for medical treatment purposes only — not to impart judgment. Suggested questions include:

- Do you use any type of cannabis product, including CBD?
- What do you use it for?
- What method do you use? (smoking, inhalation, edible or topical)
- How much and how often do you use it?
- When was the last time you used marijuana? What route and quantity?
- Do you have any concerns about your marijuana usage?

Physicians should make available to patients information about the potential risks of marijuana use. Certainly, if the patient shows signs of intoxication, informed consent is not possible, and treatment may then not be possible. Therefore, a mental status evaluation is critical before a consent form is signed by a patient who uses marijuana.

Another question for healthcare facilities is whether to allow possession and/or storage of marijuana on their premises. Possession of medical marijuana may be essential to a patient's care. However, physicians should take care to implement a policy that considers the legal implications for personnel to possess marijuana. Many states feature a provision whereby healthcare providers are granted immunity from professional discipline and criminal and civil liability for providing health care services that involve the legal use of medical marijuana.[14] These provisions apply only to state law, as marijuana remains illegal under the Controlled Substances Act, but the U.S. Department of Justice is currently prohibited from spending funds to interfere with state medical marijuana law under the Rohrabacher-Farr amendment.[15]

However, a health care provider is required to register with the federal Drug Enforcement Agency (DEA) to write prescriptions for controlled substances.[16] The storage of marijuana, as it violates the CSA, therefore may put a physician's, pharmacist's, or healthcare facility's DEA registration in jeopardy.

Compliance with federal law (including the CSA) remains a requirement for most receipt of federal funding and grant money, as well as billing for services for which there may exist Medicare, Medicaid[17] or private insurance reimbursement. For that reason, some health care providers require lockboxes to which only individual patients have the key. They mandate that the marijuana product be self-administered or administered by a designated

caregiver.[18] Using this method, facility employees are relieved from possessing or administering marijuana, but enabled to give patients access.

Finally, healthcare facilities may consider whether to permit use of marijuana products by patients on the facility premises. Missouri law, for example, prohibits individuals from "[c]onsum[ing], smok[ing], or us[ing] marijuana in a hospital or medical facility without a hospital or facility's consent."[19] Obviously, there are some circumstances where a patient may be too ill to leave the facility but still wish to take medical marijuana. As such, health care providers should strive to provide the best patient care when developing a policies. This may include confining smoking to certain areas, proper ventilation and verifying physician recommendations.

EMPLOYEE USAGE

In regard to employees who use marijuana, courts have increasingly upheld state medical marijuana laws' anti-discrimination provisions and also found that state general anti-discrimination laws apply.[20] However, many states have clarified that medical marijuana legalization does not permit a person to perform a task while under the influence of marijuana. This is especially the case if the user conducts professional malpractice, operates a dangerous device or motor vehicle while under the influence of marijuana, works while under the influence of marijuana, or brings an employment claim for any adverse action for working under the influence of marijuana. Although employers may not be able to regulate employees' off-duty use of marijuana, they can regulate on-duty use and on-duty intoxication.

CONCLUSION

While there is uncertainty about the direction of the marijuana industry, there is an opportunity for education, entrepreneurship and evolution. It is critical that physicians seek the guidance an attorney familiar with the state's marijuana law, as well as their state board, before proceeding. Although the answers are not crystal clear, the results will be better once the smoke clears.

References

[1] *Because marijuana is still a federally illegal substance, physicians cannot "prescribe" marijuana but instead "recommend" it for their patients.*

[2] *See 21 U.S.C. § 812 (2018).*

[3] *South Dakota is the sole state in which CBD is illegal. In March 2019, the South Dakota Attorney General clarified that CBD oil remains illegal under state law, and as of the date of this publication, this stance has remained unchanged. See Office of the South Dakota Attorney General, Attorney General Ravnsborg Clarifies Questions Regarding Industrial Hemp and CBD (Cannabidiol) Oil (Mar. 25, 2019), https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=2167.*

[4] *See United States Food & Drug Administration, FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD) (Mar. 11, 2020), https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd.*

[5] *See National Conference of State Legislatures, State Medical Marijuana Laws (Mar. 10, 2020), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.*

[6] *See Mo. Const. art. XIV, § 1.2(15).*

[7] *See Mo. Code Regs. tit. 19 § 30-95.110 (2020).*

[8] *See Missouri Department of Health & Senior Services, Frequently Asked Questions for Physicians, https://health.mo.gov/safetymedical-marijuana/faqs-physician.php.*

[9] *See Vince Gerasole, Chicago Hospitals Prepare for Problems Related to Legal Marijuana Use, CBS CHICAGO (Dec. 17, 2019), https://chicago.cbslocal.com/2019/12/17/chicago-hospitals-prepare-for-problems-related-to-legal-marijuana-use/.*

[10] *http://dph.illinois.gov/topics-services/prevention-wellness/medical-cannabis/physician-information. See Illinois Department of Public Health, Physician Information,*

[11] *Conant v. Walters, 309 F.3d 629, 635-36 (9th Cir. 2002). This case also struck down a federal policy that threatened physicians with administrative discipline for recommending marijuana to a patient because this policy violated the freedom of expression under the First Amendment to the United State Constitution. In other words, any physician-patient communication about marijuana is protected by First Amendment.*

[12] *Id. at 636 (citing Gaskins, 849 F.2d 454, 459 (9th Cir. 1988); United State v. Gil, 58 F.3d 1414, 1423 (9th Cir. 1995)).*

[13] *Conant, 309 F.3d at 636.*

[14] *Mo. Const. art. XIV, § 7(f).*

[15] *This provision was included in the Fiscal Year 2020 spending legislation and is effective through September 30, 2020.*

[16] *21 C.F.R. § 1301.11 (requiring DEA registration for "[e]very person who manufactures, distributes, dispenses, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importation or exportation of any controlled substance").*

[17] *Of note, some state laws, including Missouri's prohibit the denial of state Medicaid or other benefits due to legal use of medical marijuana. Mo. Const. art. XIV, § 7(m).*

[18] *See Gavin Souter, State Cannabis Laws Present Medical Malpractice Conundrum, BUSINESS INSURANCE (Oct. 25, 2019), https://www.businessinsurance.com/article/20191025/NEWS06/912331350/State-cannabis-laws-present-medical-malpractice-conundrum.*

[19] *Mo. Const. art. XIV, § 9(a)vi.*

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