With the rapid legalization of medical and recreational marijuana across the U.S., the healthcare community faces myriad questions. Should physicians recommend 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. 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, 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, 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. 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

Alexandra S. Haar focuses her practice on trials involving complex business litigation matters, including product liability (particularly pharmaceuticals), religious/school institution cases, professional liability, premises liability, and motor vehicle accidents/personal injury. She also handles criminal matters through the Missouri Coalition for Right to Counsel. In addition, she represents clients in the new and evolving cannabis industry in the Midwest.

Prior to joining HeplerBroom, Haar served as a judicial law clerk for the Missouri Court of Appeals, Eastern District, and as an Assistant Circuit Attorney for the City of St. Louis. As a prosecutor, she tried several bench and jury trial cases to conclusion in state court. She also has experience handling all phases of the litigation process, including motion practice, discovery, and trial preparation.
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.

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.” 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.

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.

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.”

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
Communicating marijuana’s risks protection, courts have held that effects and interactions. As further disclosure will help providers treat to their healthcare providers. Full to disclose their marijuana use are best practices. It is inevitable that some patients will be marijuana users — medically or recreationally. Although there is virtually no law in these areas, there may exist Medicare, Medicaid federal funding and grant money, as well as billing for services for which currently prohibits spending funds to interfere with state medical marijuana law under the Rohrabacher-Farr amendment. 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.46 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. 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.46 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. 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. 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. 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. 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. 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. 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. However, a health care provider is required to register with the federal Drug Enforcement Agency (DEA) to write prescriptions for controlled substances.6 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 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
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.” 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. 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.
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) Bill (Mar. 25, 2019), https://atg.sd.gov/OurOffice/Media/pressreleasesdetail.aspx?id=2167.
6. See Mo. Const. art. XIV, § 1(15).
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 States 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(b).
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, dispenses, distributes, imports, or exports any controlled substance or who proposes to engage in the manufacture, distribution, dispensing, importing or exporting 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(b).
19. Mo. Const. art. XIV, § 9(b)ii.

Did you know?

WE OFFER:

- Personalized Risk Assessments that can be requested online
- Extensive articles to guide you through COVID-19 considerations
- A FREE opioid online course

A FREE opioid online course

profsolutions.com/physicians/risk-management